Deformations of Justice

The Presumption of Innocence, Double Jeopardy, and Other Fairy Tales

by Philip Jenkins

Darren Gygi

If a U.S. administration formally attempted to establish an authoritarian police state, its efforts would almost certainly encounter bitter and even violent resistance; recent experience, however, has shown that remarkably authoritarian and unconstitutional methods can be established without provoking serious protest, provided they are introduced piecemeal and justified by the rhetoric of good intentions. In the last 15 years, notions of justice in America have repeatedly been subverted and distorted, usually through what might be called the politics of the ultimate evil: Yes, of course, we believe that individual rights and due process are essential to democracy, but what you naive citizens fail to realize is that major concessions must be made in order to fight the uniquely menacing and difficult problem of [insert emotive issue here]. Whether we are dealing with drugs, child abuse, terrorism, nonpayment of child support, tobacco, or handguns, this particular threat is so urgent, and so challenges our conventional legal mechanisms, that liberties must be sacrificed to achieve a higher good. What honest citizen could disagree, at least without seeming to connive at the wrongs in question? Though this attitude is certainly not new to the Clinton administration, it flourished uniquely in this communitarian environment: This was the administration that suggested that illegal immigration must be combated by requiring all employees to possess identity cards, encoded with those vastly informative microchips. Identity cards would also have been the basis of the failed healthcare reform package of some years back: One way or another, under whatever excuse, the cards are coming.

While assaults on liberties have been numerous and multifaceted, the most dangerous of all have focused on legal rights and judicial process. Through a sequence of "ultimate evils," we have undergone a silent and scarcely noticed revolution in which such basic ideas as the presumption of innocence have been scattered to the winds. And so has the right to trial: not the right to a *fair* trial, but to the formality of a trial as a prerequisite for the infliction of serious penalties. While civil libertarians have been fighting persistently to protect the rights of suspects and defendants in criminal cases, they have scarcely noticed the massive shift of official regulation and sanctions out of the scope of criminal law altogether and into the area of administrative law and civil litigation. How have we come so far, and why did most of us fail to notice it? Why are we not panicking?

Many of the legal abuses of recent years have involved the violation of "due process," and it is useful to define exactly what that concept has entailed: If the ideas seem painfully obvious, it is all the more striking that they should be flouted daily with so little objection. The ancient legal tradition is that punishment should be inflicted only for acts, not for beliefs or tendencies, and that wrongful acts should be carefully and specifically defined in order to limit the exercise of arbitrary power. In the Anglo-American world, proper procedure requires a formal hearing in which both prosecution and defense have a full opportunity to present evidence, and in which the accused has the presumption of innocence. The Enlightenment tradition further demanded that punishments should be proportional to the crimes committed and that they should be clearly stated so that citizens would know precisely the risks they were running in undertaking certain types of conduct. Throughout, the guiding principles are clarity, predictability, and rationality, together with a healthy suspicion that the state is likely to abuse any discretionary powers with which it is entrusted.

And yet, if a contemporary federal court decided to enforce these principles strictly, it would be viewed as launching a legal

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revolution and ruthlessly trampling on the agents of law enforcement, who have come increasingly to rely on the denial of due process in order to accomplish their everyday work. Consider, for example, the vast realm of anti-drug enforcement, which currently consumes some $15 billion of federal money annually (to say nothing of state expenditures). Much of the funding for this War on Drugs comes from asset forfeiture, a supposedly civil proceeding which in fact inflicts savage penalties on individuals without legal process.

The idea of asset forfeiture is ancient and is based on the reasonable belief that tools or weapons used in the commission of a crime should be seized by the state. Under a 1970 U.S. law, however, authorities are permitted to seize any goods or property used in connection with drug manufacture or trafficking, while the Omnibus Crime Control Act of 1984 allows agencies to seize any cash or property allegedly used in connection with the narcotics trade. Monetary seizures are a particularly sensitive topic, as cash is often taken because individuals happen to be transporting what customs officials regard as suspiciously large amounts, even if there is no concrete evidence of wrongdoing. Confiscated money can be reclaimed, but only through a cumbersome procedure in which the accused individual has to prove his innocence and is required to put up an oppressively large bond even to obtain a hearing. This represents a gigantic leap from the simple notion of confiscating a burglar's tools or a robber's knife. The same 1970 federal law introduced the vicious RICO process, ostensibly targeting Racketeer Influenced and Corrupt Organizations, and any group so designated may have its assets seized prior to trial or judgment, destroying its ability to mount an effective legal defense.

Cumulatively, the new legal apparatus means that goods can be confiscated even if the actual owners of the property were unaware of the illegal conduct for which it had been used, and by means of a process in which the accused possesses few rights. In a 1996 decision, the U.S. Supreme Court ruled that authorities could seize assets through a civil procedure in addition to prosecuting offenders criminally, even though this is a *prima facie* violation of the constitutional prohibition of double jeopardy. Incredibly, the seizure of property is not legally categorized as a punishment, though the confiscation of a house, car, or bank account looks pretty penal to most observers. As confiscated goods are used to fund further anti-drug efforts, state, city, and local agencies have a vast incentive to seek out drug trafficking, and many blatantly cut legal corners in the process. Very few politicians even question the activities of the anti-drug bureaucracy, much less defend the rights of alleged drug dealers. (One exception is Rep. Henry Hyde, whose courageous jeremiad *Forfeiting Our Property Rights* was published in 1995 by the Cato Institute.)

For most members of the public, the War on Drugs seems a distant and unsavory reality, and there is a general sense that, while a certain rough justice might be inevitable, few of those arrested or imprisoned are truly innocent. However, ideas like asset forfeiture have an inevitable tendency to creep into the social and legal mainstream, and the overwhelming power of the notion is apparent from some recent controversies. One came in New York City, where Mayor Rudolph Giuliani decided to apply the principle to seizing the cars of people arrested (not convicted) for drunk driving. After all, drunk drivers are now so unpopular that they can have no defenders, and the same holds true of anyone accused of the offense: accused, suspected, proved guilty, what is the difference?

One remarkable example of official *chutzpah* from earlier this year was a pernicious piece of stealth legislation which sought to impose a "Know Your Customer" principle on all banks. Under the proposed law, which was withdrawn following a national outcry, banks would have been required to track the financial patterns of their customers and to report to federal authorities any deviations which suggested extraordinary or suspicious transactions—behavior which might imply money laundering. Once the IRS or DEA had determined that the unexplained check or payment indicated evildoing, the agency theoretically could have seized the account in question and held it under the same circumstances which apply to suspected drug dealers. Assets could be recovered, but only if customers could prove their innocence and could afford to post the required bond which constitutes the admission fee to the courts of justice.

Contrary to widespread impression, you can indeed suffer criminal penalties without a smidgen of due process, and that is not the only legal myth which has recently been exploded. There are some ill-informed folk who believe in a mythical beast called the "principle of double jeopardy," the theory that no one should be tried twice for the same offense. Once again, this principle of justice has been put to rest as part of the pursuit of higher and nobler goals: in this instance, the establishment of civil rights. The civil-rights revolution of the 1960's marked a legal watershed in American history because of the many glaring instances in which state and city authorities denied or twisted justice in the interest of preserving racial superiority. In response, the federal government vastly increased federal criminal jurisdiction at the expense of state powers and intervened to supersede the decisions of biased Southern courts. One casualty of this process was the idea of double jeopardy. When flagrantly guilty racist assassins were freed by Southern juries, the government intervened to prosecute them anew for the novel offense of violating the civil rights of their victims, a fascinating concept given the vast array of possible connotations of "civil rights."

When groups of men in white hoods and/or swastikas hang or burn a black man chosen randomly on the basis of his race, most reasonable people would agree that an offense against civil rights has been committed, but then a natural process of escalation expands the meaning of the term still further. It is suggested by analogy that any number of other victims are likewise persecuted on the strength of their status, whether as women, gays, or ethnic minorities, and the level of "violation" required to invoke the law plummets from the forcible violence of lynching to assault or even mere name-calling. It is puzzling to know that a California jury acquitted the police officers charged in 1991 with beating Rodney King, but it is even more troubling to see that this verdict was *de facto* overturned by a civil-rights prosecution. Of course, the second trial was not technically for the same charges, but the same actions by the same individuals were examined afresh by a new court. By any reasonable standard, that is a second trial for the same action.

Protection against double jeopardy also collapsed due to the thorough confusion of civil and criminal penalties, which, as we have already seen from the case of asset forfeiture, constitutes a sinister and pervasive threat to our ideas of justice. A majority of Americans were outraged when O.J. Simpson was acquitted of criminal charges, and they were duly gratified when

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a subsequent civil trial found him responsible for two violent deaths and, therefore, liable to pay tens of millions of dollars. While not subjecting him to lifetime imprisonment, at least the civil verdict promised to cripple him financially; justice, it seemed, was served. But was it? Were it not for the fact that the second trial was labeled civil, with a different prevailing standard of evidence and proof, who but a lawyer would deny that Simpson was subjected to double jeopardy, to two trials for the same offense, in exactly the same way as the assailants of Rodney King? And whereas a criminal trial demands proof of guilt beyond a reasonable doubt (say, the support of 98 percent of the available evidence), a civil suit requires only a preponderance of evidence (51 percent). One way or another, the prosecution will get you, by fair means or foul.

The same mixture of civil and criminal process is found in recent sexual-predator legislation in many American states. Under these statutes, a sex offender is sentenced to prison for a set term, and, as the time of release approaches, is subjected to a new hearing at which he can be adjudged a "sexual predator" who might endanger the public in the future. He is thereupon committed civilly to a special institution for an indefinite term, perhaps lifelong. The evidence in this second, "civil" encounter basically recapitulates that from the original trial, but once again, the fact that it bears the charmed title of "civil procedure" immunizes it against double-jeopardy protections. However difficult it is to mobilize public sympathy in favor of O.J. Simpson, much less a repeat sex offender, we should be thoroughly alarmed at the idea that a formal trial with the power to inflict life-destroying penalties should be immune from conventional legal restraints solely because it is termed "civil litigation."

The use of a wrongful death suit in the Simpson case also illustrates the use of litigation to achieve goals which seem beyond the reach of the criminal process. Here again, we are dealing with the legacy of the civil-rights movement, which transformed attitudes toward the role of courts and law and promoted the view that civil litigation could be a healthy and socially desirable means of redressing injustice. "Litigating for rights" was appropriate when cases were fought on behalf of classes of unrepresented victims opposing powerful corporations or institutions. Particularly since the "litigation revolution" of the late 1970's, the urge to hit hard at unpopular or indefensible conduct has repeatedly encouraged legislatures to incorporate civil penalties into criminal laws, so that perpetrators can be both prosecuted and sued. The classic modern example of this is the 1994 federal Violence Against Women Act, but the same idea is also found in more recent hate-crime statutes. Both measures feature civil processes because such actions are easier to prosecute successfully than their criminal counterparts, while the prospect of financial remedies serves to encourage litigants. Although "fomenting litigation" was one of the worst professional breaches with which a lawyer could be charged, the active encouragement of speculative and even buccaneering lawsuits is now official federal policy.

To take another current example, no government would dare pass a law explicitly stating that the sale or manufacture of tobacco was a criminal offense and, moreover, apply the law retroactively to those who had engaged in these activities 20 or 30 years ago. The very notion is abhorrent and would not endure for a minute before an appeals court: The criminal law has clear and known principles which such a measure would violate. Yet what would not be attempted on the floor of the legislature can be achieved with remarkable ease in the courts, given sufficient public outrage against any supposed malefactors of great wealth. The recent lawsuits against the tobacco industry, and the subsequent multi-billion-dollar "settlement" extorted from those particular pigeons, have inflicted gigantic quasi-criminal penalties on the basis of *ex post facto* law, funded on the palpable fiction that individuals who smoked cigarettes in the 1960's and 1970's were unaware of the health consequences to which they were subjecting themselves. (Did they live on desert islands?)

Whatever happened to the idea of punishment being "legally inflicted in virtue of a law passed and promulgated before the commission of the offense," as Lafayette and Jefferson phrased it in the French Declaration of the Rights of Man? Ah, but the payments in the tobacco cases are neither punishments in general, nor fines in particular: They are merely a civil settlement agreed at quite voluntarily (or so runs the legalspeak). Civil suits thus offer the potential to sidestep the criminal process altogether, to effect far-reaching social change without having to deal with the protections available to criminal suspects and defendants. Worse, the abuse of civil litigation is a cumulative process, as the vast successes enjoyed in one field of legal endeavor are bound to be imitated in other areas, and as future corporate "perpetrators" recognize the expediency of settling rather than fighting to the last ditch. Tobacco, guns, then liquor, coffee, and presumably red meat: If the sequence sounds alarmist right now, just wait five or ten years.

In a very few years, we have all but lost the presumption of innocence, as well as our protection against double jeopardy and *ex post facto* laws, which frankly does not leave much of our theoretical rights. If we have any hope of preventing further erosion, or even of beginning the long climb back to a just society, we need to be extraordinarily vigilant and hostile to any further enhancements of official power. And whenever an administration proposes any extraordinary or draconian legal principle, it always helps to remember a basic rule: today, the drug dealer or terrorist; tomorrow, the rest of us. ◁c▷

The Abyss

by Timothy Murphy

His subterfuge is deep
and devious is his task
but the man behind the mask
I take off when I sleep
is the one friend I can ask
to look before I leap.

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