Annals of Injustice

Every week there are further revelations of the rot that has corroded almost every aspect of the U.S. criminal-justice system, and the last few weeks have produced particularly rich harvests of such evidence. Leading them has been the description by Judith Miller, former correspondent of the *New York Times*, of the dishonest reshaping of her evidence in the Lewis "Scooter" Libby case, in which Libby, the chief of staff of Vice President Dick Cheney, was ultimately convicted of obstruction of justice and perjury. Many will recall that, in the summer of 2003, Mr. Libby was accused of compromising national security by revealing the identity of a CIA secret agent, Valerie Plame, because Ms. Plame's husband, former ambassador Joseph Wilson, had disputed President George W. Bush's claim in the 2003 State of the Union address that the British government had discovered that Iraq had tried to buy fissile uranium in Africa. It was alleged that, as a federal investigation proceeded, Scooter Libby lied under oath to protect his chief, Mr. Cheney.

The whole story was fishy from the start, as Ms. Plame was in fact outed by then Deputy Secretary of State Richard Armitage, to columnist Robert Novak, who confirmed the information about Plame and Wilson with presidential adviser Karl Rove and CIA public-affairs director Bill Harlow. In fact, the disclosure of Ms. Plame's identity didn't compromise national security, but in thrashing around to find someone to convict, special counsel Patrick Fitzgerald locked onto Libby, while really aiming at the vice president of the U.S., without regard to the facts. The entire case that followed depended on conflicting recollections of a four-year-old telephone call. Libby said he was surprised when NBC's Tim Russert asked him about Ms. Plame in a phone call in July 2003, and in November of that year Russert told the FBI he didn't recall mentioning Ms. Plame to Mr. Libby but that he might have done so. Nine

months later, Russert (who died in 2008) told Fitzgerald under oath that he could not have mentioned Plame to Libby.

In his demonic zeal to catch the big fish, Fitzgerald threw Judith Miller into jail for 85 days for taking the traditional journalistic position of refusing to reveal her sources. She was conditionally released and carefully prepared as a grand-jury and trial witness by Fitzgerald, in the widespread American technique of prosecutors intimidating and cajoling witnesses and shaping their testimony to their requirements for conviction. She was persuaded by Fitzgerald that a phrase from her reporter's notebook, "wife works in Bureau?," proved that Libby told her about Plame. Three years later, when she read Valerie Plame's memoir of the affair, and saw that Plame had worked for the State Department, she realized that the word "Bureau" applied to that department and was not a reference to the CIA (which does not use the word "bureau"). Fitzgerald had reviewed Plame's employment record and had taken sworn testimony from all relevant people. He was aware of the sequence of contacts in the controversy and knew that Armitage was in fact the source, but ignored his constitutional duty to act on exculpatory evidence. He misrepresented the facts to the judge and the jury, and he encouraged Judith Miller to misinterpret her own evidence in order to facilitate a conviction of Scooter Libby. Accurate testimony from Ms. Miller would have blown up most of the already unstable case against Libby, who was just a bridge to Cheney anyway; the vice president, Fitzgerald told the court, was "under a cloud," meaning one confected by Fitzgerald. Ms. Miller conducted her own research after the fact and it was confirmed to her by Libby's counsel that Fitzgerald, again in the usual corrupt functioning of the American plea-bargain system, had twice offered to drop all charges against Libby if he would inculpate the vice president. The big scalp leads to the big political or private-sector job, and to hell with the facts, the law, the public interest, and the rights of inconvenient people.

In indicting Mr. Libby on October 28, 2005, Fitzgerald, who knew the charges to be false, piously stated that “the truth is the engine of our judicial system.” I encountered Fitzgerald in my own trial, originally on 17 counts, including the usual farrago of absurdly extreme allegations (racketeering, money laundering, etc.), all of which counts were abandoned, rejected by jurors, or unanimously vacated by the U.S. Supreme Court (though a lower-court panel that the high court had excoriated but to which it remanded the vacated counts for the “assessment of the gravity of its errors” spuriously retrieved two counts; I did, however, have the pleasure of winning the largest libel suit in Canadian history against the authors of the original claims).

Fitzgerald’s underlings in the U.S. Attorney’s office in Chicago, sometimes under his direct supervision in person in court, were caught red-handed in lies and misrepresented evidence many times, never with any serious rebuke from the judge or supplementary advice to the jury to treat prosecution allegations with caution. It was clear that the entire case against me was a fraud, from the launch of the prosecution by Fitzgerald, in a blaze of accusatory publicity designed by him to poison the well of the jurors, following the ex parte seizure of the proceeds of the sale of my condo in New York on a false affidavit that the proceeds were “ill-gotten gains,” all to deny me the money to pay counsel’s retainer, which he knew from illegal telephone intercepts to be my intention. Fitzgerald’s stooges ended by calling their chief cooperating witness a perjurer, as if anyone but Fitzgerald had extorted and suborned the perjury and granted immunity for it.

Patrick Fitzgerald was a rotten apple infesting the Chicago courthouse, even by the subterranean norms of official ethics in Chicago and the almost totalitarian standards of a prosecution service that dwells in a world foreign to the Bill of Rights and secures convictions on 99.5 percent of prosecutions, 97 percent of those without trial. In any other

serious common-law jurisdiction, Fitzgerald and his ilk would be disbarred.

The egregious prosecution of seven-term U.S. senator Ted Stevens in 2008 was another monumental travesty based on prosecutorial withholding of exculpatory evidence, which was exposed shortly after his conviction and narrow defeat for re-election. The verdict was reversed and the prosecutors condemned, but not punished.

These two infamous cases incited the hopes of many that Congress would reintroduce prosecutors to the Bill of Rights. What happened to Libby and Stevens showed that no one is safe, no matter how exalted or how legally innocent. But nothing has happened, just continued obsequious truckling to the Nancy Grace script of choreographed baying for more convictions and longer sentences. (Not the least unflattering performance in the Libby affair was that of President George W. Bush, who rejected his vice president's request for a pardon for Libby, repeating like a parrot the same faith in the criminal-justice system he had professed as governor of Texas every time he contentedly confirmed an approaching execution.)

Another disturbing recent development in the saga of gonzo American prosecutors is New York State attorney general Eric Schneiderman's prosecution of the Evans Bank for violating consumer-protection regulations by not adequately making loans available in lower-income, largely minority, areas of Buffalo. These laws are sloppily written and are just pandering to specific income-level and ethnic voters, and enable opportunistic prosecutors to intensify their campaigns for higher office by pandering to targeted voting blocs and trying to superimpose affirmative action over commercial criteria on how banks treat their depositors' and shareholders' money. A competing bank chairman, not involved in any such case, Frank Hamlin of Canandaigua National Bank, wrote last month in a letter to his shareholders that he was "extremely suspicious of the arbitrary and capricious manner in which [prosecutors]

are abusing the legal system in order to further their own political and economic interests." Of the prosecution of Evans and another bank, he wrote that "the regulations are vague on explaining what conduct is actually prohibited. The media, of course, does the people no service by merely assuming these prosecutions are based in sound legal theory and fact . . . [unaware that the] legal system has mutated its focus from time-honored legal principle and justice to efficiency and political expediency. . . . The reason that 98 percent of prosecutions are settled and not taken to trial . . . has to do with a fundamental and reasonable lack of faith that our legal system is working properly." It is a brave stand for a community banker to take opposite an attorney general who seeks votes by abusive grandstanding in the Spitzer-Cuomo tradition (that propelled both of them to the governor's chair). Schneiderman and Fitzgerald are a matched pair.

At the custodial end of the system, Florida, which has the country's third-largest prison system, with 101,000 inmates and a $2.1 billion budget, following a crusading investigation by the *Miami Herald* into a doubling of violent deaths in the system over five years (and a larger-than-admitted share of violence in the state's approximately 340 inmate deaths in 2014), has engaged 66 agents to investigate the system and recruited a blue-ribbon commission to propose reforms. It has been notorious for years that the correctional officers kill prisoners and lie about it, redact reports to withhold facts, and call murders suicides or deaths from natural causes. Two incidents, one involving a wheelchair-bound woman who, though handcuffed, allegedly managed to hang herself with a bedsheet, having left a "suicide note" that was in fact a birthday greeting for her fiancé, and another of a man who expired when locked for two hours in a 180-degree burning shower, but was deemed to have died naturally, have galvanized opinion. There have been frequent firings and suspensions over particularly odious incidents in the Florida prison system, which was held

in effective trusteeship by federal courts for 20 years, up to the mid 1990s, because of conditions so inhuman they were deemed to violate the constitutional ban on cruel and unusual punishment.

The United States is afflicted by a plague of unjust prosecutions, almost automatic convictions, and often one-way tickets to a bloated, corrupt, and frequently barbarous correctional system. This is not what the founders and guardians of the sweet land of liberty intended.

To end on a more upbeat note, I commend to readers an excellent youth-adventure book written by a friend from prison (while I was awaiting the Supreme Court vacation of my surviving counts). It is *Shadowy Reflections*, by William G. Anderson, available on Amazon and elsewhere, and is a triumph of the will by a fine man who made the most of his unkind circumstances. Contemplations of the U.S. justice system inspire a spike of gratitude for the irrepressibility of the human spirit.

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