

ORDINARY INJUSTICE

**HOW AMERICA
HOLDS COURT**

AMY BACH

METROPOLITAN BOOKS
HENRY HOLT AND COMPANY
NEW YORK

INTRODUCTION

One rainy afternoon in Quitman County, Mississippi, I met with a woman who was certain her granddaughter had been raped. There was plenty of evidence and a likely perpetrator, yet the allegation had never seen the inside of a courtroom. The victim was just eleven years old.

When I was greeted by the grandmother at her door, she asked whether I was from the Justice Department. Her face was lit up with hope. It was, however, a strange question. Just the day before, I had explained that I was working on a book about America's criminal justice system and wanted to talk about her family's case. We sat at the kitchen table where she produced a worn paper bag filled with the detailed inquiries she had sent to government officials as well as the form letters she had received in response. She wanted answers: Why had no one taken the case seriously? Did no one care that an adult male had raped an eleven-year-old girl? A prosecutor is obliged to evaluate

2 ■ ORDINARY INJUSTICE

reports and decide whom to charge. Why wasn't the prosecutor doing his job?

It turned out that the grandmother was not the only one frustrated with the courts. As soon as word got out that there was a reporter in town, my phone started ringing. People from all over the area wanted to tell their stories; most were victims of crimes that had never been investigated, let alone prosecuted. They were happy to talk to me—relieved even—though also incredulous. Why was I so interested? Even the county's prosecutor was surprised. He had resolved these cases ages ago, why was I bothering with them? "Let me ask you this," he said. "Who is complaining?" He knew the answer, of course. It was no one—no official, no one he could hear.

The grandmother's questions were more difficult to address. Like so many citizens, she wanted to hold someone responsible for the lapse in justice that had left her granddaughter's rapist uncharged. She was right to mistrust the prosecutor, though he was but a small cog in a very large and malfunctioning wheel. He lived and worked in a community where legal professionals, local officials, and citizens had known about ongoing problems in the criminal courts for years but had done nothing to fix them.

This book examines how state criminal trial courts regularly permit basic failures of legal process, such as the mishandling of a statutory rape allegation. Ordinary injustice results when a community of legal professionals becomes so accustomed to a pattern of lapses that they can no longer see their role in them. There are times when an alarming miscarriage of justice does come to light and exposes the complacency within the system, but in such instances the public often blames a single player, be it a judge, a prosecutor, or a defense attorney. The point of departure for each chapter in this book is the story of one individual who has found himself condemned in this way. What these examples show, however, is that pinning the problem on any one bad apple fails to indict the tree from which it fell. While it is convenient to isolate misconduct, targeting an individual only obscures what is truly going on from the scrutiny change requires. The system involves too

INTRODUCTION ■ 3

many players to hold only one accountable for the routine injustice happening in courtrooms across America.



This book is based on the premise that it takes a community of legal professionals to let a sleeping lawyer sleep. Over the years, there have been quite a few reports of lawyers who literally dozed off during trial, but the one that made international headlines featured Joe Frank Cannon. His client, Calvin Burdine, was convicted of murder for shooting a man during a convenience-store robbery in Texas; for the crime, he was sentenced to death. In 2001, a panel of federal appellate judges vigorously debated whether Cannon had violated the Constitution by falling asleep repeatedly during the trial (with his head nodding and tilting down to his chest for minutes at a time). The panel considered whether a sleeping lawyer can adequately represent someone at trial, as if the problem was about setting an appropriate legal standard and a particular lawyer whose performance had been subpar. Although the panel reviewed the issue through a narrow legal appellate lens, it gave commentators an opening to condemn the state's vigorous use of the death penalty in such an obviously flawed system. But this criticism missed the crucial point: How was it possible that a defense lawyer could fall asleep during a murder trial, and yet no judge, defendant, juror, or member of the bar sitting in the courtroom, no witness, not even the prosecutor, objected?¹

The prosecutor claimed he was too focused on the witnesses to notice what was happening at the defense table. The judge said he was busy watching the witnesses testify, taking notes, and drafting the charge to the jury. But the jury foreperson saw Cannon dozing and so did two other jurors. The court clerk, whose job is to assist the judge, said she had seen the lawyer sleep on other occasions, too, not just during long portions of this trial. "I knew that he had this problem," the clerk testified when the sleeping became an issue on appeal. Another attorney, who had worked with Cannon before on a capital murder trial, said as much. So at least one court official knew what was happening, although no one in the trial had bothered to wake the lawyer.²

4 ■ ORDINARY INJUSTICE

I often thought of Joe Frank Cannon during the winter of 2001 when I found myself sitting in court on a daily basis. I had made a career as a journalist writing about law and later went to law school myself. Working on a series of magazine articles about civil rights, I was intrigued by the routine violations of constitutional law that no one with legal training (or even an avid fan of the many legal dramas on prime-time TV) could fail to notice. With great regularity, I saw citizens have their rights flouted. Many of these people had no idea what they had been denied. And the attorneys looking on never protested.

This pattern of inaction was only the surface of what I began to notice in courts across the country. What was more startling, and what launched this project, was a sense that many of the lawyers involved, often talented and dedicated professionals, couldn't see their own role in perpetuating bad behavior. They didn't seem able in any way to connect their conduct to the courts' worst outcomes. For example, while researching this book I met a New York judge who had stopped notifying many defendants of their right to have an attorney. He also repeatedly failed to assign lawyers to the indigent, as he was obliged to under the Constitution. Twice he recorded guilty pleas for a man without the man's knowledge. In another instance, he refused to assign a lawyer to a seventeen-year-old girl charged with assault; she wanted an attorney but ended up conducting her own trial, alone against a prosecutor (she lost). When the state eventually charged the judge with misconduct, he told me that his response was to ask, "Where is the serious stuff?"

This example may seem extreme, but the effects of less spectacular denials of due process are just as damaging to the system. They happen regularly and create an environment in which more grievous incidents can take place. Ordinary injustice seems to occur in a blind spot. Of course, the ideal (the laws, principles, theories) and the actual (the practitioners and the contingencies they face) never match each other perfectly. But the way legal professionals strike the balance between the two ultimately determines what criminal justice actually amounts to on any given day.

INTRODUCTION ■ 5



America has an adversary system of justice. A trial is a contest between the prosecutor, who represents the state, and the defense attorney, who represents the accused. The facts of the case or an appreciation of the truth at the heart of it arises from the combat between these two sides. The role of the judge is to oversee what happens, impartially enforcing rules of evidence and procedure.

This adversarial model is most evident in countries where the practice of justice is based on English law. Many say the United States has the best system in the world. It is uniquely American in that it is based on regulated competition, much like U.S. markets are supposed to be. One could argue that the American trial process is meritocratic. The best argument and most compelling application of the law wins. Having one set of lawyers that investigates the facts and says, “He did it,” while another set tests that assertion and says, “He did not” should ideally create a self-checking mechanism. The contest in the courtroom is, in theory, the end result of the tireless work—depicted in so many movies, hit TV shows, and books—of legal troops who scope out crime scenes, pick through garbage, and employ cutting-edge technology to tap a phone or match saliva through DNA evidence. Even if facts get distorted or a lawyer has performed incompetently, each party is assured the opportunity to present its side of the story and focus attention on the evidence and applicable law.

A person accused of a crime is guaranteed certain rights to ensure a fair process that produces a just outcome. Those rights include trial by jury of one’s peers, the right to have one’s lawyer cross-examine the prosecution’s witnesses to test the truthfulness of testimony, and the right to present testimony that may show innocence. In a perfect world, these rights make certain that facts are subjected to tests, which serve to counterbalance the lopsided battle between the state (represented by the prosecutor) and the individual (represented by the defense). The structure aims to protect against foibles such as laziness and the temptation of professionals to collude.

6 ■ ORDINARY INJUSTICE

Collegiality and collaboration are considered the keys to success in most communal ventures, but in the practice of criminal justice they are in fact the cause of system failure. When professional alliances trump adversarialism, ordinary injustice predominates. Judges, defense lawyers, and prosecutors, but also local government, police, and even trial clerks who process the paperwork, decide the way a case moves through the system, thereby determining what gets treated like a criminal matter and what does not. Through their subtle personal associations, legal players often recast the law to serve what they perceive to be the interest of their wider community or to perpetuate a “we’ve-always-done-it-this-way” mind-set. Whether through friendship, mutual interest, indifference, incompetence, or willful neglect the players end up not checking each other and thus not doing the job the system needs them to do if justice is to be achieved. This book shows what happens when the theory behind the adversarial system is not realized.

One case at a time, we see in each chapter how daily collaboration within the system can undermine this adversarial mechanism. When a lawyer is forced to choose between performing vigorously in his role as an adversary and maintaining easy and necessary professional and institutional relationships, he often opts for the path of least resistance, which undermines justice for some.

Lax adversarialism, a condition that lets cases and defendants pass through the system unchecked, often begins well before a case gets to court. Prosecutors have crushing workloads; they don’t want to waste their time on a matter that might not end in conviction. At times, legal teams develop a shorthand calculus for predicting which cases will end up in the “lost” column on their scorecards. You will never see this formula published in a book or as part of a public record, but it governs the prosecutor’s approach to a case in which a win before a jury seems unlikely. The assessment is not based on the actual facts but often on stereotypes or on the stature of the victim. Consequently, entire categories of crime, like domestic violence, might go unpursued for decades.

On the flip side, when everyday cases do get to court, incentives to keep caseloads manageable and moving drive the process. Prosecutors

INTRODUCTION ■ 7

negotiate plea deals without having interviewed the victims or witnesses; instead they rely on a few details scribbled in a police report and hope the defense lawyers will overlook any inaccuracies. Defense attorneys, for their part, are also overwhelmed, and often collude, sometimes unknowingly, with prosecutors to abandon cases that don't seem worth their time. Teamwork like this pushes cases through the system at a rapid clip. The point here is not that every case warrants an extensive trial. Plea bargaining is an accepted, condoned practice, as is exercising the prosecutorial discretion not to bring a case to trial. The concern is that ordinary injustice flourishes in the shadows where these deals are cut and decisions are made.

At times, judges abandon their neutrality and step into the adversarial void, acting like prosecutors, forcing defendants either to take a deal or wait in jail for a trial date. That, or they deny a defendant his rights altogether. During my research, I saw many defendants plead guilty without a lawyer present. In some cases, they had been in jail for months without counsel. In others, they had no idea what they were pleading guilty to or they accepted sentences higher than the legal maximum. Some sentences may seem small at the time, but they can have catastrophic unanticipated consequences for landing a job, obtaining public housing, maintaining an immigration status, or for the punishment of a crime that occurs later.

With little fear of being called out by their peers, the professionals (judges, prosecutors, and defense attorneys) seem at ease. They feel okay about their work. A smooth, non-adversarial, machine process gives the appearance of efficiency: courthouse employees can go home on time; colleagues who run into each other don't have to worry about hurt feelings after an uncomfortable exchange because there has been no struggle to ferret out the truth.

Alongside the easy manner in which such slack justice is carried out is the opposite problem, one of excess adversarialism, in which legal professionals over-prosecute, usually at the insistence of a community that feels threatened by a headline-grabbing crime. A prosecutor wants to show the community that the crime will be redressed and order restored.

8 ■ ORDINARY INJUSTICE

It is for these cases, which take on a “show trial” quality, that the system saves its ammunition. The state marshals its forces and will not let up. Defendants who are wrongfully convicted are living proof of the extent to which the state will go to demonstrate the system’s vigor, even when presented with evidence that contravenes its case.

Consider Rolando Cruz who was sentenced to death in the 1983 kidnapping, rape, and murder of ten-year-old Jeanine Nicarico in DuPage County, Illinois. Early on, the lead detective resigned in protest over the way prosecutors were mishandling the case.³ Two years later, another man, a known sex offender, confessed to committing the rape and murder himself.⁴ Nonetheless, prosecutors stuck with Cruz as the perpetrator. In 1992 a young lawyer who was defending the state against Cruz’s appeal concluded that he was innocent. She advised the attorney general of her findings—to no avail. Ultimately, she too quit her job, making news. DNA evidence eventually excluded Cruz as the perpetrator and linked the confessed sex offender to the crime, yet still prosecutors refused to drop the case. Why, in the face of overwhelming evidence to the contrary, did the state cling so desperately to its theory?⁵

Legal professionals do sometimes denounce failings but more often they assist them in ways large and small, which then compromises their ability to speak out. Attorneys on both sides become defensive and don’t want to admit problems. When challenged, they tend to respond as a unit and place the blame elsewhere. “The defendants are guilty.” “The victims deserved it.” “The case is minor.” “There’s nothing to be done.” “It’s an aberration.” “We have the right guy even if DNA says otherwise.” These explanations are rampant. They are the stock phrases of ordinary injustice that appear throughout this book.



Ordinary injustice is virtually always rooted in an incomplete story. The complete facts of a case, the very stuff that could force a remedy, are usually missing. We assume that competing narratives drive every courtroom drama. But when the contest is short-circuited because every case

INTRODUCTION ■ 9

on a docket is pleaded summarily or because a case never makes it to court in the first place there will be no narrative on record.

This book attempts to fill in the incomplete stories. Each chapter begins with one of the key players in the adversarial model (the defense attorney, the judge, or the prosecutor) and examines the circumstances that have allowed injustice to thrive in his particular court location: Greene County, Georgia; Troy, New York; Quitman County, Mississippi; and Chicago, Illinois. While I chose stories that occurred in state trial courts—because that is where most people experience the criminal justice system—the specific settings matter less than the overarching issue of how America holds court. North or south, rich or poor, urban or rural, black or white, ordinary injustice cannot be explained away by any one variable.

When I began this project, I took a wager that ordinary citizens, most of whom will never face a criminal prosecution, could be roused to engage with what transpires in the nation's courtrooms. Indeed, in nearly every community I visited, I found individuals striving to correct failures in the system: clerks, paralegals, prisoners, family members, as well as journalists, and outside organizations. Even more encouraging was the participation of the four lawyers at the center of this book: Robert Surrency in Georgia, Hank Bauer in New York, Laurence Mellen in Mississippi, and Tom Breen in Illinois. While they were, or had been, mostly blind to the problems they had aided and abetted, they did not attempt to hide them. Were it not for their candor and that of other attorneys in the legal communities I have observed over the past seven years, the cases and patterns identified here might never have come to light. The very people who have helped perpetrate ordinary injustice met with me repeatedly, for countless hours, to talk about their roles and answer questions they might well have preferred to ignore. In their transparency, we can see the outlines for change.