

JUSTICE AND THE LAW DO NOT MIX

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Images: André Azevedo

Justice is in the eye of the beholder, and not some absolute standard that is clearly and quantifiably definable or identifiable. However, human beings have a sense of what is just and what is not, which is often governed by their belief systems and experiences in Life. The law, on the other hand, is an imperfect discipline governed by grossly-inflated egos and political considerations, and flavored by incompetence and arrogance.

Is the law ever just? Perhaps this question is the proper starting point. “The law” is not some idealistic and intellectually pure result, resting on a cloud somewhere. Rather, it is a hard-edged and hard-fought amalgam of competing ideas and biases, dictated by judges who are imperfect at best—and often egotistical, callous, mean-spirited, power-hungry, self-righteous, condescending and, yes, incompetent and arrogant. They can smile at you, just as easily as they can slit your throat and never think twice about doing it.

How on earth can the dispensers of that magical ingredient, justice, do so when they are “unsavory” themselves? How can they judge another person when they often bring distorted realities and moral visions to the process? Many of them, at least in the United States, are former prosecutors who seemingly have never laid eyes on an innocent criminal defendant. To put on black robes does not change their mindset. Indeed, many seem to relish the power trip. Shakespeare’s famous quotation—“The first thing we do, let’s kill all the lawyers”—must have been written in some light-hearted moment with the dark and sinister characteristics of judges in mind.

Having been a lawyer for more than 45 years, and having received two law degrees from prestigious American law schools, I can honestly say that the thought of becoming a judge has never crossed my mind. Indeed, when I arrived at Berkeley for my first year of law school, I was stunned by how many of my classmates had dreamed of becoming lawyers most of their lives. The pinnacle was to become

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a judge, which was repulsive to me. While I read many learned and well-written opinions in law school, I never figured out why anyone would want to be a judge.

We had fine law professors who taught the best of the law; and they instilled in us a belief in the purity and sanctity of the law. Forty-five years later, I do not doubt their sincerity at the time, but I have never encountered a sitting judge who met their expectations. The best reason for being a judge was told to me one day in chambers by a California Superior Court judge, who said that it was easier than practicing law. I respected him for his honesty and candor, and his willingness to tell the unvarnished truth. Most judges would never do that. It was refreshing. He smiled when he said it, and did not slit my throat or even come close. In fact, he decided in my favor.

If the law is little more than decisions made by judges based on whether they got up on the wrong side of their beds or not, or took umbrage with a lawyer or client, then is there any rhyme or reason to it, which makes sense judicially? I concluded ages ago that the proceedings in most American courts are remarkably close to “Law West of the Pecos by Judge Roy Bean,” the hanging judge. In Bean’s

court, the law was what he said it was, and nothing else mattered. Too often in U.S. courts today, very little has changed. Judges have become the law unto themselves. Any citation of legal precedents is met by judges whose eyes glaze over, because many of them were taught in law schools where the purity and sanctity of the law did not matter. Brute force governs far too many courtrooms.

State courts—certainly those in California—are a total joke. Judges routinely ignore the applicable law, or twist the law to suit their desires. It is a travesty, and really no law at all. Our federal courts are somewhat better, only because federal judges have law clerks who actually research the law; and federal judges are mindful of the fact that they can be overruled on appeal. Owing to the fact that our Supreme Court takes so few cases these days, and most of its cases are heard for political reasons, our federal courts of appeal become the only real checks on the actions of District Judges.

At the U.S. Supreme Court building in Washington, D.C., there is a statue of “Justice” with blinders on her eyes to depict the impartiality and objectivity that the word justice is supposed to represent. However, another interpretation can be given to the statue; namely, blindness to injustices that occur each and every day in our legal system. More than eight thousand petitions for certiorari are filed with the Court every year, yet the number of cases that are heard is usually less than one hundred. Justice William Brennan was the last jurist to read such petitions. They are now read exclusively by the individual justices’ law clerks, who decide which cases the Court hears and those that are never heard.

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As a practical matter, the American system of justice no longer exists—because the presumption of innocence no longer exists. In U.S. courts, even though it is not articulated—certainly by the judges themselves—there is a presumption of guilt instead of innocence in criminal cases. Any appearance of bending over backwards to help the defense is window dressing and largely form over substance. Many judges are courteous, but their long knives come out before the process is completed. Others do not mince with words, and are tyrants from Day One. Still others defy one’s imagination with respect to how they got there. They do not understand the law or facts of the cases, nor do they care; and they seem to be political appointees who have overstayed their welcome.

The United States is a nation where rogue prosecutors reign, whose goals in life include the prosecution of even the innocent. Federal, State and local prosecutors ruthlessly and gleefully pursue countless numbers of innocent Americans for a multitude of crimes that were never committed; and the judiciary has allowed this to happen. Corruption is rampant among federal prosecutors and those who work with them, such as FBI agents. No amount of rational thinking or discourse can be applied to a system that is inherently and systemically corrupt.

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A federal official with reason to know told me that between 15-20 percent of the indictees in our federal courts are probably innocent. Some are elderly who have been charged with cheating the Social Security system—America’s retirement benefit program—and they are scared to death, so they agree to plea bargains rather than fight for their innocence. The latest figures indicate that 97 percent of convictions in federal courts were the result of guilty pleas. In 2006, the last year for which data was available, the corresponding figure for State courts was 94 percent.

Indeed, Justice Anthony M. Kennedy wrote for the majority in a recent U.S. Supreme Court opinion—quoting other sources:

[Criminal justice today] is for the most part a system of pleas, not a system of trials. . . . [Plea bargaining] is not some adjunct to the criminal justice system; it is the criminal justice system.

He added—again quoting other sources: “[L]onger sentences exist on the books largely for bargaining purposes.”

What Kennedy neglected to mention is that “criminal justice” today in the United States is not a system of justice at all, at least for many Americans. It is appalling that so many innocents are swept up in our criminal system. Even if they do not go to prison, the mere fact that a prosecutor comes after them and they have to deal with the system is brutal and tragic. Lives are wrecked in the process by zealous prosecutors and callous judges, who should be consigned to prison life themselves—where they would come to understand the true meaning of justice.

Fortunately, America has a very good public defender system, at the federal, state and local levels; and this helps a great deal, although far too often its lawyers are burdened with very heavy caseloads, and the accused may not understand that they can avail themselves of such assistance. Anyone who thinks that prosecutors are advocates of truth and justice is living in a “Mary Poppins” fantasy world, and knows nothing about how our legal system really operates. It is seldom if ever discussed or written about, yet it is often said—by lawyers—that the only thing separating prosecutors from guilty criminals is the “badge.”

Also, in criminal prosecutions, there is often the systematic concealment of significant exculpatory evidence, in some instances intentionally, which gave rise to the guilty verdicts against former United States Senator Ted Stevens of Alaska being set aside, and a dismissal of the case against him. It is another travesty and miscarriage of justice that three years after the federal judge set aside the verdicts, the wrongdoers within America’s Justice Department have not been subjected to criminal prosecution, convicted, and sent to prisons—where true justice would be meted out—instead of getting “slaps on the wrist” for their criminal misconduct.

To be fair and put things into perspective, victims of criminal conduct need and deserve protection as well; and the guilty must not be sheltered or coddled if there are to be deterrents against the commission of crimes, especially those of a violent nature.



Also, many crimes are not reported or dealt with, such as rampant fraud that is occurring over the Internet each and every day, and bilking sophisticated and unsophisticated Web users out of billions of dollars. Clearly, none of us would like to be a “jailed innocent,” but similarly we do not want to be harassed by vicious or other criminals either. Those people who are truly innocent should not enter the criminal system; and innocent victims must be protected at all costs.

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It has been noted that if we want to be 100 percent certain that no innocent will end up in jail, the inevitable result is that nobody will be in jail. There is no such thing as perfect evidence or a perfect judge. Indeed, as noted at the beginning of this article, the law is an imperfect discipline and process. Also, it must be recognized that the cost of criminal and civil litigation in the United States and globally is staggering; and it takes years to resolve complex litigation. The cost of business litigation in America’s federal courts often exceeds \$1 million on each side of the action; and this figure does not include the cost of a trial or appeals.

Lawyers are trained in law schools to be advocates, and sometimes this becomes a curse. When they represent clients in divorce proceedings, the last thing that estranged couples need is their respective lawyers “stirring the pot” to earn greater fees, and increasing the acrimony that exists already. However, it happens, which is why lawyers are ill suited to handle such proceedings. Also, male lawyers prey sexually

on their distraught and emotionally vulnerable female clients, which should give rise to automatic disbarments. Both the American Bar Association and State bar associations “turn a blind eye” and do little or nothing to curb such abuses. Like rogue prosecutors who are sheltered from discipline, so too are lawyers in divorce proceedings who abuse their positions and power. This is among the many reasons why non-lawyers in the United States and elsewhere view lawyers with such contempt and disdain—not dissimilar to how they view leeches and vermin.

Without the law though, we would have anarchy and chaos. Yet, there is a certain amount of inherent anarchy and chaos within the legal system itself. Harsh economic times produce demands on lawyers and courts, and bring citizens in contact with the system who otherwise might not be there except for their economic plight and hardships. Whether the issues involve housing foreclosures or evictions, or the loss of jobs or dissolution of marriages, the American legal system is taxed like seldom before. Budgetary constraints dictate shorter court hours and over-burdened judges, and closed courthouses and furloughed prisoners to ease overcrowding. What is certain is that the situation will become worse between now and the end of this decade, at least in the United States.

Perhaps the only saving grace about the American legal system is that it may still be the best in the world, albeit very imperfect and flawed. Indeed, it is the only legal system that I can address with a modicum of understanding and authority, having spent my entire career thus far dealing with it. Unfortunately, too few lawyers are willing to speak out and criticize the profession, and “tell it like it is.” The judiciary is almost completely blind to the problems, because its members are at the root of many of these issues. Also, the American Bar Association is essentially worthless; and State bar associations are not much better. I am a member of the District of Columbia Bar, which I have always been proud of though.

These are a few of the very serious problems that face our system of justice and fairness for all, which demand attention. They are not easily fixable or remedied, yet they are at the tip of an enormous iceberg of problems. There is a real question as to whether our system can be “fixed.” Much like family members or loved ones of alcoholics or drug addicts, it is arguable that we cannot fix or change our legal system. All we can do is take care of ourselves, and hope that we never come in contact with it. There are even those who believe that quantitative and qualitative analyses can and must be applied to “redesign the judicial structure . . . into a practical process with an understood functionality and imperfection”—in the words of one engineer with a keen sense of justice.

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