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OPINION

Justice System for White-Collar Defendants is Flawed Top to Bottom

From whistleblowers to cops to prosecutors, it's skewed against the accused.

BY STUART GASNER

I am not an expert by any means, but I was a prosecutor for four years, serving as an assistant U.S. attorney for the District of Hawaii, and I have spent the rest of my 32-year career as a white-collar criminal defense and civil trial lawyer. So I know a bit about the criminal justice system. I have never studied criminology or pored over criminal justice statistics. What I have to say is completely idiosyncratic and based solely on personal experience.

My conclusion is that the criminal justice system is broken.

Let's start with input into the system. It is arbitrary and capricious. Most white-collar cases start with a disgruntled employee who decides to pick up the phone, write an anonymous note or otherwise set about to ruin someone's life. Sure, there are real whistleblowers who detect wrongdoing and courageously report it. But for every one of those, 10 more act from suspect motives. For every famous white-collar defendant, there are many others who engaged in similar behavior but for some reason stayed out of harm's way.

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For my clients who get caught at the intersection of bad luck, politics and misjudgment, I usually recommend reading Tom Wolfe's "Bonfire of the Vanities," a novel about a white-collar "Master of the Universe" sucked into the vortex of the criminal justice system.

A certain amount of bad luck is almost always involved, and the defendant's fate usually depends on whether the folks with badges and guns decide to act. Most of them are great people working for modest wages and trying to do the right thing. However, they often divide the world into good guys and bad guys. Good guys are people who are blameless beyond reproach or who are willing to help them take down

bad guys. Bad guys are people who have actually committed crimes or people in a grey area of responsibility who have a bad attitude. Once a person is declared a "bad guy," it's hard to recover.

Of course, for a criminal case to proceed, law enforcement also needs a prosecutor to agree, and the prosecutor typically needs two things: enough evidence and a recognizable narrative. Both are often supplied by a handful of emails that would look good on a PowerPoint slide at trial, whether or not they are part of a more complex story.

The system for adjudicating white-collar criminal cases really falls apart after the indictment. Discovery? Forget about it. It comes in two sizes: next to nothing and way too much. The Federal Rules of Criminal Procedure are designed to keep the defendant at a distance from the prosecution and witnesses and to provide the minimum amount of information necessary to satisfy constitutional requirements.

Despite the vastly higher stakes in a criminal case, federal prosecutions have no provisions for interrogatories, depositions, third-party subpoenas or any other means of figuring out the basis for the government case or preparing for trial, except under highly limited circumstances or shortly before the trial begins.

A DUMP TRUCK OF EVIDENCE

The one bright spot in the Federal Rules is the provision that requires the government to produce documentary evidence "material to the defense." But in complying with this rule, prosecutors are either stingy in their assessment of materiality or go to the other extreme and unload a dump truck of electronic evidence.

Motions? Forget about those, too. Most constitutional law gets made in the context of drug and violent crime prosecutions, so the prodefendant cases are few and far between. There is no equivalent of summary judgment, and no effective way to challenge a meritless prosecution. For most criminal defense lawyers, winning a motion is like hitting a triple—possible but not very likely, and requiring a well struck ball that gets in the gap.

That brings us to plea bargaining, the heart of the criminal justice machine. It is unquestionably necessary, to some degree. But to what degree? Is it the mark of an effective system that the vast majority of cases plead out? Or is the large number of pleas in our system due to the fact that the deck is stacked so heavily against the defendant, with such draconian consequences for going to trial that the risk of doing so has become unbearable?

For the white-collar defendants insistent on their constitutional right to trial in federal court, more trouble awaits. Just having a bunch of FBI or other federal agents on the other side gets things off on the wrong foot: If it were just a debatable matter, these clean-cut folks with guns wouldn't have brought the case. That's why it's so much easier to win against the Securities and Exchange Commission in exactly the same fraud case, even though the government's burden of proof is theoretically lower.

Juries just don't presume innocence in criminal cases no matter how many times the judge tells them to, and they don't take "beyond a reasonable doubt" as seriously as it deserves.

Finally. sentencing. Thanks to *United States v. Booker*, even federal judges brought up under the sentencing guidelines are finding their sea legs and making individualized decisions. But the guidelines still skew the inquiry in the direction of absurdly long prison sentences.

Much of that comes from the "quantity" bias of the guidelines, in which the weight of the drugs or the total amount of money involved is the primary driver of the length of the sentence.

It all adds up to another settlement machine, in which individuals are forced to settle to avoid getting torn apart by a highly flawed system.

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