BOOK REVIEW

Criminals and Victims. Lois G. Forer. W.W. Norton & Co., New York, 1981. Pp. 1, 333.

This largely anecdotal book is the result of nearly a decade of experience by its author as a judge of a state court of general criminal jurisdiction. Interspersed among historical recitations of cases that have come before the author, or that have been brought to her attention, are severe criticisms of the criminal justice system as it presently exists and suggestions for reform that range from mundane to radical.

My own experience with the administration of criminal law extends over twelve years as a state and then federal trial judge. I recognize that the system is in some state of disrepair. I have not yet come across any person or group of persons who can fix it.

The book emphasizes the many factors that are currently thought to be causes of crime. Among them are educational deprivation, unemployment, mental illness, drug addiction, alcoholism, and the frustrations arising out of racial discrimination. As to most of these, courts are powerless to act in a corrective fashion. When courts can act, it is after the fact of conviction and not in a preventive sense. The major battles to eliminate the root causes of crime will have to be fought in the political arena, and not in the courtroom.

The major interest for me in *Criminals and Victims* lies in its critiques of judicial action and its suggestions for change and reform that can be accomplished, at least to some extent, by the judiciary without legislative implementation or, in some cases, by constitutional change.

The author comes down hard on the recognized disparity in sentencing between those guilty of what is called "white-collar" crime and the offender who has committed a "street" crime. The author gives some examples of what, on the surface, seems to be unduly lenient treatment of the so-called "white-collar" offender. I am not sure that intense examination would reveal these sentences to be legitimately subject to criticism. Sentencing is an art, not a science, and first impressions or superficial examinations of a particular sentence are inherently suspect. For example, I must take issue with one statistic the author uses in support of her unjust disparity theory. It is reported that 91% of those convicted of federal bank robbery receive custodial terms while only 17% of those convicted in federal court of embezzlement during the same year (1976) were incarcerated. I believe that I have handled as many bank robbery and embezzlement cases as any federal judge during the last seven years. There is good reason for this statistical difference. The average federal bank robber is one who enters a bank with a loaded handgun thereby placing lives

in jeopardy. And by the time an offender has graduated to armed bank robbery he has usually compiled an extensive record. By contrast, the usual embezzler is a young adult, probably female, employed as a teller who has lifted a few thousand from the till. Invariably, these embezzlers are first offenders. The difference in severity of the offense and the potential danger to society between these two types of offenders is obvious, and clearly justifies the differences in the sentences imposed.

The author advocates that economic crime be punished in economic terms and, hence, advocates fines in triple the amount of the criminal's economic gain. To some extent, judges could carry out this valid thesis. However, since our present statutes contain such an irrational schedule of maximum fines, implementation of this idea would only lead to new cries of sentencing disparity. Under the federal mail fraud statute, a frequent vehicle for "white-collar" prosecution of sophisticated schemes involving large sums of money, the maximum fine is $1,000, and the maximum period of imprisonment is five years. However, if an automobile dealer turns back the odometer on a used car he is subject to imprisonment for one year and to a fine of up to $50,000. The suggestion that there be no maximum limit on fines has obvious merit.

The major thesis of *Criminals and Victims* lies in its advocacy for greater concern with the rights of victims. Plans are urged to place victim compensation and greater measures of restitution within the administration of criminal litigation.

Most judges will order restitution as a condition of probation when the amount of loss is liquidated. However, a criminal case is mainly concerned with the fact of wrongdoing and only to a very limited degree with the consequences of it. An atrocious assault case may necessitate proof that the victim was stabbed. It is not important that the result was only a minor flesh wound rather than blindness, quadriplegia or some other immense physical calamity. The judge may be interested in the extent of the consequences for sentencing purposes, but such is not important in the determination of guilt. In a major securities fraud case, the criminal proofs are only rarely suitable as a predicate for a finding as to the actual extent of loss.

Problems of proof of the amount of restitution or compensation are compounded when the criminal case is terminated, as over 90% are, by plea rather than trial. If an embezzler is indicted in ten counts and pleads to one, restitution may be ordered in the amount specified in the count to which a plea is entered. I know of no way to force restitution for the amounts specified in the counts dismissed as part of a plea bargain. That, of course, can be made part of the bargain and a

condition of acceptance of the plea would then be an agreement to make restitution in full as a condition of probation. But if the defendant balks, in light of the demands on the criminal courts, I doubt that a trial would be forced because the defendant would not agree to restitution in full. I also add that before civil liability may be imposed there is a right to jury trial and the victim may not be satisfied with the hurried valuation made within a criminal case, but would prefer civil litigation with full discovery. Moreover, criminal cases, at least in the federal courts, move much more swiftly than do civil cases. Where the harm to the victim is severe, there probably will not be enough time to enable an accurate finding on damages.

I have serious reservations about the practicality of a vastly increased use of restitution and victim compensation as an adjunct to criminal litigation. There is no point in dramatically complicating a criminal trial with a subject that is traditionally civil. To so complicate them is to delay them. I worry about denial of rights, such as jury trial and discovery, necessarily associated with civil litigation. Even if the judge separates the restitution or compensation hearing from the criminal jury trial, are our criminal courts prepared to take on this added burden? Moreover, if the victim is not bound by the compensation thus assessed, but may sue later for increased damages, an unnecessary duplication of judicial effort will be involved.

By stating my disagreement with several of the author's premises and conclusions, I do not mean to imply that this is a valueless book. The problems addressed are pervasive and complex. New solutions breed new problems, but because they do is no reason not to advance them.

*H. Curtis Meanor**

---

* Judge, United States District Court for the District of New Jersey.