

LECTURE 16 – THE BAD AND THE GOOD IN THE AMERICAN LEGAL SYSTEM

Today I'm talking about one of my favorite subjects – the bad and good about the American legal system. I put bad first because the shortcomings of the American legal system are something Americans are very good at talking about because we are always criticizing trying to make things better in our country. The nice thing about a democracy is you have the ability to improve things, to vote new people in, new ideas in, new laws in, and some people even believe that if we criticize our system we can make it better. The second reason I've put it in is because one of the more important observers and critics of the American legal system when he lived there for 15 years is a Russian, definitely one of the most famous men of the 20th century, Alexander Solzhenitsyn, who is one of my heroes. I think he is probably a hero of many people, in Russia because he helped bring down the communist system, the gulag system, and the whole Soviet system with his writing and his disclosures. He was exiled by the communists after he wrote the Gulag Archipelago and he came to live in the US and lived in the state of Vermont, an area of the US very similar to Karelia, north and cold. He lived there for 15 years and has sons who still live there. His criticisms of America and its freedoms and liberties are very important to me and I think to many Americans because he is such a libertarian, a man in favor of personal freedom.

Solzhenitsyn had one major criticism of the US legal system after he had been there several years. He saw that too many criminals got off or were delayed in their justice and their punishment because of what he called legal technicalities. If you look at my Reading #22 - The Constitution Frees Too Many Criminals, you'll see that I have personally been very concerned about this issue in the past. Many Americans are worried about our legal rights for criminals - Constitutional Rights such as: 1.) The Miranda Rule - no policeman may arrest or stop a criminal without telling him that he has the right to remain silent, the right to a lawyer and the government will pay for the lawyer if he can't hire him, and anything the suspect says can be taken down and used against him in a court of law, 2.(The Exclusionary Rule – anything that's discovered and taken from a person illegally in a search – they may take it from his automobile or his house, anything that's taken without a search warrant can be excluded from use at the trial and if you have a trial to convict someone, illegal evidence could keep the person from being convicted. Alexander Solzhenitsyn worried that the American system was more concerned with law than justice. It is not as bad as the old Soviet System which suffered from his main complaint: a system that has no objective legal scale is the worst. I think after he went to the US, he felt the US had only a legal scale, no other morals or higher power to it and he thought a legal scale alone was lacking in something. Today, I hear Alexander Solzhenitsyn is back in Russia and has been a big supporter of the Church and believes there must be some religion in government and some religious authority in power. One of the last things I'll say about Alexander Solzhenitsyn is that based on his experiences in the US one of

his main criticisms in Russia today is that if Russia is going to become truly democratic and get the values of democracy, it must have more local self government – cities, states, school boards – with authority. And it's interesting that Solzhenitsyn lived in a part of America where local self government is very important. It's where the original colonies were formed in Vermont, which was originally a part of the state of Massachusetts. In those original colonies, local self government is very important. The majority of rules about zoning, building, how high the building can be, how close to each other they can be built, the sewers, the streets, the taxes are all imposed by local town meetings. The people will have town meetings in a large auditorium where they all go one night per month and decide what the taxes are going to be, what streets are going to be repaired, what building are going to be built and how they are going to spend their money. It's done as a matter of local self government.

If you look at my You Be the Judge IV book, you'll see the Reading #14 is about the case of mental patient rights and where again, I'm sure Mr. Solzhenitsyn would agree, America gives too many rights, not just to criminals but to mental patients. In the case a brother of a person in a mental hospital brings a lawsuit against the hospital and doctors and said they shouldn't be able to give medication to calm patients down in a mental hospital, and of course the state mental hospital went to court and said, "We have doctors who know what's best for these mental patients and when to calm them down". You can't ask a crazy man what he wants to do and what medications he wants, but the courts decided that mental patients have rights and if they don't want to take anti-psychotic medication, Thorazine, to calm them down, they don't have to take it. The judge even said that mental hospitals are not like gulags where the government can decree what is going to be done because the patients have rights too. As a result, America is not as good a country as it used to be. We are a rich country with streets that are filled with beggars. I never thought when I was young that I would see beggars in the streets of America, a wealthy country. We have beggars at every street corner in major cities asking for money -not because they are poor – many people don't have money – but these are people who are mentally unbalanced and mentally sick and no one can stop them because mental patients now have rights and you can't just stop someone because he's begging or because he's mentally unbalanced. And we even have a legal technicality, considered a civil right that police may not arrest someone or remove him from the street because he has no money.

As for other criticisms of the American legal system - first of all you've got the criticism of the American legal system that is the same as almost every legal system in the world. I've heard it said often, and it does exist to some extent in the US, and that is that it favors the rich over the poor. We try very hard in America to not have our system favor the rich over the poor. You may recall the issue of whether rich people only could go to court and how do we help poor people go to court. We have 3 things in the US to try very hard to overcome this and give poor people the right to go to court and to have lawyers. 1.) We give free public defenders to people accused of crimes who want a criminal defense

lawyer, but cannot pay themselves. 2.) If someone is interested in having a lawyer for a civil non-criminal matter, but they can't afford it and they are poor people they can go to what is called Legal Aid. I call them poverty lawyers, lawyers in poor neighborhoods who represent poor people. I did it as a law student at a clinic, I represented poor people. It can be rewarding in some ways. They can get divorces. They can go to court over landlord/tenant disputes. They can advise in contract disputes, stop creditors from repossessing cars and televisions and they can provide welfare and social security assistance. 3.) And of course, if the poor get injured, how are they going to go to court if they can't afford a lawyer? Well we have the contingency fee in America that's valid probably nowhere else in the world except in America, and that is the percentage of whatever you win in court can go to the lawyer. So a lawyer will represent a poor person who is injured because he is able to recover a large amount of money for that person and receive 1/3 of that money for himself.

We also have a criticism in America that's similar to that in many countries and that is corruption. But we don't really have major corruption in the US. It's very hard to find corrupt judges or police. I remember an old lawyer told me once when I was a young lawyer about the judges in our city – we had 50 large court judges and 50 small court judges – that out of those 100 judges 3 or 4 of them are crooks that will take money and bribes and we all know who they are, because the word gets around, so we know to avoid them and to be careful of them and to try to cancel cases we have in front of them. He told me that's a very small amount of corruption compared to a lot of countries and places. The corruption in America is more likely to occur from the fact that there are elected judges. We have elected judges in many of our states. In some states they are appointed and in some states they are elected. But elected judges can cause a different kind of unfairness or corruption. If someone goes before a judge and he's of a political party or a political faction that's going to get him a lot of votes, that judge is very likely to decide in favor of the person who is more politically powerful and is going to get him good publicity so that he'll get elected next time. One of our problems in democracy is the need to get votes and therefore for an elected official to take action that will get him or her votes. This is more of a problem in America than corruption by money.

Another criticism and negative thing about the American legal system, we have to look at is the fact that under democracy and capitalism as opposed to dictatorship and communism there is more crime. It's very hard to distinguish between criminals and non-criminals, between mental patients who are crazy and criminals. As a result, you will find there is more crime in the US than we would like there to be.. There's more crime in countries like Russia today now that there's democracy and capitalism. It's just one of the unfortunate prices we have to pay for democracy. We even have a large amount of organized crime in the US, which you have also in Russia. And we even have the Russian mafia in the US, especially in New York City. All I can say is that modern technology has helped the police deal with the Mafia and organized crime even more so than

small crime and bank robbers and people like that because today the resources of government can be exerted technologically through wire taps, telephone eavesdropping, electronic eavesdropping in a very effective way. Most of the large Mafia bosses have been caught in this way and put in jail. It's very hard to be a leader of the Mafia without being caught because the government and the criminal law prosecutors go after them and catch them. But still, we have more crime than we would like in the US. I would say it's one of the things you would notice is different in Cuba, which is a communist country, Russia when it was communist, and China.

Some of the lesser things people criticize the American legal system for are Plea Bargaining. I don't know if you know what plea bargaining is. That's the system in criminal law where a criminal defense lawyer and his client come and say, "You've charged me with armed robbery, I'll plead guilty to simple robbery if you will drop the charge of Armed robbery against me. In other words, I will plead to a lesser offense – something smaller." Or they charged him with 3 crimes, armed robbery, burglary and fraud – if they just charge him with fraud, he will plead guilty to fraud if they will drop the other 2. This is called plea bargaining and it happens often because the criminal prosecutors and judges do not have time to prosecute every case that comes before them. There is not room in the jails for every criminal they sentence, so there is a lot of plea bargaining going on in the US, which some people think is unfair. I don't know if it exists in Russia. I don't know if it exists in Europe. But I know it's very widespread in the US. It's a subject of criticism by half our country. The other half thinks it is ok because otherwise the system would be so overburdened that it couldn't deal with all the crime.

Another final negative point of the American legal system is one we've talked about before and is something that Alexander Solzhenitsyn also criticized: it is too easy to go to court. Americans are so eager to bring lawsuits, go to court, and win big money in lawsuits that there are many ridiculous, foolish law suits. People sue McDonald's hamburger chain because they got fat – they ate too much fat food. Or they sue McDonalds because they spilled coffee on their legs and it turned out the coffee was too hot and burned them. They sue tobacco companies because they got lung cancer after 20 years of smoking cigarettes. There are endless ridiculous lawsuits in the US. I'll just run through and give you some examples of them and you will see why people get a little bit impatient about all these law suits. There's a man who sued Michael Jordan, the famous basketball player, because he looked like Michael Jordan and had people coming up to him all the time in the street and asking if he was Michael Jordan so he decided that he would sue Michael Jordan for causing him all the grief of being confused with the real Michael Jordan. Of course his lawsuit was thrown out quickly but what a waste of lawyer's time and judge's time. We have people who bring lawsuits against referees at school sporting/athletic events for making wrong decisions about goals. or points, or some ruling in the game.

In Russia you may have heard of some of these and you'll probably be amazed at how ridiculous some of these are. The existence of the contingency fee which we've talked about before means many lawyers will take a lawsuit and take a chance that they will win because they might win some ridiculously large amount of money. And they take chances because it only takes a few hundred dollars to file the lawsuit and some time of the lawyer, but if he wins, he can win \$100,000 to a million dollars and he gets a percentage of that. So in one year a lawyer only needs to win one or two of those cases and he becomes a rich man. Here's a story of a woman who was attacked by a squirrel that ran up her leg as she walked outside a grocery store. So what does she do, but sue the store on the basis that the store did not warn her that there was a squirrel that might attack her as she was walking to and from the store. Another person sued a store because someone put glue on a toilet seat he bought there and when he went home and sat down on the toilet seat it was glued to his bottom, so he sued the store because of that. Here's a woman who was fat and overweight and decided to do liposuction to remove all the fat by a doctor she found in the telephone book. He did a poor job so she sued not the doctor, but the phone company for listing him as a doctor when he was not competent to do a good job of removing all the fat from her body. And she won over \$1 million from the telephone company. Another woman sued McDonalds because she was obese so she brought a class action on behalf of all overweight people who had eaten at McDonalds, Burger King, and Wendy's, fast food restaurants. Even though the suit was dismissed by the judge, think of the time that was wasted and the amount of money that is wasted on these suits. Here's a woman who sues a doctor for her husband's death even though he was overweight and smoked cigarettes. She sued him for medical malpractice because the doctor didn't save her husband. She won over \$3 million even though her husband was obese, ate poorly and was a cigarette smoker. Another man sued the police in a city because after being called about a drunk at a New Year's Eve party he fell into some snow and the police went to look for him, but couldn't find him. The man later suffered frostbite because no one pulled him out of the snow so he sued the city because the police did not discover him and remove him from the snow and save him from frostbite. He won \$850,000. Many people think that this has to end and lawsuits in America have to stop getting so ridiculous, but unfortunately that's one of the prices we pay for democracy, for an open legal system, for too many legal rights. Whenever it's argued that we shouldn't allow these legal rights, people say, "Judges should know better, why can't they get rid of these suits." Of course the real problem is the jury system and lawyers who want to be able to get past the judge who will throw the suit out recognizing it's ridiculous. If a lawyer can get to a jury who feels sympathy for the injured person and realizes there's insurance involved, the jury will award money to an injured person even though it's a ridiculous lawsuit because the money will be paid by the insurance company and jurors feel sympathy for a person who is injured.

Now let's talk about something I'm a little prouder of and that's the good points of the American legal system. Let me say one of the good points is that we can

always reform and make our system better. That is why we have something we talked about last week called Tort Reform. There may be too many problems with injuries and so there are many attempts at reform and many attempts at tort reform and many states and even the federal government is trying to make the system of injury lawsuits better. For instance, many states, one state Texas, a large major state, passed a law putting a \$250,000 maximum on medical malpractice cases. You cannot win more than \$250,000 even if the jury awards you \$10 million or \$100million. The most you can win against a doctor or hospital is \$250,000. That's a law that was passed as part of tort reform to stop lawsuits from putting doctors and hospitals out of business. So we have the ability to reform our laws and make them better and that's one of the good things about democracy and the American legal system. If we aren't happy with the system and it gets too ridiculous, we can reform that system. I think the best and most positive thing about the American legal system is the ability to change leaders - to change Congressmen and the President every several years. The ability to throw out the people you don't like or even throw good people out because the people around good people are sometimes not so good. Sometimes you get supporters, friends, appointees, of a good President or of good Congressmen or a good Mayor who may not be so good, and they take advantage of their friendship and their special status. It's good then that you can change the leaders because even when you get good leaders, many of the people around them get entrenched and you don't want them entrenched for too long. I think probably the most imitated and beneficial thing about democracy is the ability to change leaders. We kept Franklin Roosevelt as President of the US 16 years during the Great Patriotic War and changed our Constitution after that to limit Presidents to 8 years. There's an old saying when you are in the middle of a war, "Don't change horses in the middle of the stream - don't change leaders in the middle of a war." So when there's a war there's often the feeling you don't want to change leaders. And that's one of Alexander Solzhenitsyn's criticisms of communism and the Soviet System. "War is often an excuse for domestic tyranny," he said. Many countries and leaders will get their countries into war just as a means of consolidating power in their leadership because they know the people will stick with their leader and go along with a lot of mistakes and a lot of problems with their leaders during a war rather than change leaders. Even in a war unpopular with the people, like Iraq, it was hard to get Bush out in the last US election. But now he must go after 8 years.

I would say one of the other good points of the American legal system is its low corruption rate. I once had a law teacher who said, "Ha, you think you have corruption in America - it's nothing compared to the rest of the world!" Take the old China before communism came in - for hundreds of years China was like much of Africa today. 90% of all the money collected by government goes to corruption, bribes, payoffs. 10% goes to what it's supposed to go for, public works, like bridges, roads, buildings, and salaries of government officials. In America he said only 10% goes to corruption. 90% goes to what it's supposed to go for, public works, bridges, roads, highways, and salaries of government

officials. So don't complain, things are much better in America than you think. The level of corruption is much lower than you think.

I think another good point of America is that legal rights are easily asserted. If you've got a criminal defense, a way to defend against something, you'll be able to assert it and find a lawyer to assert it and a judge and jury will listen to you (e.g. television insanity as criminal defense). I'd say one of the best things about America is the way we have dispersed authority across the entire country - 50 different state governments and 50 different state legislatures in state capitals and 50 Governors, plus hundreds more who are legislators in each state. And in each of those states they can try something like tort reform, maximum penalty in civil suits, and the other states can look, they don't have to try it. They can look and see if it works - if it lowers the amount of medical malpractice or if it increases the ability of people to be compensated for medical malpractice. They can look and see what the statistics are of that type of reform. I would say the fact that we have 50 different states, each one being able to be like a laboratory to test different laws for the others to imitate if they are successful, is probably a very good thing about the US. Another good point in the American legal system is something that Alexander Solzhenitsyn found that within every state there are numerous local government officials and local governments that have power. If you've ever seen American movies about our South, you'll see the Sheriff, who's the local county policeman in a southern county is shown as the most powerful political figure you'd ever want to see. Nobody messes around with the Sheriff so he rules except in major federal matters like when Southern states don't allow black people into their universities. Other than this the federal government stays away from local southern governments. And these local government officials have enormous amounts of power and influence. So I would say Solzhenitsyn was correct when he said that powerful local government is very important because local government can be free in a large country like the US to handle all the local small matters. And Russia, which is at least 3 times larger than the US should have local governments, free of federal influence from Moscow in small matters of local concern, just as in the US local government is free from Washington.

That's all I want to say about the good points of the American legal system. I think the final thing I'd say is that capitalism and the ability to have free enterprise and everybody making some money himself and herself is a good thing and a good goal of government. We try to keep business free from government interference so that people are free to make their own money. Over 150 years ago the Frenchman Alexis de Tocqueville came to America and studied it and said he found it interesting that so many people, at that time, mostly farmers and small businessmen, were able to have money in America, and he didn't find any great concentrations of wealth because money was so widely dispersed. I don't know if that's as true today as it was then because there are large wealthy companies, large wealthy families, but there are still many people who are just plain old rich folk. They have \$100,000 of wealth, large houses, large tracts of land. They may

have \$1 million, which used to be a lot of money and still is a lot of money, but not as much as it used to be in America. As a result they have the freedom to hire people to, do what they want, and to be free of having to do whatever the government wants. That is a very important part of free enterprise that everyone can go out and earn a living without having to get a job or money from the government.