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The Legal System's Role in the Disintegration of America

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"The biggest problem is not to get people to accept new ideas, but to get them to forget the old ones."—Nassau Senior

When I was a boy, about 75 years ago, maxims about the legal system were commonly known. As children we were taught that it was better that guilty persons should go free than the innocent be convicted. Children were also taught that it was wrong to take the law into their own hands. These were lofty principles that have somehow tumbled from their high perches. Today, those associated with the Innocence Project have proven conclusively that the innocent are routinely convicted, and stand your ground laws have made taking the law into your own hands legal whenever the miscreant can plead that s/he feared for her/his life. Of course, no one can ever disprove that claim. How can a claim of I was afraid be disproved? Insects make some people fear for their lives. Even police can make that claim successfully. In Arkansas a SWAT team, more heavily armed that the troops that landed on the beaches of Normandy in 1944, killed a 107 year old man it was called upon to help. The special prosecutor hired to investigate the incident exonerated the squad, saying the killing was justified because the members of the squad feared for their lives. Sure they did!

How can convicting the innocent and taking the law into your own hands have become so acceptable and so prevalent? How could Americans become so antagonistic to one another? Well, it took some time, but it is a logical consequence of the way the American legal system was developed and how it works. People are told that the law ought to be respected and obeyed, but if you read this piece to its end, you may never again respect the law, the legal system, or anyone in it.

It all began in England. (So many of the world's wrongs began in England!) Known as the Common Law, it began sometime after William conquered Harold in the Battle of Hastings. Before then, disputes were settled by local bishops and sheriffs in ecclesiastic courts. Ecclesiastical courts had scholastic philosophy and the Bible to guide decisions. Then Henry II began sending judges from his court throughout the country to adjudicate disputes according to their own notions of right and wrong. They had no principles of justice to guide their judgments; nor were they especially upright men. Many were openly corrupt, and judgments to benefit the monarchy were common. When these judges returned to the king's court, they discussed their cases with each other. In time, a practice, known as precedent, was developed by which judges agreed to follow the decisions of other judges. When judges began to respect each other's decisions, a system of law common throughout the whole of England, the common law, came into being. Much of this practice exists in America today.

Common law judges were the primary source of law until Parliament acquired legislative powers. This kind of legislating from the bench was asserted to be the primary source of law

in the U.S. by the Supreme Court in 1803 under John Marshall.

John Marshall did two things in Marbury v. Madison that fundamentally changed the newly created nation. First he assumed the court's power to overrule acts of Congress by asserting the common law principle that "It is emphatically the province and duty of the judicial department to say what the law is." While true in common law, that principle was lost when Parliament acquired legislative power in 1649. The American Constitution gives the Congress alone, not the judiciary, the power to say what the law is. The responsibility of the court is only to say if the law has been broken. This assumption of power by the Court from which there is no appeal possible by the Congress, the President, or even the people made the nation into an oligarchy of judges with absolute authority. The United States of America was no longer an incipient, enlightenment democracy although it retained democratic trappings.

The second thing Marshall did was provide the legal system with a paradigm for promoting injustice. Marshall writes that Marbury was entitled to his commission but refused to grant it saying the Court lacked jurisdiction just after having said the Court had the duty to say what the law is. He could have merely claimed jurisdiction. American courts have been promulgating unjust decisions ever since. They merely assert that the law says something it doesn't say, as, for instance, that the Bill of Rights applies to corporations. The faults of this system have become evident and their disastrous consequences indisputable.

In the absence of any commonly recognized standards of justice, the legal system has become replete with bad (unjust) decisions. Except for errors made by jurors in jury trials, these decisions serve as precedents which means that they propagate themselves spreading injustice everywhere.

As a matter of fact, the Supreme Court of the United States is infamous for making bad decisions. Numerous lists of them are on the Internet. Progressives post lists, moderates post lists, conservatives post lists, professors post lists, and journalists post lists. What these lists prove is that the Court has made a vast number of bad decisions, and while Justices of the Court issue opinions based on their personal predilections, those who post the lists use their personal beliefs too. So when asked, "When it comes to Supreme Court cases, what do you think were some of the most damaging to the cause of liberty?," Judge Napolitano replied, "Almost all of them." I suspect that there is not a single opinion issued by the court that has the concurrence of all people. Yet it appears that no one in the legal profession, especially in law schools, cares or wants to fix this abominable situation. No members of the Court has ever expressed and shame over being on a Court that regularly issues bad decisions. Apparently the Court's members like being wrong or at least are not disturbed by it.

If this were not bad enough, the Court's decisions exacerbate social conflicts and make it certain that this nation will never be domestically tranquil which is something the Constitution cites as a goal of the nation. Why? Because appellate court decisions are made by tribunals instead of single persons, and the decisions are rarely unanimous. If the concurring members of a court cannot even convince their dissenting colleagues that their decision is right or just, how can anyone expect them to convince the general public?

This inability to convince critics is a result of the way the Court operates. When the Court accepts a case, its members read various briefs submitted by interested parties and hears

oral arguments. Then the case is decided by a vote of its members. At that point, the case is over even though no opinion has yet been written. So what function does the opinion have? It is certainly not written to convince anyone of anything. It becomes obvious upon reflection that the opinion's sole purpose is merely to document its sequence of precedents so subsequent jurists can cite the case in deciding similar cases. No one member of the Court need care whether anyone agrees with a decision, because the decision is absolute; only a Constitutional amendment can overture it, and passing an amendment is both time consuming and burdensome.

That decisions of the Court often do exacerbate disputes among the citizenry can easily be demonstrated.

When Chief Justice Roger Taney wrote the opinion in Dred Scott v. Sandford (1857) he believed he was resolving the issue of slavery in America but all he did was inflame the passions of those who advocated freedom. The result ultimately was the Civil War in which upwards of 750,000 people were killed. The war freed the slaves, but did not resolve the problem which still exists today as racism. The Court continued to prolong the problem by refusing to enforce Constitutional amendments 13, 14, and 15 which allowed "Jim Crow" practices to continue in the South for 125 years. This issue has still not been resolved. Many people believe that America still is a racist country today.

In 1973 the Court issued its opinion in Roe v. Wade giving women the right to have abortions under certain conditions. The decision only antagonized lifers so that the issue remains unresolved to this day, becoming a major issue in every election since.

There are many other decisions that could be cited, but these, one conservative and one liberal, were cited to show that ideology, while important, is not the cause of bad decisions. The issue of bad decisions is systemic, caused by the system itself. American judges are not selected for their Solomonic wisdom but for political reasons. All judges act the same way. By the rules of the game, they search for precedents that support their personal preferences. With a history of two hundred years of decisions, precedents that support every inclination can be found. To have any confidence in such a legal system is impossible. If united we stand, divided we fall has any validity at all, America is a doomed nation. The people will never enjoy equality under the law.

Troubles with trial courts are equally severe. Almost any other attempt at solving problems is preferred to trials, which have gotten much too expensive, take much too long, and yield much to uncertain results. Corporations prefer out of court settlements or arbitration, which because of how arbitrators are selected, has become worse that trials by jury. Defendants and prosecutors prefer plea agreements. The results of trials are far too uncertain for anyone to rely on them. And now if a person has a gun, the dispute is often settled in the street.

But s/he goes to jail, you say! Maybe, maybe not. In criminal trials, the state bears the cost of uncertain trials, not the defendant who has become a law unto her/himself, and the outcome is always uncertain. And just as with appellate court decisions, judges who render what the public considers to be inappropriate sentences cause raucous disagreement among the people and diminishes respect for the legal system.

Americans are often told that this is a nation of laws rather than men. But is it? If a tribunal of nine old men (and women) have the authority to "say what the law is," isn't that a nation

of old men (and women)? How can it be otherwise? And the law, what function does it have anyhow?

Well it provides society with some semblance of order some say. Yes! But look at that order carefully. When a woman is arrested for driving an automobile in Saudi Arabia, a woman who has done nothing morally wrong or injured anyone, is that a law that provides order? When a person is arrested in America for possessing marijuana, a person who has done nothing morally wrong or injured anyone, is that a law that provides order? If a person is arrested in China for advocating democracy, a person who has done nothing morally wrong or injured anyone, is that a law that provides order? I suspect not! These people have merely broken the saw! Such laws are instruments of repression. All laws are essentially instruments of repression, and as such are not worthy of respect.

Of course, some repression is necessary in all societies. The repression of violence, actions injurious to others, dishonesty in transactions are among them. But nonviolence, actions not injurious to others, and honest actions in transactions are not. But because something is sometimes necessary doesn't necessarily make it worthy of respect.

When the Chinese incarcerate those who advocate democracy and Americans incarcerate those who are caught possessing marijuana, people are being incarcerated merely for doing something the established in control of society disapprove of. Law always functions that way. It defines what the established approves and disapproves of, and people are expected to conform. Being told that the law ought to be respected and obeyed is nothing more than an attempt to get people to conform to what the *status quo* desires. So if you're a critic of society and advocate any kind of change, the law is an instrument to be used against you. In a society like America's. "liberty and justice for all" is impossible. These are impossible in most other societies too. That is what Tacitus meant when he wrote, "laws were most numerous when the commonwealth was most corrupt." Law does not set one free; it's always repressive. Calling a person a justice doesn't make her/him just, and people do not become honorable by calling them "your honor." Desiderius Erasmus called lawyers jackals; was his view correct?

If united we stand, divided we fall means anything, it means that a large degree of conformity must exist in society. But conformity is brought about in two different ways—by wise laws that people obey willingly or by unwise laws that people obey in fear. The latter kind of conformity is apparent only, is not real. In that kind of society, disunity lurks in the shadows and expresses itself in widespread criminality. The huge number of incarcerated Americans proves that shadows are everywhere.

What passes for justice in America is very odd. Being schooled in what the law is rather than what the law should be, American lawyers look to the past rather than the future, so they tend to be conservative, to maintain the *status quo*. They tend to want to retard and even reverse human progress. They favor corporations over consumers and the working class, no member of which has ever been a federal judge. The Court overturned minimum-wage laws, workers' compensation statutes, utility regulations, and child labor laws. In the early 1930s, it struck down New Deal legislation. It struck down a statute that made the financial industry fair, rejected a suit by women against a woefully discriminatory company, shielded the makers of drugs from lawsuits by patients who had been harmed, rejected lawsuits against mutual fund cheaters and liars, and disallowed a suit by inmates even though prosecutors failed to reveal exculpatory evidence. Blatant injustice! Is it any wonder that American society is disintegrating?

The system of Common Law is an eleventh century phenomenon. It didn't mesh with the Constitution of 1789. Jefferson wrote after the Supreme Court's decision in Marbury v. Madison that the Constitution was "a thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." The judiciary has shaped it poorly.

Various sessions of the Supreme Court are often identified by naming them after their chief justices, for instance, the Marshall Court, the Warren Court, and now the Roberts Court. But the Court is really just a Robbers Court. It deserves no one's respect!

As the American government seeks to destabilize nations in far off places, the legal system is destabilizing the country from the street to the halls of Congress. Absolutely nothing good can come of it.

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