

WHEN A CONVICTION CARRIES NO SHAME and DISBARMENT BECOMES AN HONOR

By Evan Gutman CPA, JD (2002)

The comedian Steve Martin used to tell a joke that inflation wasn't a bad thing because everyone would then be a millionaire. The obvious flaw in the theory is it does not recognize that if everyone is a millionaire, the buying power of a dollar is diminished. A loaf of bread that currently costs \$ 2.00 would cost \$ 50,000.00, give or take several thousand. No one as a matter of substance would really be richer, even though as a matter of form, we would all technically be millionaires.

Similarly, if the majority of citizens have a criminal conviction, the conviction does not carry any shame or disgrace. The intended concept of being convicted of a criminal act is that the "criminal" is supposed to be recognized as a really bad person, whereas the average citizen is respected. However, once laws are adopted prohibiting virtually everything, or are applied in an arbitrary manner so that anyone can be convicted for committing acts which are not violent, heinous, or harmful, the importance of being convicted of a crime is diminished.

If driving an automobile after drinking two glasses of alcohol constitutes a serious felony, it becomes irrationally equivalent to homicide which is also a serious felony. The effect of classifying both as serious felonies, diminishes the horrible nature of homicide by placing it on a level equivalent to driving after having two drinks of alcohol. Criminal convictions should be applied sparingly, so that they carry immense weight and detrimental impact upon those who are really guilty of serious crimes.

Currently, in this nation approximately one out of eight African-American males has a criminal conviction of some type. Consequently, being an African-American male means there's a pretty good chance you're a felon. It also means that applying the most basic principles of logic, African-Americans really shouldn't view having a felony conviction as all that bad of a thing, since so many people have them. If one African-American tells another African-American that they have been convicted of a crime, the recipient should logically interpret the communication as meaning, "well, maybe he committed a crime and maybe he didn't." It would have to be the logical response.

The issue however, is by no means limited to any minority group. It applies equally to the manner in which virtually everything a person does today, potentially subjects them to a criminal prosecution. The result is that the impact of having a Conviction has become immensely diluted. Due to the reckless manner in which legislators enact laws, the prevalence of prosecutions for relatively minor acts has diminished the importance of criminal convictions in our nation. There is something seriously wrong with irrational state legislators, when conduct that was completely legal 20 years ago, results in a lengthy prison sentence today.

When I was 19 years old, I went drinking at Bars regularly. It was totally legal and everyone I knew did the same thing. Today, a 19 year-old may wind up having a "Criminal Conviction" for doing the same thing. That's wrong. The matter is simply too trivial in nature to criminalize. That Conviction will "dog" that person relentlessly for years to come and can not help but breed disrespect for the law. Legislators need to come to the realization that they are not the Babysitters of society. They are wholly unfit to assume the role of moral guardian. As former U.S. Supreme Court Justice Jackson wrote:

"It is not the function of the government to keep the citizen from falling into error, it is the function of the citizen to keep government from falling into error."

It is well known that many of our Presidents have at one time or another committed criminal acts. Similarly, many Justices of the U.S. Supreme Court at one time or another committed criminal acts. It is irrefutable that we have allowed the importance of the criminal conviction to become greatly diluted by prosecuting people and even sending them to prison for relatively trivial matters that in fact harm absolutely no one.

The launching of prosecutions for minor acts is then coupled with a failure of defense counsel to provide competent representation, resulting in a so-called "conviction." The theory of our criminal justice system is that one must be proven guilty beyond a reasonable doubt. As a matter of substance however, the mere charging of one with a crime typically is sufficient to obtain a plea bargain of guilt, even when the defendant is innocent. Such convictions must logically be construed as carrying no shame.

It must be remembered that legislators are not particularly bright individuals. They rarely consider whether the laws they enact will withstand constitutional scrutiny, and instead for the most part adopt an attitude of "we'll roll the dice and see what happens." The impact of such is that the courts are forced to sift through all of the laws to determine what is constitutional and what is not. Courts have essentially been forced into a position of becoming super-legislatures due to reckless legislators.

Consider the following hypothetical (which I do not believe is all that far-fetched in today's world.) A Legislature in some hypothetical state, (which we'll call "Oregon") adopts a law prohibiting every single conceivable act of any nature that a person could commit. Only two possibilities then exist. The first is that every single citizen in Oregon would be a felon, and therefore a felony conviction would obviously carry no shame. In fact, all of the Oregon felons could get together and joke about their convictions with each other. In such an instance, the legislature would have caused an immense harm to the societal interest, since citizens would be unable to set apart those individuals who were truly violent criminals. In substance, the most violent criminals would have become the beneficiaries of an irrational and foolish legislature that criminalized everything, thereby placing guilty individuals on a level equal to innocent people.

The second possibility under this hypothetical, is that the Oregon courts would have to sift through all the laws to determine which ones were constitutional. Through no fault of their own, they would be forced into deciding which laws citizens should be bound by, and which laws were unconstitutional. The result would be that the Legislature by virtue of its' own ignorant eagerness to assume authority in all areas, totally negated its' own power. The Courts would be deciding in every subject area what was legal, and what was illegal. The Legislative statutes would be rendered substantively meaningless.

Legislators as stated, are not particularly bright individuals. Laws in order to have the maximum degree of respect by both citizens and the courts, should only be enacted to prohibit those areas of conduct which are truly, irrefutably and undoubtedly viewed by most citizens as being criminal in nature. If there exists doubt about whether a law is constitutional, the chances are that it isn't. If it criminalizes conduct that was widely accepted as legal by society during the last several decades, it probably isn't constitutional. If violating a particular law doesn't result in actual harm to someone else, chances are the law is not constitutional. At some point, Legislators should catch on to the fact that the more laws they pass, the more power they transfer to the Judiciary, thereby diluting their Legislative authority.

The Judiciary is by no means absolved of guilt in these matters. We have entered an era where the State Bars vindictively impose so-called ethical discipline on attorneys who buck the system. State Bars consistently classify falsely the brave acts of attorneys by using the ambiguous phrase "prejudicial to the administration of justice." That is quite simply put, nothing less than a meaningless, garbage phrase. Ultimately, if the State Bars are themselves the ones acting in an "unjust" or unethical manner, then engaging in conduct inimical to their false definition of "justice," actually constitutes an act of morality and justice. When the most passionate lawyers are banned from the profession, for reasons

including but not limited to attacking the immoral conduct of the State Bars then Disbarment becomes an honor. When State Bars are proven to have used deceptive and unconstitutional investigation tactics characterized by a marked absence of due process and fairness, for the purpose of enhancing their own interests, Disbarment also becomes an honor.

It is a well-known premise of constitutional law dating back to *Marbury v Madison*, that the violation of an unconstitutional enactment is not an illegal act. Former Justice William O. Douglas of the U.S. Supreme Court once emphasized that citizens have a civic responsibility to violate unconstitutional laws when he wrote:

"An ordinance -- unconstitutional on its face or patently unconstitutional as applied -- . . . can and should be flouted. . . ."

I suggest the eager little, hypocritical Legislators begin thinking a bit more carefully about the laws they enact and whether they can sustain constitutional scrutiny, instead of trying to be moralistic Babysitters. Because the bottom line is that there are a lot of laws that are ripe for "flouting."