

IN PURSUIT OF SIMPLE, ORDINARY JUSTICE*

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On any day except Sunday, you can walk a few blocks and visit the Superior Court for the District of Columbia. At the very bottom floor Courtroom C-10, down the hall from the cell block—where a U.S. Marshals poster reads “Let No Guilty Man Escape” below an image of a gallows—you’ll see men and women, escorted in one by one. But before you see them, you’ll hear them: that is, you’ll hear the jingling of their chains. They will stand below the judge and be told that the United States of America wants to convict them of a crime, forever changing their lives. Then the judge, the Assistant U.S. Attorney, and the defense lawyer will take about three minutes to decide if the defendant will sleep in his bed that night, or on a cot at the D.C. Jail. Listen to the clerk intone the litany of one case after another: “United States v. Smith, United States v. Jones, United States v. Johnson . . .”

Imagine hearing the “United States of America versus” *you*.

This is our criminal justice system. In every state, in every city, every day: “The United States of America charges . . . ;” “The State of Maryland charges . . . ;” “The People of the City of New York charge . . .” With each case, one man’s freedom, one woman’s freedom, is put into play.

Back upstairs at the Superior Court, the long, dark hallways are filled with the lawyers, families, defendants, victims, and police, sitting, standing, pacing, waiting to be called into court. There are groups standing off to the side, quietly negotiating, dealing, advising, reviewing, like actors waiting in the wings offstage, or athletes standing on the sidelines, waiting to be called into the game. Beyond the large wooden doors of the trial courtrooms sit the judges (some of you will be there as judges one day), the prosecutors (some of you will prosecute the accused), the defense counsel (many of you will defend them), and the defendants (pray to God that none of you have that role).

It is an extraordinary world that many try to understand, examine, and critique. We must study it, for nowhere else in our society—other than in combat—are the competing forces of good and evil, justice and injustice, victory and defeat, and hope and despair so powerfully on display. It impacts every citizen. Its controver-

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sies hold our emotions and define who we are as a people, what we are as a society.

For fifty years, the American Criminal Law Review (“ACLR”) has been contributing to this study by offering insights, opinions, and wisdom on the myriad topics that define this strange, often inexplicable world. This anniversary provides a unique opportunity to reflect on the role of the ACLR: its purpose, its service to the cause of criminal justice, and its importance to Georgetown University Law Center (“Georgetown” or “the Law Center”). I am honored to give these remarks and to participate in the celebration of the journal.

By way of background, I was one of the editors of the journal when it first came to Georgetown; I had a close association with Sam Dash, the man who brought the ACLR to Georgetown; I have had writings published in the ACLR; and for years the journal—particularly its annual survey—has occupied a prominent place on my bookshelf. So, let me spend a few moments discussing the ACLR. Then, I will use it as a backdrop to discuss a couple of issues at the forefront of criminal law, and how you as lawyers may want to view and shape our criminal justice system. First, though, I need to give you a bit of background about Sam Dash.

Sam was a professor of criminal law and ethics at Georgetown for almost forty years, arriving here in the mid-1960s. His career was legendary, both at the Law Center and around the world. Perhaps his most notable achievement was as Chief Counsel to the Senate Watergate Committee, where he set the gold standard for how investigations should be conducted.¹ Ultimately, the work of the Senate Watergate Committee led to the impeachment hearings and resignation of Richard Nixon.

But Sam’s impact went well beyond Washington. Throughout the world, he was involved in numerous epic battles relating to human rights, including the investigation of Bloody Sunday in Ireland and helping to free Nelson Mandela from prison in South Africa.

His greatest impact, though, was as a professor at Georgetown. Thousands of students learned from Sam, and his goal was to blend the world of academia with the practical world outside the walls of the academy. He was always looking for opportunities to help the students. Through those efforts, he brought the ACLR to Georgetown.

The journal has become a staple of the legal profession, particularly in the criminal law community. An extraordinary and comprehensive range of articles has been published in this journal. It has been a canon of the criminal law for the last half-century. Over the last ten years, it has been the most cited criminal law journal in the country.² It has powerfully and incisively illuminated the develop-

1. SAMUEL DASH, CHIEF COUNSEL: INSIDE THE ERVIN COMMITTEE—THE UNTOLD STORY OF WATERGATE (1976).

2. The ACLR has had the most total citations over the last ten years, by a wide margin for several of those years. The ACLR has been the most cited criminal law review in court cases every year for the past ten years (as far back as the records go), by a very wide margin. *Law Journals: Submissions and Ranking*, WASH. & LEE U. SCH. OF L. LIBR., <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Sept. 26, 2013).

ments in the law relevant to defense counsel, prosecutors, judges, academics, and students. Sam would be proud of—but not surprised by—its success at the Law Center and beyond. So congratulations to you all at the ACLR.

Apart from these congratulatory words, permit me to comment on two of the topics that have come under scrutiny in the pages of the ACLR: first, our prison system; and second, the role of counsel, particularly your role.

Our prisons constitute the most vile, most depraved, and most racist aspect of our criminal justice system—perhaps our society. I make these comments because I do not believe that anyone who is concerned about criminal law, and has the pulpit, should let the moment pass without confronting this grotesque system of injustice. Consider the following:

- The United States, with 5% of the world’s population, has 25% of the world’s prisoners,³ the highest incarceration rate of any nation in the world⁴, at the cost of \$75 billion per year.⁵
- 2.3 million people are in our prisons and jails.⁶
- More than 60% of the people in prison are racial and ethnic minorities.⁷
- In some states, 80%–90% of all offenders sent to prison are African-American.⁸
- In 2011 in the D.C. Superior Court, 2,514 people were sentenced in felony cases after being convicted of crimes; 2,395 of them—95.3%—were black.⁹
- Solitary confinement—torture by any other name—is used as a long-term condition for an estimated 25,000 inmates in the federal and state supermax prisons, and perhaps 80,000 others are in isolation sections in regular prisons.¹⁰
- The 5,200 inmates of the Louisiana State Penitentiary, also known as “Angola” or “The Farm,” earn only between two and twenty cents per hour for their labor.¹¹

3. AMERICAN CIVIL LIBERTIES UNION, *BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION* 11 (2011), https://www.aclu.org/files/assets/bankingonbondage_20111102.pdf.

4. THE PEW CENTER ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA* 2008, at 5 (2008), http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf.

5. JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, *CTR. FOR ECON. & POL’Y RES., THE HIGH BUDGETARY COST OF INCARCERATION* 2 (2010), <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

6. AMERICAN CIVIL LIBERTIES UNION, *supra* note 3, at 11.

7. *Racial Disparity*, THE SENT’G PROJECT (2010), <http://www.sentencingproject.org/template/page.cfm?id=122>.

8. Michelle Alexander, Assoc. Professor of Law, Ohio State Univ., Keynote Speech at American Friends Service Committee Dinner (May 26, 2011), <https://afsc.org/story/michelle-alexander-gives-keynote-speech-afsc-dinner>.

9. DISTRICT OF COLUMBIA SENTENCING AND CRIMINAL CODE REVISION COMMISSION, *2011 ANNUAL REPORT* 36, 39 (2012), http://acs.dc.gov/acs/frames.asp?doc=/acs/lib/acs/pdf/Annual_Report_2011.pdf.

10. George F. Will, *When Solitude Is Torture*, WASH. POST, Feb. 20, 2013, http://articles.washingtonpost.com/2013-02-20/opinions/37198669_1_solitary-confinement-supermax-prison-suicides.

11. James Ridgeway, *God’s Own Warden*, MOTHER JONES (Jul. 25, 2011, 3:00AM), <http://www.motherjones.com/politics/2011/07/burl-cain-angola-prison>.

Central to the world of prisons is the growing for-profit industry that reaps billions of dollars in profits from this population. As one writer puts it, “no more chilling document exists in recent American life than the 2005 annual report of the biggest of these firms, the Corrections Corporation of America. Here the company (which spends millions lobbying legislators) is obliged to caution its investors about the risk that somehow, somewhere, someone might turn off the spigot of convicted men:

Our growth is generally dependent upon our ability to obtain new contracts to develop and manage new correctional and detention facilities . . . The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them.”¹²

You can hardly imagine a more bloodcurdling document: “a capitalist enterprise that feeds on the misery of man trying as hard as it can to be sure that nothing is done to decrease that misery.”¹³

If you want to feel even queasier about the growth of the prison industrial complex, read the article published in the February 19, 2013, edition of *The New York Times*. The vulgar headline says it all: “A Company that Runs Prisons Will Have Its Name on a Stadium.”¹⁴ Florida Atlantic University gave the naming rights of its football stadium to The GEO Group Inc., one of the largest operators of for-profit prisons in the United States.¹⁵ It profits from the incarceration of human beings. Go FAU Owls!

I say nothing more about this issue except that all of us who are engaged in the criminal justice system are complicit in something that is unjust and immoral, and we cannot turn a blind eye to it. Reason dictates, and humanity demands, the reform of this gruesome system, and the responsibility will fall to all of us in the criminal law community.¹⁶

12. Adam Gopnik, *The Caging of America*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik.

13. *Id.*

14. Greg Bishop, *A Company That Runs Prisons Will Have Its Name on a Stadium*, N.Y. TIMES, Feb. 19, 2013, http://www.nytimes.com/2013/02/20/sports/ncaaf-football/a-company-that-runs-prisons-will-have-its-name-on-a-stadium.html?pagewanted=all&_r=0.

15. Lulu Ramadan & Michael Chandeck, *A Timeline Recap of FAU's Stadium Deal With GEO Group*, U. PRESS, Apr. 9, 2013, <http://upressonline.com/2013/04/a-timeline-recap-of-faus-stadium-deal-with-geo-group/>.

16. Perhaps change is on the way. On August 12, 2013, Attorney General Eric H. Holder announced that the federal government would initiate steps to reduce the bloated prison population, focusing on the absurdly high number of prisoners incarcerated for low level drug crimes. In his speech before the American Bar Association in San Francisco, Attorney General Eric Holder acknowledged the social difficulties confronting our society, urging

But how does each of us individual lawyers approach a subject as daunting as reform in the criminal justice system? Must we look at the system as a whole, with all its rules, procedure, and complexity, or do we need to accomplish change “in the trenches,” as individual trial lawyers trying to act with a certain level of human decency in each case that comes across our desks? I submit to you that both are valid paths, and looking at both is particularly appropriate for this group because the ACLR has endeavored to balance the academic and the practical throughout its history. Permit me, then, to offer you the perspectives of two recent authors on these paths to reform, and then to give some examples of individual lawyers I have seen make big differences in the ordinary paths of their careers.

Many of you may be familiar with the recently published book *The Collapse of American Criminal Justice*,¹⁷ written by William J. Stuntz, a law professor at Harvard, who died shortly before the book was actually published.

A common theme of Stuntz’s critique is that bad structure can result in dehumanizing and unjust results.¹⁸ Stuntz criticizes overly harsh mandatory sentences,¹⁹ the practice of overcharging to compel guilty pleas,²⁰ and the prioritization of process over just outcomes.²¹ One point of Stuntz’s argument suggests that the Bill of Rights has produced much injustice, and that the country might be better off with the French Declaration of the Rights of Man.²² The Rights of Man says “be just.” The Bill of Rights commands us to “be fair.”²³ The end result, Stuntz concludes, is that we can give an individual much process, but little justice.²⁴ As one commentator notes:

[T]his emphasis . . . has led to the current mess, where accused criminals get laboriously articulated protection against procedural errors and no protection at all against outrageous and obvious violations of simple justice. You can get

Americans to “face the reality that, as it stands, our system is, in too many ways, broken . . . a vicious cycle of poverty, criminality and incarceration traps too many Americans and weakens too many communities.” Sari Horwitz, *Holder Seeks to Avert Mandatory Minimum Sentences for Some Low-Level Drug Offenders*, WASH. POST, August 11, 2013, http://www.washingtonpost.com/world/national-security/holder-seeks-to-avert-mandatory-minimum-sentences-for-some-low-level-drug-offenders/2013/08/11/343850c2-012c-11e3-96a8-d3b921c0924a_story.html?hpid=z1 (quoting Attorney General Eric Holder). It is a start, but as one commentator noted, it is still going to be a difficult process: “The work ahead is daunting, but Mr. Holder’s announcement holds out hope that we have crossed a threshold, that there is no longer any serious argument about whether there is a problem with criminal justice in America. It’s sad it took so long for this moment to arrive—and that the impetus has come as much from budget pressures as from concerns about justice—but we need to seize it.” Vanita Gupta, *How to Really End Mass Incarceration*, N.Y. TIMES, August 14, 2013, http://www.nytimes.com/2013/08/15/opinion/how-to-really-end-massincarceration.html?_r=0.

17. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

18. See *id.* at 2.

19. See *id.* at 32.

20. See *id.* at 257–60.

21. See *id.* at 80.

22. See *id.* at 74–85.

23. *Id.*

24. See *id.* at 80.

off if the cops looked in the wrong car with the wrong warrant when they found your joint, but you have no recourse if owning the joint gets you locked up for life. You may be spared the death penalty if you can show a problem with your appointed defender, but it is much harder if there is merely enormous accumulated evidence that you weren't guilty in the first place and the jury got it wrong The obsession with due process and the cult of brutal prisons, the argument goes, share an essential impersonality. The more professionalized and procedural a system is, the more insulated we become from its real effects on real people.²⁵

Stuntz is on to something. With the amount of attention given to procedure, sometimes “simple justice”—that is, the system’s “real effects on real people”—gets lost in the shuffle. In Kafka’s *The Trial*, Josef K.’s protestations of innocence were drowned out by a similar deluge of process rather than justice.²⁶ It is worth examining the criminal justice system as a whole, including its rules and procedures, to make sure this simple justice is not lost. That will be difficult and take time. But this kind of justice does not always require an act of Congress or the Supreme Court to achieve. This kind of justice can be accomplished by a single conscientious lawyer, judge, or prosecutor.

When individual lawyers miss out on opportunities for simple justice, and no one challenges them for it, the consequences can be grave. For examples, check out a recent book by Amy Bach—a lawyer and journalist—titled *Ordinary Injustice: How America Holds Court*.²⁷ Bach spent seven years sitting in mostly state courts,²⁸ watching as, among other things, public defenders pleaded out most clients without knowing anything of their circumstances;²⁹ prosecutors said they were acting “mercifully” by letting indicted cases languish without resolution because at least the defendant was out on bail;³⁰ and judges, to save everyone time and bother, entered guilty pleas for defendants who were not even in court or represented by counsel.³¹ It seemed to Bach that these people were not ultimately “bad” people, and most even wanted to do the right thing.³² They all talked to her at length about the challenges and pressures to which they were responding.³³ But their human instincts were deadened by the press of cases and the imperative to keep the docket moving.³⁴ Bach explains that “[o]rdinary injustice results when a

25. Gopnik, *supra* note 12.

26. See FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir trans., 1992).

27. AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* (2009).

28. *Id.* at 9.

29. *Id.* at 15–22.

30. *Id.* at 26.

31. *Id.* at 4, 114.

32. *Id.* at 26.

33. *Id.* at 27.

34. *Id.* at 6–7.

community of legal professionals becomes so accustomed to a pattern of lapses that they can no longer see their role in them.”³⁵

This is the perspective “from the trenches” of criminal practice. Bad procedure is not the only thing causing injustice. It is also important to reflect on your role as an individual lawyer and the impact that your attitudes and decisions have on others playing different roles in the system. The good news is that when you do, you will see opportunities to achieve “ordinary justice,” “simple justice,” a rare human moment that, when you practice in this field, will stand out to you as being just as significant as any victory won on law or procedure. What follows are some examples from people I’ve been privileged to encounter in my career.

In the late 1970s, I was working at the Public Defender Service (“PDS”). A client had been sentenced by Judge Samuel Block, and there was no quarrel with that decision. But the client was to be sent away, and he wanted to marry his longtime girlfriend before leaving D.C. He was already locked up, and so I asked the Marshal Service if they would permit the client and his girlfriend to be brought to a holding cell where I could arrange to have a minister perform the ceremony. The Marshals said they would cooperate, but a court order would be required. I drafted a motion and a proposed order and sent it to Judge Block. A day later I got a call. Judge Block said he had no objection but wondered if we couldn’t do better. He said that such an arrangement was no way to begin a marriage, and proposed that the ceremony take place in his chambers, that the client’s family attend, and that he preside. When the day came, I arrived in chambers and saw that Judge Block had brought in flowers and had also made arrangements for my client to wear a proper suit. It was a beautiful ceremony. Judge Block offered some touching remarks about redemption, hope, and promise. I do not know what happened to the client or the marriage, but I do know that on that day, every person in the room was elevated to a more hopeful and humane state.

Martin Clark is an Assistant U.S. Attorney in Baltimore, a career prosecutor. He is known for being tough but fair. Several years ago, I represented a renowned doctor and scientist who became a scapegoat for Congress and Inspectors General for having a conflict of interest as he simultaneously worked for the National Institutes of Health (“the NIH”) and pharmaceutical companies. The case was a lot of storm and thunder, as can only come from a congressional committee. Righteous indignation reigned, and it seems that all participants—the media, the executive branch, and Congress—wanted their turn to shame him in the public eye. The pressure was on the government to get a felony conviction and serious prison time. My client, simply stated, was the “fall guy.” He was going to pay the price for wrongdoing that involved many more people than just him. Case agents, immature congressional staffers, posturing members of Congress, and the initial prosecutors were all on board. It would be a felony: consequently, my doctor-client would go to

35. *Id.* at 2.

prison and lose his profession. It didn't matter that scores of patients, colleagues, and acquaintances spoke about the doctor's essential goodness, the fact that he had served others, and the fact that he had much to give society; nor did it matter that the charges of actual misconduct were minimal. The system insisted on a felony, jail time, and the undoing of a good and decent man.

Then humanity showed up. The prosecutor bucked the system. He took seriously the mandate that a prosecutor's interest is that "justice shall be done."³⁶ He said a misdemeanor would do, knowing full well that that would be the basis upon which my client could continue his career. He determined that justice could be served by being merciful, and my client was given a second chance. His career and his life were saved because one man served simple justice.

Judge William Bryant was for many years the Chief Judge of the United States District Court here in D.C. He served on the bench until he was ninety-three, keeping a full calendar of trials. In the mid-1980s, he started to notice what the Sentencing Guidelines did by taking away discretion from judges, and he refused as a matter of conscience to participate in the fundamental injustice that they would wreak on other human beings. So he kept his full calendar, and decided that he would let other people do the sentencing. It is not clear whether defendants were better off, but his voice and conscience said, "this is wrong." And of course, after the Supreme Court's decision in *United States v. Booker* in 2005,³⁷ the Guidelines are no longer mandatory.

For almost forty years as a trial judge in the D.C. Superior Court and as Chief Judge of the Court of Appeals, Judge Bill Pryor created an environment where all participants—prosecutors, defendants, defense counsel, witnesses, etc.—are treated with uncommon dignity that makes everyone realize that the courtroom is a hallowed place and the pursuit of justice is a noble calling.

In your career you will meet lawyers such as Pat Hickey, former director of the D.C. Public Defender Service, who for over a quarter of a century took on the D.C. Jail Suit,³⁸ exposing and correcting the abusive processes that forced people to live in inhumane and cruel circumstances. My old PDS colleagues, Steve Bright, Richard Rosen, and David DeBruin have fought for decades against the horrors of the death penalty. Kirby Howlett ran a post-conviction practice in which I suspect he saved his clients as many years of incarceration as any lawyer in history. Bill Corboy was a legendary homicide detective, and if he pursued a case against your client, that was the end. But he also railed against prosecutors and police corruption, and helped make the system honest. If he learned of a detective who was taking liberties with the evidence, he would take steps to protect an innocent defendant. And finally, Charles Ogletree, first at PDS and then for many

36. *Berger v. United States*, 295 U.S. 78, 88 (1935).

37. 543 U.S. 220, 222 (2005).

38. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

years at Harvard Law, has led hundreds of lawyers in battles against injustice. As your career progresses, you will find your own heroes.

I'll close with one matter of personal privilege that I hope is not too filled with maudlin excess. In late November, my father passed away. His name was also Bob Muse, and he was a lawyer, with some great successes in criminal defense. The day after he was buried, the *Boston Globe* ran a story, of which here is a small part:

[H]e would have told you his single greatest accomplishment in nearly a century on this earth was getting Bobby Joe Leaster out of prison.

In 1970, Leaster was 21 years old, barely off the bus from a little patch called Reform Ala., when he was charged with shooting a Roxbury convenience store owner to death in a robbery. He didn't do it and had an airtight alibi. But that alibi evaporated when the girlfriend he was with, far from the murder scene, told the cops he wasn't with her. She was white, he was black, and it was a time when that sort of love didn't speak its name.

The evidence was weak, but the rush to judgment was strong, and Leaster was doing life in prison when Bob Muse handed a file to his son Christopher, a freshly minted lawyer, and suggested he check out the case. Father and son spent nine years on appeals, without being paid a dime, until they found a new witness and Leaster, after being locked up for 15 years, walked out a free man.

Leaster's life wasn't the only one Bob Muse saved. Muse was a 24-year-old fighter pilot in the spring of 1945, when he flew into the Battle of Okinawa and saw a kamikaze dive-bombing toward an American warship. Muse flew through the flak and shot the Japanese plane from the sky. Three hundred men on the USS *Henry A. Wiley* lived, and their children were born, because of Bob Muse.

To Bob Muse, winning the freedom for one man wrongly imprisoned was as important as saving the lives of 300 men. Justice meant that much to him.³⁹

As part of the Leaster case, my father filed motions in every court he could. He would not give up until the injustice was corrected. The man was innocent. At one point, deep into his representation of Leaster, he and a partner ran into one of the judges who had denied a motion for new trial. The judge, a friend of his, said "Bob, when are you going to stop filing all those motions in the Leaster case?" My father replied, "I'll stop doing my job when you start doing yours."

In criminal law, one lawyer, in the ordinary course of a career, can accomplish extraordinary things. For fifty years, the ACLR has combined the best aspects of the academic and the practitioner in this field, striving in its own way to promote the cause of justice. Reform of the system as a whole—with all its rules and procedure—will require the commitment and the cooperation of thousands, perhaps millions of individuals across the country, through legal and political actions. It will take time. But remember, avalanches begin with loose rocks. In the

39. Kevin Cullen, *A Life Saved and Lived Well*, BOSTON GLOBE, Dec. 4, 2012, <http://www.bostonglobe.com/metro/2012/12/04/life-saved-and-livedwell/YcA3sT8sT4MoXd183rwiVL/story.html>.

meantime, every day you enter the courtroom, every day you stand in the well of the court and argue for or against one person's freedom, every time you encounter a person accused or convicted of a crime, every time you interact with another lawyer who is on the opposing side, or on the bench, you have choices that can promote or detract from the humanity and justice of the process. That you, as one person, will have the opportunity to make such decisions, and as such must be responsible for their consequences, is the great privilege, obligation, and adventure of practicing criminal law.