

THE AMERICAN CRIMINAL JUSTICE SYSTEM: FROM MAYBERRY TO MOSCOW

Kim R. Lindquist*

In early 1993, I sat with the FBI Hostage Rescue Team outside the sprawling compound of religious fanatic, David Koresh, at Waco, Texas. I was clad in a helmet and bullet-proof vest, and equipped with a prosecutor's pen and notepad. My police officer companions were dressed and armed as soldiers; the compound was a sandbag fortification. Overhead, helicopters were flying angrily.

That immediate situation came to a devastating conclusion a few days later with a violent mass death, tragically mirroring the previous loss of several law enforcement officers just a few days prior at the same compound.

I remember finding it difficult to remember that I was on American soil, and even more challenging to recognize the situation as a law enforcement operation as opposed to war.

From U.S. tragedies borne of fanaticism, such as Waco, Ruby Ridge, the civil and drug trade wars of South America's Colombia, Paraguay, Argentina and Brazil, and ultimately to the killing grounds of Chechnya, Palestine, Israel, and Moscow, we see a continuum that runs from law enforcement to war and back again.

Crime and war are two relative extremes on a normative, procedural and moral spectrum along which criminal justice systems and military authorities now struggle to function.

I had the same horrible, sinking feeling when I watched the video replay of the airliners flying into the Twin Towers of New York City. I tried to contemplate the social context that gave rise to such a heinous and massive event of hate, death, and destruction, and how the criminal justice system would deal with it. Since then, that context, including its essence of religious fanaticism, has manifested itself more clearly, only confirming anxiety and fears regarding a criminal justice system's ability to address the situation.

How can the U.S. criminal justice system deal with crimes of such magnitude? Was it intended to do so? Is our system being ordered to march into realms where it was never intended to go?

My purpose in writing this is not to make excuses for criminal justice systems or their functionaries. We are facing a cultural crime phenomenon that is bigger than, and threatens to go beyond, the historically intended reach of the traditional

criminal justice system.

Are these the social issues criminal justice systems were developed to address and resolve? If not, can these systems evolve, or be modified, to encompass these horrendous modern novelties?

On one end of the spectrum is the local law enforcement scenario, represented (as shown hereafter) by the fictional town of Mayberry from the Andy Griffith show. Although Mayberry is a Hollywood invention set in the American South, it nonetheless is fairly representative of the historical, social context that gave rise to the traditional U.S. criminal justice system.

On the other end of the spectrum is the war scenario, illustrated vividly by the Waco incident or the 2002 Moscow theater hostage crisis, where Chechen rebels who took over 700 hostages were killed when Russian government officers raided the building.

In the Mayberry, or law enforcement scenario, we have a law enforcement response to a relatively isolated and local event. This response prompts, and in fact requires, a procedural resolution that attempts to balance accountability with fairness and freedom in the local crucible of justice.

This law enforcement crucible necessarily consists of several components that are particular to jurisdiction, specifically investigation, formal reception of evidence and judgment, which reveal themselves in legal codes or rules. These rules proscribe criminal behavior, control investigative techniques, establish procedural requirements, and provide for the manner of evidence reception in judgment.

On the other hand, as epitomized in the Moscow theater siege, we have the event of mass and indiscriminate killing and destruction of property in magnified violation of a moral norm. Sometimes it is a threat to the very existence of a given culture or society, considering the mass destruction now made feasible by modern technology.

This event tends to exceed local boundaries and, more often than not, invokes foreign and extra-territorial considerations.

The Law Enforcement Scenario

The killing of a single human being is part of the law

enforcement scenario. The local applicable criminal code would proscribe such behavior. Other related local rules regarding the arrest of persons and the search for and seizure of evidence, the procedural process, and the manner of reception of pertinent evidence by the local trier of the facts in judgment would similarly apply. Moreover, in this local law enforcement scenario, the accused violator would necessarily be entitled to, and the justice system would promote and sustain, certain protections or rights created by the same local, cultural context giving rise to the morality-based normative proscription.

The development and maintenance of a law abiding citizenry historically came from four primary institutions: the family, the school, the church and the community at large. These institutions largely determined the behavioral norms, and, more importantly, instill obedience to those norms. Families nurture. They are supported and sustained by school teachers and administrators, religious leaders and other community components, such as employers, all to ensure successive generations of law abiding citizens.

Mayberry, and specifically the role of the local sheriff Andy Taylor, is an example of this historical approach to law enforcement. In Mayberry, families, schools, church and the community at large were viable and strong in raising widowed Andy's son, Opie Taylor, to be a good and law-abiding young man. Indeed, Andy's role as father was more of a theme in the television show than his role as law enforcing sheriff. Even when he locked up Otis, the town drunk, he did so less as a police officer and more as a community mentor. As sheriff, he represented the criminal justice system in Mayberry, symbolized by his uniform, but rarely did he carry a gun. He didn't have to, because those institutions most responsible for civilizing the next generation were, for the most part, doing their job. On rare occasions, a bad guy would reveal himself and Andy would don a gun and apply the criminal justice system more aggressively; but he did so reluctantly, as a matter of duty rather than social preference. Barney, the deputy, with an eager gun in his holster and a single bullet in his front shirt pocket, served as Andy's character foil and perhaps a comedic precursor to "Rambo."

In this social context, the criminal justice system was designed as a secondary and reactionary mechanism. It was never intended as *the* or even *a* primary civilizing entity. It emerged as a safety net for the occasional, individual fall, not the circus tent that constantly covered the entire community.

Mayberry, Andy Taylor and the criminal justice picture they portray are not just Hollywood fiction. They have existed and can yet exist in both rural and urban settings. However, they are lamentably rare today, lost in the tragic wake of pervasive social abdication by those most responsible. Parents today are distracted from their unequalled

responsibilities either by the complacency of materialism and affluence, the degrading reality of poverty, or the ambivalent middle ground. Legal repercussions force teachers to abandon their moral influence in favor of important but colder academics. Religious leaders find their message and outreach marginalized more every day. In addition, too infrequently nowadays does the profit-minded employer perceive any obligation to a struggling youth. These four primary civilizing institutions have either abdicated outright their social responsibility or simply lost influence through misguided social orientation.

The inevitable and now immediate and pervasive result of this social abdication is twofold. First, a civilizing agent vacancy or void is created. Secondly, there is a dramatic increase in uncivilized behavior, in crime, to such a degree that it constitutes a primary threat to society. Hence, the absolute need for law abidingness and a civilizing agent has not waned. Indeed, it is more cogent than ever.

The War Scenario

The Geneva Convention comes to mind when considering the war scenario. The war scenario lends itself to, and even instigates, the creation of alternative, international-type forums, where violations of such magnitude and nature are addressed. International criminal tribunals are an example.

The subject matter of the same is described in terms of "genocide" and "crimes against humanity." This international judicial alternative might very well bear on the solution to the dilemma that is posed with regard to a given national criminal justice system. To date, however, it has neither resolved the dichotomy tension nor relieved that national system of normative and procedural responsibility with regard to the phenomenon of terrorism as the incubator of a war scenario; it probably never will.

From the perspective of the U.S. and other national criminal justice systems and their respective reaches and responsibilities, with September 11 and related terrorist events, the systems have moved to effectively encompass war scenarios.

A Role Confused

So where do we now turn in dealing with society-threatening crime and for that essential, but now largely absent, civilizing agent? What is our social recourse?

Unfortunately, societies look errantly for alternative institutions and find an unsuited and unwilling but very available and deceptively accommodating criminal justice system to address both aspects.

Conceptually, the criminal justice system is meant to deal with crime any way it presents itself. Crime has become

a fundamental threat to our society. We, in frustration, desperation or calculated and irresponsible misapplication, confuse the limited and reactive role of the criminal justice system with that of a primary, affirmative, civilizing agent and blindly task the courts to fill that void.

From the parent telling the judge, "It's *your* job to deal with my wayward child;" to the attorney general of an entire country querying, "If your criminal justice system is so good, why do you have so much crime?" we all look too frequently to the courts to solve our social ills.

That system, however, was never designed to fulfill such a role. As I tell my aspiring criminal justice students, by entering this profession you are largely being set up to fail, with the profession taking a personal toll through alcoholism and other problems. Society demands of the system and its people what they were never intended to provide. Criminal justice functionaries, by their inherent institutional nature, are reactive, systemic technicians, not affirmative civilizing agents.

More specifically, police officers are primarily enforcers of law and discoverers of facts, not nurturing employers. Prosecutors are legal advisors, accusers and formal presenters of discovered facts, not socially assigned moral teachers of youth. Judges are overseers, referees, evaluators of discovered facts and interpreters of established law, not parents to defendants. Defense attorneys are protectors, scrutinizers and challengers, not community clerics.

The dramatic increase in crime means that the hallmark, localized, individual criminal event, the basis of the "law enforcement scenario," has expanded and multiplied to such a degree as to destroy the procedural significance of that individuality and locality, thereby approaching analytically a "war scenario." The practical reality of this phenomenon is confirmed by expressions such as "the war on crime," and "the drug wars."

As an example of the transition from individual crime to a war scenario, drug trafficking, with all the violence and social destruction associated with it, has taken on an invasive complexion with law enforcement and the criminal justice system waging pitched battles against it around the world.

SWAT team versus the Beat Cop

Further manifestation of the criminal justice system's hapless transition from localized single crime to war scenario is seen in the militaristic orientation and development of law enforcement entities. A SWAT team is deemed more pertinent and desirable than a neighborhood patrol. The beat cop has given way to Rambo.

This expanded law enforcement scenario results in two questionable products: a criminal justice system that can't reactively handle the crime increase within its designed parameters, and a criminal justice system that is additionally and impossibly tasked with affirmative social civilizing.

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With recent terrorism events, the transition from a local crime scenario to a war scenario seems confirmed. From the

investigative, charging and judging perspective of the criminal justice system, September 11 and the Moscow theater takeover are more akin to Pearl Harbor than they are to a local murder prosecution. If the system struggles or fails in handling an expanded law enforcement scenario, it truly constitutes an impossible mission as to the war scenario.

In law enforcement, terrorism is perhaps even more challenging and elusive for the criminal justice system as a war scenario than that represented by the classic invading army.

Jihadist or extreme Islam-based terrorism, for example, is truly an ephemeral, stateless nation of individuals linked by a common, fanatical religious ideology. Whether dealing with the infiltration of America and its infrastructure by actual Islamist suicide killers or by Jihadist ideology in material support of violence world-wide, many countries of the world are truly in a terrorism war scenario.

It largely is being fought, however, with historical and traditional law enforcement scenario tools, and is struggling as a result. If those tools are inadequate in an expanded law enforcement or local crime scenario, they are even more wanting in this terrorism war scenario.

Consider the extensive investigation and trial last year of the Saudi student at the University of Idaho in Moscow, Idaho. He used his computer to publicize online Islamist recruitment and funding of overt and material support of terrorist activities. After more than two months of trial testimony, a jury in Boise, Idaho acquitted the defendant of some charges and hung on the rest. Once again, without making individual or institutional excuses, this criminal justice result might very well be explained in part at least by the law enforcement scenario-based criminal justice system failing to function in a war scenario.

First, the defendant used his computer in the United States to publish and post on the world-wide Internet Jihadist material that had the express purpose of promoting, funding and recruiting for terrorism in Russia and Palestine. Since the case dealt with something that exceeded the essentially local,

domestic nature of a law enforcement scenario, the prosecution was forced to fashion, in accordance with the available statutory charging tools, a complex series of three conspiracy statutes interwoven into one charge. Given that the various applicable statutes went into effect at different times, the charging document had to combine the general conspiracy statute of 18 U.S.C. Section 371 with the material support conspiracy statute of 18 U.S.C. Section 2339A in order to charge the foundational, local jurisdiction material support conspiracy. The object of that foundational conspiracy, in addition to the material support components which also varied in application over time, was yet another conspiracy statute, 18 U.S.C. Section 956, which allowed extra-territorial application, but with jurisdictional ties to the United States. In short, the prosecution had to charge a domestic conspiracy which, in turn, included a foreign conspiracy, the purpose of both being the commission of terrorist acts abroad.

Although every good litigator must pride herself or himself in being a teacher first and lawyer a very distant second, it was extremely difficult for the prosecutors to teach the jury this legal and factual disconnect. The prosecutors even had to constantly revisit and confirm their own understanding of the legal basis in relation to the facts. One can only imagine what it was like, then, for the jury to grasp and meaningfully apply the same.

Furthermore, the court imposed, as directive to the jury, a freedom of speech norm that effectively precluded conviction absent a finding that “speech [was] directed to inciting or promoting *imminent* lawless action and is likely to incite and promote such action. . . .” (Italics added). Without advocating that freedom of speech has no application whatsoever to ideological expression and the material support of terrorism—which the author does not espouse—the criticism lies in the legal fact that such requires proof that ideological expression must *imminently* incite or promote terrorism. Jihadist indoctrination is not only psychologically powerful, but it is patient and persevering in its social manifestation. From the standpoint of “imminence,” prompting a person by means of Islamist language to donate to the violence of Hamas in Palestine, or to go to a training camp to prepare for the commission of violent acts in Chechnya or in a Moscow theater, it is a far cry from yelling “Fire!” in that same crowded theater. Yet, the local law enforcement-based norms were nonetheless applied to the extraterritorial, war scenario facts.

The jury was asked to consider a factual scenario that had virtually nothing to do with their locality save the defendant and his computer being temporarily situated there.

Beyond that meager nexus, it was as if the trial were taking place in Central Asia and the Middle East, with its very strange geography, demographics, language, culture and religious ideology. Getting the typical Christian from comfortably aloof Boise, Idaho to comprehend Arab-based Jihadist violence as manifested in Grozny, Chechnya or Moscow, Russia, and as materially supported by a Wahhabi-educated Saudi using a computer in Moscow, Idaho, was asking much of them within the necessarily limited social confines of a criminal trial.

Once again, one is loathe to even suggest that there is material of whatever nature that a capable litigator cannot teach a jury once he or she comes to understand it, but one must wonder if Clint Eastwood as Dirty Harry didn’t also have this situation well in mind when he said that “[e]very good man recognizes his limitations.”

During approximately the same period of time in which the federal criminal court in Idaho struggled to accommodate this foreign terrorism case, a local Iraqi Muslim was prosecuted in Idaho state court for the arson murder of his wife, a Muslim convert.

The defense in that state case also involved many aspects of Islam and the Muslim culture because the crime occurred and was tried to a certain extent with a foreign religious aspect.

The murder charge, however, was individual, immediate, legally familiar and comfortably local, as reflected by the very familiar and local evidence presented. It was a classic law enforcement scenario case with a little foreign gloss, and no fundamental struggle in court mechanisms to accommodate it. This stands in stark contrast with the war scenario tried a few blocks away in Federal court.

This might explain the tendency seen among federal prosecutors to use traditional, non-terrorism related laws to address the terrorism phenomenon, and a reluctance to use the so-called terrorism statutes utilized in the foregoing case and otherwise available nationally.

Let us return to the role of the litigator as teacher. Of course, before one can teach something, he or she must learn it well. Given the localized structure of prosecutor offices nationwide, and particularly that of the United States Attorney Office system, and the random, geographic manifestation of terrorism, especially the material support aspect thereof, the learning of any given prosecutor tasked with terrorism litigation starts at square one. Each has to largely invent the wheel with every jurisdictional terrorism manifestation, detracting from the efficiency and the efficacy that can only come with mastering the material. Therein lies the

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impediment: an absence of mentoring. Due to the institutional structure of the local law enforcement scenario, it is extremely difficult to coordinate the sharing of information and experiences, even when that sharing opportunity is created administratively. Everyone has his or her own local, constantly pressing demands. As expressed by one very capable FBI agent: “Even when you get together and share information, you can’t readily share the experience of living and breathing something for a number of years.” Although the Department of Justice has an excellent and capable Counter-Terrorism Section for oversight and coordination and a marvelous National Advocacy Center for training, the localized administrative structure of State and Federal prosecutors makes it difficult at best to achieve the true mentoring purpose of those institutional components.

The officers and agents responsible for investigating terrorism are subject to the same localized crime scenario impediment. Like their prosecutor counterparts, they are stationed locally to deal with local crime. When the fickle finger of terrorism fate randomly points at them, they must gain a mastery of the material in relative isolation because of similar administrative structure. Indeed it is fate that determines whether or not that local FBI office or even region will have the personnel most indicated by their personalities and experience to meet the severe, extra-territorial demands of a terrorism investigation. Even with coordinating components at FBI headquarters, for the reasons previously mentioned, significant mentoring is difficult.

It is possible that we are perplexed and frustrated in our terrorism war scenario endeavor, burdened with ill-suited statutes and problematic constitutional norms.

We might be further hindered procedurally with very local investigators investigating very foreign facts; with very local prosecutors teaching very foreign facts; and with very local juries judging very foreign facts.

So what are the solutions? For now, the problems are more often posed than solved.

There is a need, however, for statutes that better reflect and address the terrorism reality. These statutes necessitate a more straightforward and pertinent definition of the proscription, particularly with regard to material support, and what is required to prove it. Generally speaking, there must be a statutory transition from the law enforcement scenario to the war scenario in the terrorism field.

Furthermore, there is obviously much need for greater study of and discussion concerning the operational relationship between the military and the criminal justice address of terrorism. Although courts and scholars have begun addressing this as a result of Guantanamo Bay and immigration detentions, more attention and precision are needed. The activity of the criminal justice system in the war scenario is necessarily limited.

Nonetheless, that system must do its part in addressing the phenomenon. At the same time, we have to better understand where the one ends and the other begins. This is meaningful not only for prosecutors, but especially for law enforcement agents.

Conclusion

In conclusion, the lesson gleaned as a result of this personal odyssey from Mayberry to the two Moscows of Idaho and Russia is that scholars and litigators alike must be increasingly aware of the social condition of the criminal justice system and ever vigilant as to the competition between law enforcement and war systems. Each must work diligently in identifying, developing and applying legitimate criminal justice tools to modern events without succumbing to or invading the province of militarism; and, at the same time, trust that the military counterpart is providing an equally and accommodating clarity to this paradigm.

**Kim R. Lindquist is an Assistant United States Attorney for the District of Idaho, and has been for 18 years. He is currently assigned international and domestic terrorism responsibilities with the United States Department of Justice. Before joining the Department of Justice, he was in private practice for eight years, specializing in criminal defense work. This article is condensed from a speech given by him at the INTELCON National Intelligence Conference and Exposition at Arlington, Virginia, on February 9, 2005.*