

Forward

By Hans Sherrer¹

Four decades ago Professor Herbert Packer likened the dispensing of justice in the United States to the operation of an assembly-line.² Once a person's processing begins with being charged – there is a sense of inevitability that the person will exit the assembly-line convicted of some crime.

A combination of “greases” lubricate the assembly-line gears.

One of the greases is plea-bargaining. About 95% of state and federal convictions are procured by a person's agreement to admit guilt to specified charges in exchange for either promised or expected sentencing leniency. Plea bargaining is greased by overcharging by prosecutors. A person faced with the prospect of going to trial and being convicted of a multitude of often overlapping charges is much more likely to “see the light” and agree to plead guilty in exchange for a reduction of charges and the sentence. A person convicted after insisting on a trial is unmercilessly subjected to harsh sentencing after rejection of a plea bargain. The U.S. Supreme Court has given literal *carte blanche* to the practice of plea bargaining: even approving a sentence of life in prison as permissible for a man convicted of writing an \$88.30 bad check after he turned down a pre-trial offer of five years in prison in exchange for a guilty plea.³

Another grease is the court appointed counsel/public defender system. The overwhelming majority of person's charged with a crime cannot afford to hire a lawyer – so they are appointed counsel by a judge. However, the inadequacy of the representation a person in state court can expect from an appointed lawyer is well documented.⁴ This is not a new situation. “Did You Have a Lawyer When You Went to Court? No, I Had A Public Defender,” was the title of a 1971 article by Professor Jonathan D. Casper in the *Yale Review of Law and Social Action*.⁵

Another grease is the criminalization of “everything.”⁶ There has been a proliferation of state and federal laws during the last several decades that criminalize all manners of personal, social and business behavior. Previously these behaviors were subject to familial, social or professional disapproval, or simply disregarded. Another aspect of this is the increasing of criminal penalties for some crimes, while other crimes are made more difficult to defend against by a lessening or elimination of the *mens rea* (intent) requirement.

Another grease is the prosecution of a non-existent crime. A reported crime that doesn't involve a discernable property loss or physical injury may in fact not involve an actual crime. Rape in particular is a crime that involves a high percentage of false reports. A 9-year study in a metropolitan area found that 41% of reported rapes never happened.⁷

Another grease is “inductive reasoning.” Law enforcement officers often “solve” a crime by relying on “inductive reasoning” to decide who committed it before there is sufficient evidence to support the person's involvement.⁸ Identifying the culprit and then accumulating evidence to support that conclusion can result in a conviction. However, it also can also result in the disregard of conflicting evidence and a failure to investigate leads that could result in either excluding that suspect or identifying another person as the actual culprit.

Another grease is trial and appellate judges who function as quasi-politicians by keeping an eye on what is publicly popular.⁹ With few exceptions state judges are elected, and the kiss of death to being elected or re-elected is being perceived as “soft on crime.” That often results in unfavorable rulings for a defendant (such as the setting of a high bail) that puts pressure on that person, whether guilty or innocent, to take the deal offered by the prosecution. Federal judges also function as quasi-politicians. Installed through a political appointment process, they are selected because of their known and expected affinities.¹⁰

System Failure

Another grease is procedural rules. There are strict filing deadlines for alibi and expert witness lists, motions, briefs, and the filing of a direct or post-conviction appeal, and there are rules for the form of those documents. Missing a deadline or failing to comply with form rules can result in the disregard of a motion and/or brief, the barring of testimony by alibi and expert witnesses, or even the summary dismissal of a defendant's direct or post-conviction appeal.

Another grease is the lax application by trial and appellate judges of rules barring overly prejudicial "bad character" and/or "bad acts" evidence from being introduced to support a defendant's guilt.¹¹ Loose interpretations of these rules enables the prosecution to smear a person's character with a black brush so the person can be convicted even though no physical, forensic, eyewitness, or confession evidence links the person to the crime. In a case where there is minimal or no substantive evidence against a person, smearing that person can be the primary "evidence" relied on to support their conviction.¹²

Another grease is the appeals process. Challenging a sentence, guilty plea, or conviction on direct appeal primarily involves demonstrating a defendant was prejudicially harmed by a ruling of the judge, and/or conduct by the prosecution. After a sentence and/or conviction has been affirmed on direct appeal, the post-conviction process can involve endeavoring to establish that one's legal counsel committed prejudicial errors, the prosecution concealed exculpatory evidence, or that new evidence undermines the conviction. Although a person can hope against hope, the rate of success on direct appeals is very low. Post-conviction appeals also have a poor success rate. A 2007 study found that since the Anti-Terrorism and Death Penalty Act of 1996 went into effect, only 0.29% of federal *habeas* petitions by non-capital state prisoners are successful in the granting of a reduced sentence or a new trial.¹³

Another grease is the absolute immunity of judges and prosecutors. The United States Supreme Court has ruled that neither judges nor prosecutors are civilly liable for any of their decisions or actions related to a criminal prosecution. The court created immunity shield protecting a judge or prosecutor from being sued cannot be pierced regardless of the illicitness or unlawfulness of their conduct, or the harm it causes a defendant.

Still another grease is unpublished court opinions. These opinions allow a trial or appellate court to selectively disregard a precedential ruling that will benefit a defendant. As a consequence charges are not dismissed, and convictions are not overturned that otherwise would be.¹⁴

The "justice" system's assembly-line gears are also lubricated in other ways. All of these greasing techniques compliment one another to ensure that there is a steady flow of persons convicted through the process – regardless of whether they are guilty or innocent of their convicted crime(s).

In *System Failure* James Love writes about some of these greasing techniques and their impact on the individuals involved and American society.

James Love knows his subject matter, and he puts a human face on their consequences because of his personal experience: He was convicted in 1996 of raping a girl in Cincinnati, Ohio. There was no medical or physical evidence a crime had occurred, so it was a case of "he said, she said." Preparation of Mr. Love's defense was stymied because prior to his trial the prosecution failed to disclose exactly when the alleged crimes occurred. The indictment vaguely described them as having occurred sometime during the three-year period from 1988 to 1990. The alleged victim was the prosecution's last witness. When she testified the rapes occurred once each month from December 1988 through March 1989, Mr. Love told his attorney that he was out of the country living in Mexico during those months. Mr. Love had to begin presenting his defense after the alleged victim finished testifying. Consequently, he was only able to locate a few documents that presented an incomplete picture that he was living in Mexico during the time of the alleged crimes. After his convictions and sentencing to four life terms in prison, he spent years obtaining documents and witness affidavits establishing that he was living outside the United States during the entire period of time the crimes were allegedly

Forward

committed. From November 1988 to June 1989 he lived in a resort town near Acapulco, Mexico ... almost 2,000 miles from Cincinnati. He then spent a month in Belize before returning to the United States to live. Based on the compelling “new” evidence of his actual innocence, Mr. Love’s convictions were overturned in 2006 and his indictment was dismissed in 2008. The Hamilton County prosecutor even agreed in writing that Mr. Love was out of the country during the months the alleged victim testified the crimes occurred. Time to celebrate! Well ... not so fast. As Mr. Love writes in *System Failure*, the prosecution had a new trick up its sleeve, so dismissal of the charges wasn’t the end of his fantastic tale of misjustice.

If a conviction is the desired end of a criminal prosecution, the legal system in the United States is somewhat effective in achieving its purpose. However, if justice is the goal, the condition of “system failure” that James Love describes in this book doesn’t just exist, but is flourishing.

Endnotes:

¹ Hans Sherrer is editor and publisher of *Justice:Denied – the magazine for the wrongly convicted*, and he has written hundreds of articles related to wrongful convictions. He is also creator of The Innocents Database that is the world’s largest database of wrongly convicted people. The Innocents Database is at, http://forejustice.org/search_idb.htm

² Packer, Herbert L. *The Limits of the Criminal Sanction*: Palo Alto, CA, Stanford University Press, 1968: 292-293.

³ *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

⁴ Federal public defenders have pay parity with assistant United States attorneys, and they have a support staff of secretaries and investigators, so they can, and often do provide excellent representation. However, this has little practical effect, because the guilty plea rate in federal court is comparable to the state court rate, and the acquittal rate of federal defendants who elect to go to trial is comparable with state court defendants who go to trial.

⁵ Casper, Jonathan D. “Did You Have a Lawyer When You Went to Court? No, I Had A Public Defender,” *Yale Review of Law and Social Action* 1:4-9 (1971). Casper is a professor of political science.

⁶ A recent article about this phenomenon is: Martz, Stephanie A. and Ivan Dominguez. “A Brief History of the Criminalization of Everything.” *The Champion*, September 2008: 30. (This is the magazine of the National Association of Criminal Defense Lawyers.)

⁷ Kanin, Eugene, “False Rape Allegations,” *Archives of Sexual Behavior*, Vol. 23, No. 1: 81-92 (1994).

⁸ An excellent analysis of the role of inductive reasoning in law enforcement is: Greenfield, Scott H. “Inductive Reasoning Means Murderer Walks.” *Simple Justice blog*, November 29, 2007, <http://blog.simplejustice.us>

⁹ For a detailed explanation of how state and federal judges are intertwined in the political process, see: Sherrer, Hans. “The Complicity of Judges in Generating Wrongful Convictions.” 30 *N. Ky. L. Rev.* 539 (2003).

¹⁰ It has been observed that even U.S. Supreme Court justices follow public sentiment and adjust in accordance with what is broadly acceptable. *Supra*.

¹¹ In the Federal Rules of Evidence these are §403 and §404.

¹² A glaring example of this is Kirstin Blaise Lobato’s conviction of charges related to the July 2001 murder of a homeless man in Las Vegas. See, Sherrer, Hans, *Kirstin Blaise Lobato’s Unreasonable Conviction*, The Justice Institute, Seattle, WA, 2008.

¹³ During the same period of time 12.4% of prisoners in capital cases were granted the relief of a reduced sentence or a new trial. See, King, Nancy J., Fred L. Cheesman II, and Brian J. Ostrom. “Final Technical Report: Habeas Litigation in U.S. District Courts – An empirical study of habeas corpus cases filed by state prisoners under the Antiterrorism and Effective Death Penalty Act of 1996.” *Vanderbilt Public Law Research Paper* No. 07-21, August 21, 2007.

¹⁴ The effect of unpublished/non-precedential opinions in contributing to miscarriages of justice is explored in depth in: Sherrer, Hans, “Non-Precedential Opinions Cause and Perpetuate Miscarriages of Justice,” *Journal of the Institute of Justice and International Studies*, Number 7, 2007, 299.