

## The Expanding Criminal Law

Former Dallas Cowboy Dwayne Goodrich just got 7 ½ years in prison for killing two men who were helping a stranded motorist on the highway. Sarah Foust received 30 years for killing a waitress who was pursuing her for running out on a restaurant tab and had jumped onto her car. Chante Mallard got 50 years for killing a homeless man on the highway who got stuck in her windshield. Each will have to serve at least one-half of their sentence before they can even ask for parole. In each case, the defendant did not intend to kill anyone.

The criminal law is expanding, taking in more and more cases that not very long ago would have been handled only in the civil courts. Perhaps it is the fact that our civil justice system is shrinking due to tort reform. Perhaps it is all of the reality TV, Court TV and legal commentators on Fox, etc. driving prosecutors to bring potentially newsworthy cases. I mean, if an incident gets enough press, how politically can a prosecutor *not* do something, especially where there is a vocal victim or victim's group? Perhaps it is the simple fact that in this age of Jerry Springers, Oprah Winfreys, Dr. Lauras and Dr. Phils, we have become a society of callous voyeurs who just like to see people prosecuted (which, with "gavel to gavel coverage" is sort of the 21st Century equivalent of public executions). It could be a combination of some or all of these. But one thing is for sure – more people are being prosecuted now – and sent to prison – than ever before and that trend does not show any signs of slowing.

According to a Justice Department report, at the end of 2001, 1 in every 37 U.S. adults had been – or currently was – in prison. If rates of incarceration do not change, of those people born in 2001, one in fifteen will see the inside of a prison at some point in their life. That is 6.6% of the total adult population in the U.S. In 1974, only 1.9% of the U.S. population had been to prison. And these are just the ones who actually go to prison. Combine this with the number of people we convict of felonies who successfully live out probations and hence never actually go to prison. What we are doing in this country is creating a sizeable underclass of convicted felons.

And this great social experiment in criminal justice seems to be picking up steam.

In South Dakota recently there was a tragic incident where a U.S. Congressman (Bill Janklow) and a motorcyclist collided at an intersection and the motorcyclist died. There was a four-way stop at the intersection, so clearly *somebody* was at fault, but there was no indication that drugs or alcohol played any role in the accident. The motorcyclist was not wearing a helmet. The report mentions that the prosecutor is awaiting accident reports before deciding whether to file charges. What? File charges? On *that*? Don't be surprised – another report points out that the American Motorcycle Association is "monitoring the investigation."

The Fort Worth Star-Telegram recently reported that a Deep Ellum bar owner has just been charged with manslaughter for serving two under-aged drinkers who then got into a single-car accident and died. The boy, who was driving, had marijuana in his system. The parents of the couple pushed the Dallas DA until he filed the charges.

To find guilt for manslaughter, a jury must believe that a defendant was aware of but

consciously disregarded a substantial and unjustifiable risk. To be found guilty of criminally negligent homicide, the jury must find that the defendant ought to have been aware of that risk. Neither requires an intent to kill. Both could be used a lot more often than they are even now.

Any 17 year-old kid who is speeding and darting in and out of traffic surely *ought* to know that there is a substantial and unjustifiable risk that someone could get killed that way. Perhaps he actually does know and disregards that risk. Either way, he gets convicted of a felony. In the former case, he can get up to ten years, in the latter, twenty. What about a doctor who really messes up a surgery? He's up all night and due to fatigue forgets to do something and the patient dies? He ought to know better, shouldn't he? What about a surgeon with supervisory authority over another doc and who knows that sometimes that doc does surgery after he has been drinking? If that Deep Ellum bar owner can be charged with manslaughter, why can't the supervising doc? Those liability caps you doctors all want so badly aren't going to help you much here. This slope is not that slippery. Prosecuting doctors for gross medical negligence is not unprecedented in Tarrant County.

When we prosecute the kinds of cases we have seen lately, we create in the public the expectation that we will continue to do so. In light of Goodrich, how can the Dallas DA decline to prosecute the next time someone slams into a parked car on the freeway and kills somebody? Soon enough, we will see in the press that someone is being prosecuted because somebody died in a street race (if it has not already been done). Once expanded, nothing ever really goes back to its original size. This includes the criminal law.

Criminal trials are very expensive affairs. It would not be unreasonable to say that a week-long trial costs more than \$5,000 in just court salaries alone (in a case where the defense lawyer is *not* court-appointed). That's for a judge, two prosecutors and two bailiffs. This does not include the prosecutors' support staff, police salaries for testimony, expert witness fees and the cost of preparing the trial. In a high profile case, the costs spiral because they are prepared so much more thoroughly.

Dallas just spent a bunch of money prosecuting Goodrich and now we will get to house him for at least four years. For what? We get to house Chante Mallard for at least 25 years and God only knows what the Tarrant County DA spent to prepare that trial – they had three prosecutors and essentially reconstructed her car in the courtroom. To what end? Do you really think the streets have been made safer because these two are off of them?

Or is the point of all this purely punishment – helping the families of the victims to extract some measure of vengeance for their loss? If so, we need to recognize that underwriting this service is an expensive luxury. Convicted felons do not make the most productive citizens, especially when they are incarcerated.

Watching the gavel to gavel coverage is pretty fun right now, but one day we may wake up to find that all this money might have been better spent on something else. Like schools.