

The Real Problem with Criminal Law Procedure...

J Futros

Michael J. Sandel, an American political philosopher, wrote the book 'Justice: What's the Right Thing to Do?', in which he uses contemporary legal debates to not only call into question how individuals should treat one another, but what the law should be. The goal of the book, as per Sandel, is "to invite readers to subject their own views about justice to critical examination – to figure out what they think, and why".¹ I believe Sandel's insights are applicable to the realm of criminal law, particularly with respect to procedure.

The following is found in 'Justice: What's the Right Thing to Do?' with respect to the infamous philosophical Trolley Problem:

"We start with an opinion, or a conviction, about the right thing to do: "Turn the trolley onto the side track." Then we reflect on the reason for our conviction, and seek out the principle on which it is based: "Better to sacrifice one life to avoid the death of many." Then, confronted with a situation that confounds the principle, we are pitched into confusion: "I thought it was always right to save as many lives as possible, and yet it seems wrong to push the man off the bridge." Feeling the force of that confusion, and the pressure to sort it out, is the impulse to philosophy. Confronted with this tension, we may revise our judgement about the right thing to do, or rethink the principle we initially espoused. As we encounter new situations, we move back and forth between our judgements and our principles, revising each in light of the other. This turning of mind, from the world of action to the realm of reasons and back again, is what moral reflection consists in."²

The 'turning of the mind' that Sandel writes of is essentially legal procedure. A legal principle is created, then shaped and shifted to meet the 'moral' needs of subsequent cases, meanwhile justices question the very principles they create. Judgements are revised as new cases are encountered; justices oscillate between their own judgements and principles, 'revising each in light of the other'. We are content with this process, perhaps for the reason of practicality. We are satisfied with adopting a principle as a temporary truth only to have it moulded later into something more...true??

Sandel isn't satisfied: "If moral reflection consists in seeking a fit between the judgements we make and the principles we affirm, how can such reflection lead us to justice or moral truth?"³; aha...*this* is the question we ought to be asking in the courtroom, just replace 'moral reflection' with 'the law'. Can we expect to reach truth by using ourselves, our ideas, as the referent? I don't believe so. In law, truth and justice are either emotionally sensed or pragmatically driven, both of which fall victim to the reasoning processes of our diverse cultures and judicial opinions; this is a glaring inconsistency within the legal system. With no external gauge, we are creating the truth. Courts administer 'justice' but as Sandel has pointed out, we don't know what justice *is* or even what *truth* is, for that matter. What we *reason* from our convictions (which, where did *those* come from anyway? Perhaps another question worth considering...) becomes truth and that 'truth' is reflected in the principles judges create in the courtroom. A dreary observation, but if we are to speak *truthfully* as to what goes on in the courtroom and in legal procedure with respect to all areas of law, criminal included, I would say it is a *good* observation.

I want to consider another quote from the German philosopher, Friedrich Nietzsche: "Words, like a hall of mirrors, reflect only each other and in the end point to the condition of their users, without having established anything about the way things really are. Truth is the name we give to that which

¹ Michael Sandel, *Justice: What's the Right Thing to Do?*, 1st ed (New York: Farrar, Straus and Giroux, 2009) at 30.

² *Ibid* at 28.

³ *Ibid*.

agrees with our own instinctive preferences. It is what we call our interpretation of the world, especially when we want to foist it upon others.”⁴ This sounds like good philosophy of language, albeit self-defeating. Hence his confession: “I am still too pious that even I worship at the altar where God’s name is truth”.⁵ Basically, what Nietzsche is saying is ‘yeah, reality may be all about words, but sooner or later, I too must believe in truth because I have no other choice; I cannot deny truth at the same time believing that my denial is truthful’. What does this have to do with legal procedure? Judicial principles reflect one another much like words. Nietzsche’s quote essentially echoes the same message of Sandel, namely, that it is impossible for a self-referencing system to lead to truth. And, as Nietzsche says, truth *does* exist; a true conception of justice is out there...we just have no luck of finding it with the legal system we currently use.

In the courtroom, truth is sacrificed at the altar of practicality. Is an incoherent system all that practical? What fascinates me is the students who are trained to identify flawed arguments and logical inconsistencies are taught to use an incoherent system of laws to support their own legal arguments. The flaw in legal procedure lies in the failure of its users to ask the questions philosophers such as Sandel and Nietzsche ponder, the consequence of such is a justice system with no truthful meaning of the term justice; *that* is the problem with criminal law procedure.

⁴ Philip Novak, *The Vision of Nietzsche (Spirit of Philosophy)*, (Vega, 2003) at 8-11.

⁵ *Ibid* at 11.