

**Roberts, Paul Craig and Lawrence M. Stratton. *The Tyranny of Good Intentions: How Prosecutors and Bureaucrats are Trampling the Constitution in the Name of Justice*. Forum (Prima Publishing Company), 2000. 242 pp. \$24.95 hardcover.**

It is a statement of the times that good books are published by obscure presses. If these were sensible times, this book would have been put out by one of America's leading publishers. By the same token, if these were sensible times, there would have been no need even to write a book such as this.

*The Tyranny of Good Intentions*, as the first substantive word of the title suggests, is a disturbing book. As the long subtitle indicates, it is a chilling expose' of the American criminal justice and bureaucratic regulatory systems. Economist and syndicated columnist Paul Craig Roberts is one of the few editorialists who seems to care about, or even be aware of, the daily injustices and erosion of liberty Americans now experience in the name of such objectives as stopping illicit drugs, combatting child abuse, and halting corporate fraud. He has repeatedly shown himself to be one of the few public spokesmen who genuinely and consistently love liberty, often pointing out how his fellow conservatives (he was an official in the Reagan administration) seem not to be too concerned when liberty is compromised in the name, say, of law and order. Lawrence M. Stratton, who also collaborated with Roberts on a previous book, is a young lawyer and fellow at the Institute for Political Economy.

While not a deep scholarly work, this book is as good an analysis as one will find of an as yet much neglected topic (although, interestingly, one which Aleksandr Solzhenitsyn suggested in his famous 1978 Harvard commencement address): how law, which was the traditional guardian of our liberty, has now become the vehicle for its subversion.

There are numerous, and very troubling, themes in this book. One is the dangerous erosion of the legal concept of *mens rea*. This was the traditional common law principle that there could be "no crime without intent." Grounded upon sound moral reasoning, this meant that the law required moral blameworthiness if it was to punish. *Mens rea* was dramatically eroded by such high profile regulatory and "white collar crime" cases of recent decades as those involving the Exxon Valdez oil spill, the Charles Keating savings and loan prosecution, and the Clark Clifford-Robert Altman-BCCI episode. In each of these cases, prosecutions were brought even though no standing law justified them, the principals engaged in no deliberate criminal activity, and prosecutors seemed literally to invent charges out of unheard-of legal theories or unrelated

statutes. The much celebrated Keating case also involved outright violations of the protections against ex post facto laws and bills of attainder.

On the matter of ex post facto or retroactive law, Roberts and Stratton discuss how it has been typical of environmental regulation in recent years. They explain that the diminishing of the *mens rea* requirement is connected with it simply because if an act was legal when it took place, a person could not be said to have intentionally engaged in illegal conduct.

Another major source of corruption of American criminal law is the practice of plea bargaining, which Roberts and Stratton demonstrate has severely compromised the right to trial by jury, turned lawyers into negotiators and game-playing strategists (with prosecution and defense merely trying to outmaneuver each other at the bargaining table) instead of defenders and seekers of justice, and has given rise to ambitious and publicity-seeking prosecutors who do not concern themselves about evidence or building a case or even whether a person is guilty or innocent, but just want to nail someone.

Plea bargaining, the authors inform us, has become routine in recent decades because of the inability of prosecutors and the courts to handle the massive number of cases coming to them. I might observe that the reasons for this development seem to be threefold: the lack of concern with the shaping of the soul in contemporary America (so that moral restraint is lacking and all that is left is the coercive power of law), the tendency to bring all sorts of matters into the reach of the criminal law (to “criminalize everything,” as some say), and the reckless growth of mass culture (so that massive numbers of people are left to face an impersonal way of life with no reference points and no true attention to their temporal and spiritual well-being, with resulting crime and delinquency). The breakdown of the family and the confusion of religion have furthered such enmassment in the last two generations.

Roberts and Stratton recite the odyssey of all too many plea bargaining efforts, especially in well publicized cases. A prosecutor draws up an indictment, for which he may have little evidence, for a grand jury. He then leaks this to the press to put pressure on the accused’s by sullyng his reputation. Then he may leak rumors to the press that the accused family and friends are also being investigated, and then his operatives approach the latter, mostly to intimidate. The prosecutor may then leak to the press possibly false information that the grand jury is considering expanded charges. Under this psychological pressure the accused is motivated to accept a deal to plead guilty to lesser crimes, which may be entirely imaginary, and accept a lighter punishment. It is no wonder that the authors compare this to the ordeal of torture of law of an earlier time—only now the torture is psychological instead of physical.

Interestingly, in light of the aftermath of the 9/11 events, a federal prosecutor who propelled himself into political stardom by highly-publicized plea bargaining schemes (even when he had very weak cases) was Rudolph

Giuliani. Among his victims was the supposed poster boy of corporate greed, Michael Milken, who actually committed no crimes.

Other important questions examined in this book are the violation of attorney-client privilege by unprincipled, overzealous federal prosecutors; the trampling on constitutionally-protected rights by federal bureaucrats in the name of enforcing civil rights laws; and the scandal of federal asset forfeiture laws. Two major examples of the first of these occurred in the Justice Department's savings and loan investigations of the 1980s and 1990s. The first example was the attempt by the Justice Department to force lawyers to inform on their clients by freezing the assets of their law firms. The second example was when federal investigators sought to communicate with people they were investigating without the presence of the latter's legal counsel. Both actions violated accepted norms of legal ethics, and the first was a particularly outrageous example of government intimidation.

The outright trampling of constitutional rights in the name of civil rights was seen vividly in the Clinton administration's seeking to sue and even prosecute citizens for daring to exercise their rights to speak freely and petition for a redress of grievances in opposing the setting up of homeless shelters and group homes for the mentally ill and recovering drug addicts in their neighborhoods. In one of these cases a U.S. Senator, and a liberal Democrat to boot, accused the administration of "Gestapo techniques."

The asset forfeiture laws have received considerable public attention in recent years, although they still have not been significantly changed. As a way of dealing with the drug epidemic and organized crime, Congress enacted these laws in the 1980s and 1990s. They provide for the seizure of property and assets used in or to facilitate crime, even without sufficient due process, and for their transfer to the coffers of law enforcement agencies. These laws have been grossly abused by law enforcement and other governmental agencies, and have punished the innocent as well as the guilty. For example, in one case they were the grounds for seizing a wealthy man's Pacific Coast property that had long been coveted for the expansion of a national park (he had refused to sell it), when local and federal agents claimed, falsely, that there was marijuana on the property. In an unnecessary SWAT assault on his property, they gunned down the man. No agent or official was ever called to account for this outrage. While this was a particularly gross violation of human rights, the innocent have routinely suffered from these laws. This is testified to by such cases as those involving a retired Army officer who lost his California rental property because one of his tenants was an alleged drug dealer, an elderly black woman who lost the motel she owned because a prostitute used a room, and a woman who was stopped on I-95 and had the \$19,000 she was carrying—settlement from a home insurance claim for hurricane damage—confiscated because the police officer assumed that it had to be money from a drug transaction (she got it back only after hiring an attorney and agreeing that the police department get

a cut). Most people are not even as fortunate as the woman on I-95 in getting their assets back. Roberts and Stratton show how lucrative the forfeiture laws have been for police departments facing tight budgets around the country. They quote a former New York City Police Commissioner, who called the laws a “great temptation” for state and local law enforcement agencies. Also, do not think that if one of the prosecutorial elite gets snagged in the forfeiture laws, he will suffer like everyone else. The authors mention a federal prosecutor on the West Coast whose son sold drugs from her house and car. Her superiors exempted her because of all the forfeiture money she had brought to the government in other cases!

Roberts and Stratton contend that, while many of the cases they cite are from the 1980s and 1990s, this corrupting transformation of the American criminal justice and regulatory systems did not happen over night. Indeed, most tyrannies do not develop suddenly. The beginnings of the abuse of discretion, the authors say, came with the excessive delegation of legislative power to the executive in the New Deal. This was the beginning, one might say, of “a government of (arbitrary) men, and not of law.” Today, “the vast number of rules of conduct under which citizens are forced to live do not derive from accountable legislators.” The arbitrary practices of federal prosecutors followed from the precedent set by Attorney General Robert F. Kennedy, who set out to nail Teamsters Union president Jimmy Hoffa at all costs on *some* charge. Now we frequently witness prosecutors bending the law so they can get a particular individual they have targeted. After this came the compromising of the FBI. For all his shortcomings, J. Edgar Hoover, its long-time director, refused any effort to draw the Bureau into political matters, undercover operations, or stings in which agents set up crimes to corner someone they want. This all changed after Hoover, however.

As one reads this book, the word “utilitarianism” comes to mind to describe what has happened to our law. For the sake of capturing criminals—or, post-9/11, terrorists—we will do “whatever we have to,” even if the innocent get trapped with the guilty. It is thus striking that Roberts and Stratton contend that the philosophical progenitor of our current decadent legal order is the English utilitarian philosopher Jeremy Bentham. Bentham stands in contrast to William Blackstone, the great promoter of the common law tradition and rights, whose thought he attacked with a vengeance. Following his utilitarian philosophy, Bentham thought that the law protecting the individual had to be minimized for the sake of some notion of the public interest (which was not synonymous with the common good embodied in traditional natural law thinking, to which Blackstone largely adhered). For Bentham, individual liberties and the traditional principles of common law had to be conditioned by the “exigencies of the times.”

Even while this book is punishingly truthful, it is not particularly hopeful. The authors do not propose any solutions to the problem of our

“hollowed-out legal order,” other than an end to the rampant delegation of legislative power discussed above, which has created a runaway administrative state. They do not seem to think this is on the horizon, however. Sounding a theme frequently heard by Roberts’ fellow conservative opinion columnists, Joseph Sobran and Samuel Francis, they conclude that the Republic established by our Founding Fathers died with the Civil War and the New Deal.

In spite of the widespread systemic abuses the authors speak about, most Americans seem unaware of this “silent” tyranny. Unless they get caught in its web, they cannot see it for what it is. They seem still to adhere to the increasingly irrelevant nostrum with reference to the intervention of the criminal law that “where there’s smoke, there’s fire.” Somehow, people do not believe that our system is capable of so punishing the innocent. If Roberts and Stratton are perhaps frustrated by such a response, I can sympathize. For almost twenty years I have been lecturing and writing about the systemic abuses of the so-called “child-protective” system—a frequent theme of Roberts’s columns also, by the way—and I get the impression that no one is listening. Even when local press and media run stories about it, people seem to pay scant attention. Even people who get mildly mistreated by the system seem not to appreciate the full gravity of the danger. Ironically, public policymakers seem to pay the least attention of all. Nevertheless, I believe that if a book like Roberts and Stratton’s could get wide circulation—and if some well-heeled individuals or organizations would, say, buy a copy for every American legislator—it could influence some positive changes. Renewal, as Russell Kirk was fond of saying, is always possible, and seemingly impregnable corrupt structures sometimes fall with surprising suddenness like houses of cards. At least such things happen when the efforts to change them are backed up with heavy doses of prayer.

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