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Only The Guilty Go Quietly To The Gallows.

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REPAIRING THE CRIMINAL JUSTICE SYSTEM
By Dave Harrison

The monstrous machine we call the criminal justice system is in dire need of repair, as anyone who has been subjected to its perverse operations will attest. Even the engineers, builders and operators of the machine -- who gorge themselves on the blood-drippings that pool beneath the machine's ever grinding cogs -- admit it is crippled and barely functioning; churning out verdicts that are shockingly inconsistent and grossly unjust. Such verdicts reek of an overwhelming stench. Examples abound: the State of Illinois has pardoned all her death row inmates because, ever more frequently, D.N.A. evidence is proving her death row inmates innocent (numerous other states are in the process of enacting similar moratoriums); a Reno, Nevada, man was recently freed from twenty years on death row after it was uncovered that prosecutors concealed exculpatory evidence; a rogue Los Angeles, California, police squad has been found to have falsified reports, given perjured testimony, stolen drugs from departmental evidence lockers, and attempted murder upon innocent citizens, ad nauseam; in San Diego, California, a one time Assistant U.S. Attorney (now magistrate judge) has, after ten years of denials, concealments, and perjuries, been implicated in the fabrication and mis-marking of a tape recording that he secretly offered to the trial judge so as to falsely entangle the accused in a bogus murder plot; and a few months ago a Boston, Massachusetts, a man walked out of prison after thirty-three years upon the presentation of evidence proving that the Federal Bureau Of Investigation allowed him to be framed for a murder planned and executed by two F.B.I. informants (in fact, the F.B.I. had full knowledge, prior to the murder, of the informants' plans). Moreover, hardly an individual escaped the trial of the century; State Of California versus O.J.Simpson, after which legal luminaries and the lay public alike clamored for overhauling the crippled machine. The clamoring of the masses was omnipresent in newspaper editorials, magazine articles, and on call-in radio shows and television specials. The din was equally loud and warranted from both sides of the Simpson verdict. Pro-guilt advocates screamed that the not guilty verdict was itself prima facie evidence of a grossly flawed system (incompetent state agents, a "fixed" prosecution in favor of the celebrity, and failure to convict despite pools of D.N.A. evidence). On the other hand, pro-innocence supporters pointed to a plethora of travesties and corruption within the same system (rush to judgment, perjured police testimony and planted evidence). Alas, there are innumerable, present and past instances of the machine having taken the raw materials of truth and justice and mangling them into an unrecognizable product. Surely, the young and beautiful Eliza Fennin, hanged in England on 27 July, 1815, was one such victim. Eliza's innocent blood dripped from the cogs of a machine as defective in days of yore (guilt found by a judge in-the-pocket of her accusers) as it is crippled and barely functioning in the present age.

The urgency of the situation cannot be overstated, nor can it be ignored any longer. The repairs suggested herein must be made expeditiously if we hope to ever reestablish the criminal justice system of the United States as the model for all other nations; a machine that produces verdicts which are consistent, just and free of stench. Four repairs are critical.

I

The first repair must be the abolishment of the immunity that protects all prosecutors. At present, prosecutors are protected from personal liability for their acts while executing their duties. Only under nearly impossible circumstances can a prosecutor be sued, and then any judgment would be paid by the government body employing him (tax dollars). Hardly the ruinous liability faced by all other professionals. The absurdity of immunity has not always been the norm.

In fourteenth century England prosecutors used torture to extract confessions. However, if a confession could not be extracted and the accused was later acquitted, the prosecutor then suffered the same torture that had been inflicted

upon the innocent citizen. No one (save a few overaggressive prosecutors) is advocating the return of torture as a prosecutorial tool, but the message concerning personal liability is clear. Curiously, this present wash of immunity so taken for granted by prosecutors does not bathe any other professional. Doctors, stock brokers, construction contractors, and all other professionals are subject to civil and criminal liability for their actions. Not only can a malicious doctor or unscrupulous contractor suffer ruinous financial judgments and loss of license, but he can also be subject to criminal prosecution and incarceration. Not so the malicious or unscrupulous prosecutor who is protected by statutes and decisions of the United States Supreme Court. The reality of civil and criminal liability encourages all other professionals to conduct their business affairs to the highest ethical and legal standards. Amazingly, the murky world inhabited by prosecutors does not include that reality; in their world a bizarre fantasy has taken hold. That fantasy, brazenly promoted by the law makers, courts and prosecutors, would have you believe that prosecutors will not be zealous advocates if they are subject to those liabilities faced by all other professionals. However, mere zealousness is not the problem. In the case of Bateman v. United States Postal Service, 231 F.3d 1220, 1222 (9th Cir.2000) (dicta) (amending Opinion filed at 291 F.3d 1029, 1031 n.2 (9th Cir.2000)), the Court Of Appeals expressed their plaint opinion that over-aggressiveness is being equated with zealous advocacy, and attorneys are expected to win at all costs, but ... "at the risk of sounding naive or nostalgic, we lament the decline of collegiality and fair-dealing in the legal profession today, and believe courts should do what they can to emphasize these values." Notwithstanding the Ninth Circuit's opinion, prosecutors rave that personal liability would have a chilling affect on them. A most bizarre fantasy, to be sure. Indeed, if such a fantasy were reality immunity would cleanse all professionals. To any objective person it is intellectually incoherent to argue that immunity encourages ethical or legal integrity. To the contrary, an overaggressive professional protected by immunity is fit for perfidies, stratagems and illegalities of the most egregious sorts imaginable, as the IL, NV, CA, and MASS, cases, observed above, prove. Real world liability would have a chilling affect only upon the malicious or unscrupulous prosecutors. Quite the opposite of being chilled, prosecutors stripped of their immunity would ensure prosecutions and verdicts free of the stench that now reeks from beneath the machine. Corrupted and perverted prosecutions would be virtually eliminated. There would be no more rush to judgment, no more withheld evidence, no more perjured testimony, no more fabricated evidence secreted to judges, and no more framing of innocent citizens. A prosecutor facing the reality of liability -- loss of assets, garnishment of wages, loss of license, and equal or greater incarceration as the unjustly convicted -- would not be chilled from zealous advocacy, but from perfidies, stratagems and illegalities. The machine would run smoothly, efficiently and justly. Prosecutors of the highest ethical and legal conscience would flourish. Additionally, the elimination of spurious prosecutions would free up prosecutor-hours for the truly virtuous cases, resulting in substantial savings of scarce court resources and tax dollars. Appeals would be rare.

It is time to remove the diaper of immunity, which only encourages the soiling of the machine by misconduct of the most egregious sorts; shocking the conscience of civilized society by convicting, incarcerating and executing innocent citizens. Prosecutors should be made accountable and liable for their actions, on equal basis as all other professionals. The first repair must be the abolishment of the immunity that is as taken for granted as it is abused by malicious and unscrupulous prosecutors.

II

The next repair focuses on the ill-fated practice of retrials. It occurs that a case is retried multiple times, earlier trials having succumbed to a conclusion other than conviction. Such conclusions occur, for example, from mistrials either because of an aborted trial (prosecutorial misconduct or procedural error) or the jury being unable to agree upon the guilt or innocence of the accused ("hung jury"). Aborted trials may warrant examination on a case-by-case basis, but not so the hung jury cases. Simply put, when a jury hangs by failing to convict, that is de facto reasonable doubt as to the accused's guilt. Innocence extant. Due to the manifold unfairness to the accused, Due Process protections should bar any retrial.

At retrial the defendant's case is virtually unchanged ("I didn't do it."). However, between trials, the prosecutor seizes the opportunity to interrogate jury members, rework witnesses, tamper with evidence, and sneakily rearrange and manipulate his case. Prosecutors often stonewall between trials, waiting, for example, for the defendant to become a victim of the months and years of languishing in the local county dungeon, eventually willing to plead guilty to any crime just to escape that horrible environment. The prosecutor may be stalling until defense counsel becomes overburdened with other cases, or the scheme may be as sinister as waiting for the defendant to run out of money so that he can no longer afford any defense. While the defendant is going bankrupt, the prosecutor soars aloft on the updraft of an unlimited budget. That budget is filled by taxpayers' dollars and backed by government printing presses. Although you have never heard of a prosecution being terminated due to the government running out of money, there are plentiful

examples of defendants pleading guilty due to no other reason other than the fact of impending bankruptcy to himself and/or family members whom are helping with his expenses. Such prosecutorial contrivances rise like a miasma to overwhelm the sweet scented ideal expressed by justices of the Ninth Circuit Court Of Appeals: "The prosecutor, as the agent of the people and the State, has the unique duty to ensure fundamentally fair trials by seeking not only to convict, but also to vindicate the truth and administer justice." See, Thompson v. Calderon, 120 F.3d 1045, 1058 (9th Cir.1997).

In the early-to-mid 1990s the nation witnessed the violations attendant to multiple trials in the two trials of the Menendez brothers for the shooting deaths of their parents in a tony suburb of Los Angeles. At the first trial the brothers retained worthy advocates, investigators and expert witnesses, thus were able to realize the Due Process protections guaranteed to every citizen by the Fifth Amendment of the Bill Of Rights. That trial resulted in a hung jury. The second trial resulted in the annihilation of those protections. Out of money, the brothers were unable to pay the fees and expenses of their advocates, investigators and expert witnesses (who moved on to clients able to pay), and were forced to accept representation provided by the State Of California. History shows that the brothers were convicted at the second trial and subsequently received prison sentences of life without the possibility of parole. The second trial was not a question of guilt or innocence, but of defendants squashed under the power and wealth of the State. Were they guilty? The evidence would suggest so. Did they receive Due Process? Not the second time around. Prosecutors use their financial omnipotence to literally tighten the rope around the accused's neck.

The oft spoken nonsense is that the accused is innocent until proven guilty. In fact, studies indicate that 66% of jurors believe, before the first word is spoken or piece of evidence introduced, that the accused is guilty. To have a properly operating machine the concept of innocent until proven guilty must have bite. This writer suggests that when a prosecution fails to obtain a guilty verdict on the first attempt (hung jury) then the Double Jeopardy Clause of the Fifth Amendment should bite down to prohibit any retrial. When a jury deadlocks, is that proof of reasonable doubt? Absolutely! When guilt has failed to be proven, then innocence remains (staggering perhaps, but still standing), and any retrial should be barred. A one trial limit would force prosecutors to abandon what are commonly referred to as joy ride cases, that is, cases of gossamer evidence, iffy legal foundation, necessary elements of the crime absent, cases that never can be won on merit, but only by scheming and manipulation.

When guilt is not proven on the first attempt, then the jaws of Double Jeopardy should lock down to prohibit any retrial.

III

The third repair to the machine will be denounced by prosecutors as nothing less than blasphemous. Prosecutors will scream that this repair will shut off their professional life-blood; their ability to convict [the innocent]. The machine must be repaired to eliminate any form of payment, reward, benefit, compensation or other inducement (hereinafter referred to as "payment") paid to cooperating government witnesses (co-conspirators, rats, snitches, jailhouse informants and their ilk) (hereinafter referred to as "government agent").

It is a sickening aspect of the machine that courts throughout this nation blatantly acknowledge that no practice is more ingrained in the criminal justice system than that of the government calling upon a witness to testify under a deal of immunity, reduced incarceration or other payment; a foul and improper arrangement calculated to produce a wrongful conviction. "Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration."See, Commonwealth Of The Northern Mariana Islands v. Bowie, 236 F.3d 1083, 1095-96 (9th Cir.2OO1). There are few scenarios more repugnant than Sammy "The Bull" Gravano being embraced by the government in exchange for his testimony against John Gotti. Gotti killed no one. Gravano murdered at least nineteen. Gotti received life in prison (no parole), while Gravano was paid with near immediate freedom, upon which he reentered the illicit drug trade and the victimization of the citizenry (presently facing State Of Arizona and federal drug trafficking charges; perversely, all his defense costs are being paid by the United States government). In addition, we have to question whether Gravano told the truth, the whole truth and nothing but the truth. There are innumerable examples of scripted, false and perjurious testimony being squeaked out of government agents for far less payment than Gravano received, as well as abundant instances where bought and paid for government agents have fabricated alleged confessions, which they then peddled for their handlers in exchange for negotiated payment. In the San Diego case, mentioned above, the generously rewarded government agent worked hand-in-hand with the prosecutor to produce a fabricated tape, and later provided scripted and perjured testimony to frame the defendant. "Few things are more repugnant to the constitutional-expectations of our criminal justice system than covert perjury, and especially perjury that flows from a concerted effort by rewarded

criminals to frame a defendant." Commonwealth, at 1087. Despite their inherent penchant for crime, government agents are routinely set free as payment for their cooperation. Upon release, Gravano established a nationwide Ecstasy drug operation. And, immediately following his release, the San Diego government agent embarked on a coast to coast credit card swindle. Worse yet, common practice, as in Gravano's cases and the San Diego government agent's cases, is for the government to act as savior regardless of the number and/or severity of the government agent's recurring criminal activity. The cycle of crime, mouthpiece, payment, and recurring victimization of the citizenry is encouraged to repeat itself over and over, because prosecutors care less for the cycle of crime and victimization they promote than they do about winning cases. A vile quid pro quo arrangement.

At trial jurors are easy prey of the prosecutor and government agent team message. Prosecutors weave a fanciful tale of the government agent's rehabilitated credibility, while the government agent looks each juror in the eyes and tells how he has turned over a new leaf, he is testifying because, gosh, that is what any good citizen would do. The team message is presented that regardless of the government agent's criminal history (murders, drug dealing, swindling savings from elderly citizens, etc.), pending charges or perverse deals made for his cooperation, he is, for the first time in his life, telling the truth.. Naturally, jurors would be repulsed at the thought of buying a used car from such despicable characters, and horrified by the mere idea of leaving an infant in the care of such villains. Nonetheless, those same jurors embrace the team message as if gospel; as if oblivious to the obvious agenda. Indeed, by the time the jury convicts the defendant the government agent has been set free, with a slap on the back and sly wink from the prosecutor, ready to embark on his next-- tacitly or otherwise, government sanctioned. -- criminal enterprise. For the government agent testifying is a negotiable commodity, and the more fanciful the story telling the greater the payment. A government agent would sell his little sister into an oda for another opportunity at freedom and the victimization of truly good citizens. Good citizens, on the other hand, are penalized in giving their truthful testimony. Good citizens lose work and wages, their economic and emotional well being severely impacted. They are subpoenaed, threatened with contempt of court orders and imprisoned if they do not freely give up their truthful testimony. Government agents get paid for their fabrications, perjuries and frame-ups.

Other professionals understand that purchasing information is both unethical and a perilous proposition. To professional writers, paying a source to talk is known to taint that sources information. Writers realize that when you pay someone to talk, that person then has a motive to tailor his information to suit the buyer. Prosecutors are unconcerned whether the information is tainted -- indeed, purchasing testimony tailored to the script is what they lust for -- and continue to purchase testimony from government agents and their ilk. As the Gravano and San Diego cases illustrate, government agents will do and say anything, regardless how false, immoral or illegal to get their cheese. When testimony is bought, truth is compromised. "A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." See, United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir.1993).

There is no defense to the practice of prosecutors who, by inducements of rewards and benefits, encourage fabrication, perjury and the framing of innocent persons. Nor is there any excuse for jurors who blind themselves to the obvious. The machine must be repaired to prohibit the government from purchasing testimony.

IV

The Public Defender experiment fails miserably due to the deliberate actions of law makers and the courts to ensure a skewed playing field. It comes down to resources; unlimited for the government, severely restricted for the Public Defender. In analogy, the prosecution constructs the gallows with unlimited lumber, hardware and manpower, while the Public Defender struggles with an escape plan consisting of a plastic spoon, a bit of string and not enough hours in the day.

In a typical prosecution the government might spend $40,000 to $60,000, while the Public Defender--necessitating equal expenditures -- would be lucky to be allocated an insignificant fraction of that amount. Due to the courts tight reins on the purse strings the Public Defender, therefore, is unable to marshal resources, conduct investigations, or adequately prepare for trial; scientific testing of evidence is nearly impossible, experts cannot be afforded, neither for consultation or as witnesses. Too few Public Defenders stretched between too many cases. Three repairs would level the playing field: (1) hire at least the same number of Public Defenders as prosecutors; (2) pay Public Defenders the same salaries as their prosecution counterparts, so that the quality of advocates on both sides will be comparable and, most importantly, (3) provide equal funds to the defense as are lavished upon the prosecution. If the government averages $50,000 on a typical case, then, at least, that same amount should be provided to the defense (with additional funds available upon a showing of need). Without a leveling of the playing field the accused has but a minim

of hope of escaping the gallows.

The playing field should be level in manpower, quality of advocate and financial resources.

CLOSING

Fifty years ago the United States Supreme Court observed that convictions procured by conduct such as that exposed above "do[es] more than offend some fastidious squeamishness or private sentamentalism about combating crime too energetically. This is conduct that shocks the conscience." See, Rochin v. California, 342 U.S. 165, 172 (1951). The ends-justifies-means over-aggressiveness of today's prosecutors is contrary to their duty to uphold the Constitution. Prosecutors have clearly lost touch with the ideal that they are "the representative ... of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done... [and] while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." See, Berger v. United States, 295 U.S. 78, 89 (1935), overruled on other grounds in Stirone v. United States, 361 U.S. 212 (1960).

Repair the machine now, lest your innocent blood drip from its ever churning cogs.

If you have any questions or comments, or would like to correspond with Dave, please

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