

# Baltimore's Problem, and America's

It would be ungracious of me not to acknowledge with gratitude the [column](#) on Sunday of my old friend Fareed Zakaria, citing several sources, including me, as he recounts the almost unmitigated moral bankruptcy of the U.S. criminal-justice system. As the Freddie Gray riots and indictments in Baltimore continue the fortnightly spectacles of fatal police excess that, with the eager amplification of the media, are creating the world-wide and not entirely false impression that American law enforcement is conducting a sea-to-sea shooting gallery, it is timely to review these problems, which are now decried from right (e.g., George Will) to left (e.g., Katrina vanden Heuvel). They extend from undisciplined police, through a rogue prosecutocracy infested with Torquemadas who can smoke anything past the constitutional heirloom of the grand jury and convict almost anybody by intimidating witnesses to inculcate the targets (with the choice between threats of prosecution themselves and promises of immunity for perjury), to mainly elected state judges dispensing draconian sentences and pandering to the law-and-order lynch mobs, to overstuffed prisons staffed by under-supervised unskilled labor who kill an inordinate number of prisoners in unconstitutionally bestial conditions. This is American justice today, unsuspected by Norman Rockwell, triumphantly championed by morons like Nancy Grace; it is the still largely unnoticed tragedy of many millions of ruined American lives.

In the modern United States, the only reforms are those demanded by adequately large numbers of voters or adequately rich interests. There are 48 million convicted felons in the U.S., and they have tens of millions of relatives and friends, and while most of them are relatively unconnected and demoralized by stigmatization, or just relieved that their

legal problems were long ago and they have partly or wholly surmounted them, those suffering the sting of injustice aggravated by gelatinously negative public complacency about the injustice of the system are very numerous and righteously upset. They cannot be far from where the previous waves of mass reform jumped off. Prior to smashing the barricades that restrained them, “uppity n\*\*\*\*\*s” and “mouthy women” and “angry gays” were starting to chin themselves on the need for militancy, no matter how personally risky, or at the least embarrassing, it might be. Of course, a large number of convicted people were actually guilty of something, unlike, simply by virtue of what they were, African Americans, women, and gays, but many innocent people have been convicted, and most have been over-sentenced, and all who have served their sentences are entitled to be heard about the systematic mistreatment that is so widespread in the U.S. justice system.

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Fareed Zakaria outlined the obvious proportions of the problem in his column: The United States has 5 percent of the world's population, 25 percent of its incarcerated people, and 50 percent of its lawyers (who account for about 10 percent of the country's GDP). Prosecutors win 99.5 percent of their cases, about 97 percent without a trial, and the country has six to twelve times as many incarcerated people per capita as comparably prosperous large democracies: Australia, Canada, France, Germany, Japan, and the United Kingdom. No sane, conscientious American citizen can be comfortable with these figures and their implications. In a word, the United States, the people that ordained for itself the Constitution that contains the Bill of Rights, has a somewhat tenuous claim to be a country subject to the rule of law, at least in criminal matters. And crimes include thousands of offenses, including,

as George Will pointed out in a [column](#) in April, picking up arrowheads on federal lands or driving a snowmobile accidentally onto land protected by the Wilderness Act. Given the innumerable statutes and regulations with criminal sanctions, the *mens rea* element of guilt has faded and the old principle that ignorance of the law is not an excuse would not now be equitable in many cases.

For obvious reasons, there is a tendency to view the recent interracial police-inflicted fatalities as another manifestation of longstanding African-American grievances. But three times as many white Americans are killed by police and prison employees as non-whites, which confirms that minorities suffer proportionately more abuse from law enforcement, but African Americans and other minorities would short-change themselves, and be unjust to others, if they did not recognize this as an almost equal-opportunity problem, in which the constabulary, justice, and custodial systems disserve everyone, and no one is safe from such abuse. Nor will it quite do to sound the same old note of white insensitivity in high places in the Freddie Gray tragedy in Baltimore. That is a city where the majority in the city proper is African-American, where African Americans are in charge as mayor and chief of police, and majorities of city officials, elected and appointed, are African American. Whatever is judged to have happened in this case, it was not whites killing a non-white. No doubt, that is a factor in some incidents, but it would minimize the proportions of this immense and extremely dangerous problem to see it in these terms only, or even principally.

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Americans are promised their day in court, but, because of the public-policy adoption of a goal of unheard-of levels of imprisonment (advocated as passionately by such liberals as

Robert Kennedy, Nelson Rockefeller, and Bill Clinton as by such conservatives as Richard Nixon and Ronald Reagan), the system could not possibly try a serious number of these cases, as opposed to just terrorizing defendants into pleading guilty and taking a dive, without completely clogging the system. There has been very little reform legislation in the federal government in recent decades in any field that is based on the traditional motive of people like Theodore Roosevelt and Woodrow Wilson, simply to make things work better (like TR's Pure Food and Drug Act). Reform is demanded by groups too large or rich to be ignored. Victims of the excesses of the justice system certainly are such a group, but to avoid provoking a schismatic reaction in the country, they must cross all racial and ethnic lines and make it clear that they are not mollycoddlers of crime, and are not calling for indulgence of violent crime, but seek restoration of the Bill of Rights guarantees of due process, the grand jury as a serious filtration process, no seizure of property without just compensation, access to counsel, an impartial jury, prompt justice, and reasonable bail. The plea-bargain system will have to be drastically reformed and cooperating witnesses must not be immune to apparently well-founded perjury claims, and criminal cases should not be heard by elected judges. While this cannot be legislated, the media should rub the sleeping knots of 50 years from their eyes and go back to serving the country – by deploying a free press in service of free institutions, and not competing to lead the lynch mob every time there is a publicized offense.

Most trial judges should not be ex-prosecutors. Nor should prosecutors have an absolute immunity. The Thompson case, in which a falsely accused man was left in death row for 14 years to the full knowledge of prosecutors, who were ultimately excused from heavy sanctions by a majority on the Supreme Court, was an especially extreme case of this. So was the case against Senator Ted Stevens (R., Alaska), who was electorally defeated on a prosecution the Justice Department knew to be

false, and the only serious penalty paid was by a prosecutor who committed suicide. The egregious Patrick Fitzgerald should not get a free pass for securing a conviction of former vice president Richard Cheney's chief of staff Lewis "Scooter" Libby by misshaping the evidence of Judith Miller.

Sentences should be reasonable and some sort of commission should regularly sift through all the laws and regulations with heavy sanctions, cull and consolidate them, and attach to them penalties that are appropriate and are not just bludgeons used by prosecutors to extort false confessions of guilt and Stalinesque allocutions of self-condemnation. The entire process has become a national degradation that cheapens the value of American citizenship and disgraces the country and its fine traditions, and threatens everyone in the United States, or reachable by its authorities, even though in other countries.

Not the least of the excesses of this careening juggernaut grinding people almost indiscriminately to powder has been its extraterritorial application, in which the State Department frequently gets behind the Justice Department and tries to muscle foreign jurisdictions. A striking example of this was the recent effort, clearly inspired by foreign-policy considerations, to extradite Ukrainian billionaire Dmytro V. Firtash from Austria for alleged bribery in India in a titanium deal that never occurred, but in fact because of his political activities in Ukraine. The indictment coincided with the visit to Ukraine by assistant secretary of state Victoria Nuland, to try to persuade Firtash's friend, former Ukrainian president Viktor Yanukovich, not to abandon a close political and trade agreement with the European Union. The State and Justice departments denied any such motive, but the Austrian judge found otherwise, and ordered the release of Mr. Firtash, who had posted \$130 million. The judge ruled the attempted extradition and trial a spurious abuse of justice and of the reputation of the United States as a civilized and law-abiding

country. No one is claiming Firtash has an uncontroversial record in the Ukrainian natural-gas business, but there is no obvious U.S. claim against him.

The whole U.S. criminal-justice system is now an immense problem and it gnaws, every day, at the soul of America. Where has the Supreme Court, the ultimate and always sanctimonious guardian of the Constitution, been while the rights of the people have been gutted? Generations of its justices do not have the excuse of having to face voters whipped up by tele-demagogues and gimcrack politicians. They don't have any excuse.

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