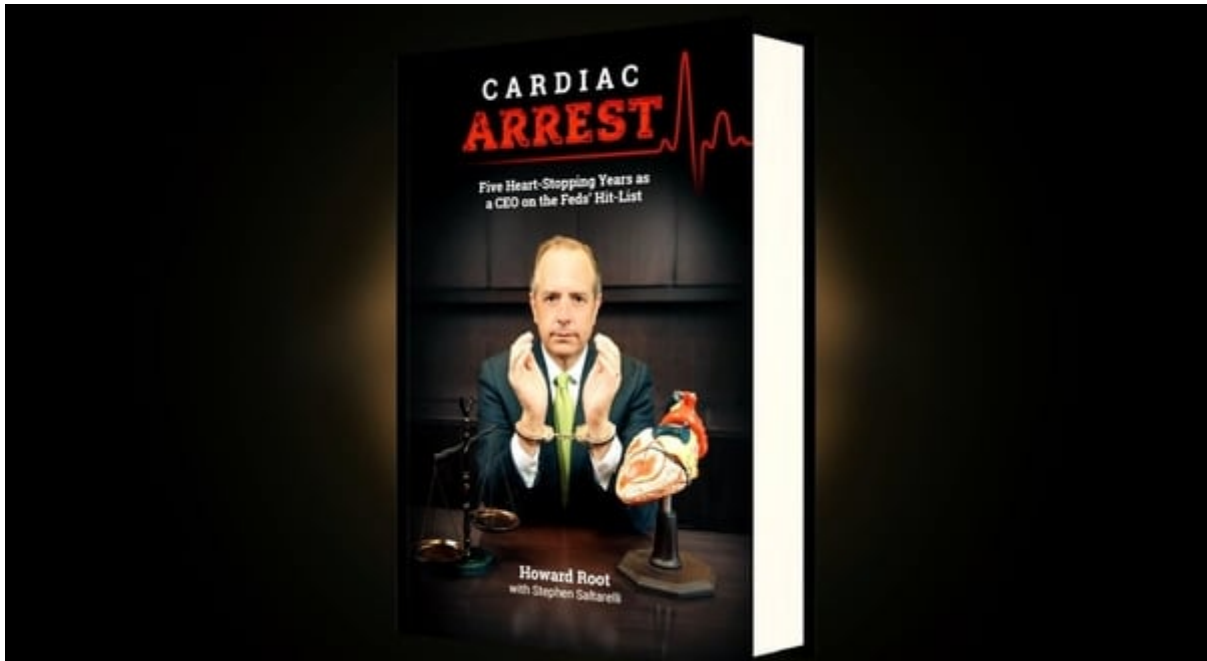


Oh the injustice

by Conrad Black



For those of us who have warred with the U.S. criminal justice system, Howard Root's *Cardiac Arrest* is a refreshing read, made a bit unworldly by the author's acquittal and other strokes of good fortune. This takes nothing from the credit due to him for fighting the evil American prosecutorial system as bravely and successfully as he did.

Root is clearly a courageous, intelligent, and capable executive, and an admirable person in every discernible respect. He is a self-made businessman, who built a company from scratch to be a successful small-cap New York stock Exchange listed company. He and his company were spuriously charged with the usual absurd profusion of criminal offenses, with no supporting evidence, based altogether on the ability and malicious delight of U.S. prosecutors to intimidate witnesses and extort inculpatory testimony with threats and promises of immunity from prosecution for perjury. Prosecutors know they can rely on friendly media, who presume everyone guilty, and a bench infested with ex-prosecutors, terrorizing

whomever happens into their cross-hairs. Mr. Root and his fine company were an unlucky and convenient token in their unending struggle against "pharma-fraud." Fortunately, the prosecutors misjudged their victim.

The author gives a witty and lively account of his five-year torture. He relates that U.S. federal prosecutions have a success rate of 91 per cent—and 97 per cent of these successes are settled without a trial. (My own research is that over 97 per cent of prosecutions are successful, and 97 per cent of these cases are settled without a trial.) Root was fortunate in his circumstances, apart from being saddled with a biased judge. He had a first-class compliance record; an unblemished prior career as a self-made corporate builder, innovator, and job-creator in Minnesota; full support from his officers and directors and employees; ludicrously excessive charges; incompetent and dishonest prosecutors; exceptionally fine counsel; and nothing the prosecutors could cite as evidence against him except by outrageous misrepresentations of a few technicalities. None of that would have made his ordeal easier to deal with for a man who had never had a legal problem more serious than a parking or speeding ticket.

His is an admirable attack on the broad failures of the system, and includes a number of useful suggestions for reform. Though Root does not elaborate on the real proportions of the American legal system's problems, he does generally refer to them. But the legally inexperienced reader might come away thinking that Root dealt with rogue prosecutors, and, even if the conviction rate in the country was high for criminal defendants, and criminal procedure was slanted to favor the prosecution, the system remained fundamentally grounded in the Constitution and Bill of Rights. It might serve the country imperfectly, perhaps dangerously so, but was not a completely out of control menace to every adult in the country (which it is).

Root dominated and managed his own counsel, something almost

impossible to do in the American system and almost always deeply resented. In a criminal case, American lawyers normally forget that they are in a service profession, put on airs of infallibility, and insist on absolute obedience from clients. The more they speak of seeking or receiving "instruction" from their client, the less likely they are to pay a moment's attention to what the client says. Root wisely sacked his first counsel for being obscenely expensive, uninterested in his case, and slovenly in preparation, and shuffled subsequent counsel according to his own judgment of who would do which task most efficiently. He rightly impugns the profession for being part of a 360-degree cartel where all do very well financially and may, in the best circumstances, care *something* about the client and whether they win or lose, but are worshipfully and self-importantly admiring members of their profession, happy to overlook its core of monopolistic abuse and inherent injustice.

The narrative makes its points well without being over-righteous and preachy. There are, perhaps, too many exact extracts from the court record where summaries would do, and a few too many instances of attempted confection of drama beyond what is plausible. But these are quibbles; it is a good yarn by a good writer, in relatively good and constructive humor about an outrageous assault on his company and himself without the least color of right. It is scandalous and shaming to the whole country that such a man had to spend five years on a knife-edge of whether he would be vindicated, having done nothing remotely illegal, or ruined, his company destroyed, hundreds of people thrown out of work, scores of millions of dollars of shareholders' value in the hands of hundreds of thousands of people scattered around the country vaporized, and he thrown into prison.

Root's company made a series of steadily more sophisticated products dealing with vascular problems. It had to conform to complicated Federal Drug Administration regulations about what

its products could do and for what conditions they could be used. The charge was of a very technical abuse of sale of a product treating varicose veins. The issue arose of whether there had been a misrepresentation by regional sales managers, and whether the head of the company had been complicit in it. The whole case was bunk; the product involved represented one tenth of one per cent of the value of the company's sales in the period covered, and no individual in the company made more than a few hundred dollars from the sales. The prosecutors had every reason to realize that their charges were nonsense, and they only built their indictment, as is the usual American practice, on the extortion of confessions of wrongdoing by a few junior individuals with promises of a free ride if they could help inculcate higher-ups, in this case their employer. In any other serious jurisdiction in the world prosecutors would be disbarred for this practice, but it is practically universal in the U.S.

The author well grasps the avarice and general ennui of almost everyone in the American legal system, of counsel who talk a bold game when they are seeking to be engaged, but become inattentive and pass files down to juniors afterwards, who, in the event of success, pat themselves on the back, and in the event of reversal, simply blame the poor case their client gave them, but send out their invoices with undiminished energy and greed regardless. He sees the legal profession swaddled in pious claptrap about the rule of law, the disinterested scales of justice, and so forth, but riddled with hacks, hucksters, incompetents, and unethical and decayed servitors. He thoughtfully proposes a number of reforms: elimination of over-strict imputation of liability in some crimes, review by an independent and unbiased counsel before prosecution, prohibition of prosecutorial publicity before the verdict (a notorious and scandalous abuse particular to the American system), real punishment of prosecutorial misconduct, recovery of defendant's legal expenses in the event of malicious, frivolous, and vexatious prosecution, and a cap on

the pay-offs to whistle-blowers.

It's a commendable effort, but, in the circumstances, a very mild reproof. The Fifth Amendment creates the grand jury as an assurance against capricious or insufficiently researched prosecutions, but it is horribly abused. Grand juries today are a mockery of justice, a rubber stamp for prosecutors. They should admit representations from suspects and impose a reasonable standard of probability that a charge may be justified. The whistleblower system is essentially a regime of denunciation akin to, if not a replication of, the justice practiced by totalitarian states, and it requires much more profound overhaul than what Root proposes. In Senator Ted Stevens's case, where false evidence was knowingly employed to convict an eminent U.S. senator and end his career, the courts refused to punish the prosecutors (one committed suicide). In *Connick v. Thompson* (2011), where someone had spent fourteen years on death row although prosecutors knew, from suppressed DNA evidence, that he was innocent, an award of a million dollars for each year on death row was overturned by the U.S. Supreme Court and the aggrieved accused awarded nothing. The confirmation of absolute power in prosecutors, insusceptible to review or punishment for illegal violation of the rights of suspects and the accused, assures horrible abuses.

The Fifth, Sixth, and Eighth Amendment guarantees of due process, no seizure of property without just compensation, an impartial jury, prompt justice, access to counsel (which courts have interpreted as counsel of choice), and reasonable bail, have all been put to the shredder. The greatest single problem in the American legal system is the hideous deformation of the plea bargain, where prosecutors can extort almost anything from witnesses with threats of prosecution and guarantees of immunity to perjury charges if they cooperate. Prosecutors are not responsible for their actions even when, as in Mr. Root's case, they are exposed as frauds. The

conviction rate of over 90 per cent in the U.S., 97 per cent without a trial, compares to 61 per cent in Canada and 50 per cent in the United Kingdom, with only about 20 per cent without trial. The United States has six to twelve times as many incarcerated people per capita as comparable, prosperous democracies: Australia, Canada, France, Germany, Japan, and the United Kingdom. The United States has five per cent of the world's population and 25 per cent of its incarcerated people. The whole legal system is a gigantic and corrupt cartel, sustained by endless invocations of the land of the free and the rule of law. It is the supreme irony of current times that the world owes the United States homage and gratitude for the near-global triumph of democracy and the free market, while the United States is not now one of the world's better functioning democracies.

Cardiac Arrest is an engaging, amusing, literate, and gripping read, well-written and carefully assembled, by a doughty and admirable author. But it barely lifts the rock on the ghastly infirmity and horrifying oppressions of the corrupt American legal system and its despotic prosecutocracy, and the bloated carceral nether region that it has created and feeds.

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