

THE BEST DEFENSE

**ALAN M.
DERSHOWITZ**



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Introduction

A conspiracy of silence shrouds the American justice system. Most insiders—lawyers and judges—won't talk. Most outsiders—law professors and journalists—don't really know. Few of those who are outside the club ever get close enough to the day-to-day operations of the system to appreciate how it really works.

Some insiders won't talk because they have a stake in not exposing the dark underside of the legal profession. Others are afraid of reprisals. Indeed, the formal rules governing the legal profession discourage lawyers from publicly criticizing their "professional brethren," and encourage them to promote "public confidence in our courts" and in "the honor of our profession." Equally important is the informal understanding among insiders that they should criticize only within the club and not in public.

This dichotomy between insiders who know but won't say and outsiders who will say but don't know has deprived the public of a realistic assessment of the American justice system. In this book I try to break down that dichotomy. Although I am a law professor, I have been litigating cases at every level of our justice system for more than a decade. Because I do not rely on my legal cases for a living, I have less fear of reprisal than do most practicing lawyers. Because I insist that my students approach the law with rigorous honesty, I can hardly remain silent about the dishonesty I encounter in the real world of justice.

I was an outsider during the first years of my legal career. I had seen the system only from the perspective of its highest courts and its most elite institutions of learning. After graduation from Yale Law School, I was privileged to serve as law clerk to two of the finest and most humane judges in American history: Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia and Associate Justice Arthur Goldberg of the United States Supreme Court.

get off because of some governmental misconduct—a “technicality.” In such cases, the law demands acquittal. As Justice Oliver Wendell Holmes put it: “It is a less evil that some criminals should escape than that the government should play an ignoble role.” Although prosecutors are sworn to uphold this law, they often seek convictions in cases based on illegally obtained evidence. In such cases the prosecutors are not seeking justice. They, like the defendant who wants an acquittal, are seeking only one thing: to win.

I explain why most prosecutors (and defense attorneys) are as concerned about their won-lost ratio as any major-league pitcher. Their concern helps to explain why plea bargaining is so widespread: both the prosecutor and the defense attorney can add a “win” to their record—only the public sometimes loses, but nobody keeps a won-lost record for them. I believe that plea bargaining is one of the most destructive and least justifiable institutions in the American criminal justice system.

Well, you may think, at least judges are interested in justice. They have no stake in any particular result in a given case. Would that it were so! Most judges have little interest in justice. They, too, have their own agenda: many see themselves as part of the system of law enforcement, as adjuncts to the police and prosecutors. They want to make sure that criminals are convicted and sent away. Even if the law requires acquittal, many judges will do everything within their lawful power—and some things beyond it—to convict defendants who they believe should be in jail. Judges are also interested in the efficiency of the system, in making certain that there are no backlogs or traffic jams in the courts. Most important, they do not want their decisions to be reversed by a higher court. We will see in this book the lengths to which judges sometimes go to protect against reversals of “their” convictions; they regard a reversal as a personal and professional affront, even when the reversal is essential to achieving justice.

Black Robes, White Lies

I say some critical things about judges—from the lowliest magistrates to the Chief Justice of the United States. (I try to be as critical of judges who have ruled in favor of my clients as of those who have ruled against them, but I doubt that I managed to eliminate all the sour grapes from the bunch.) Indeed, one working title for this book was “Black Robes, White Lies.” That would have been appropriate, because lying, distortion, and other forms of intellectual dishonesty are endemic among judges. In my twenty years of experience in the practice of law, I have been more disappointed by judges than by any other participants in the criminal justice system. That

is partly because I, like so many others, expected so much of these robed embodiments of the law. When I began to practice, I naïvely assumed that other judges would be as honest in their approach to the law, as sensitive to constitutional rights, as concerned about human beings as were the two judges for whom I had clerked. I have been keenly disappointed. Beneath the robes of many judges, I have seen corruption, incompetence, bias, laziness, meanness of spirit, and plain ordinary stupidity. I have also seen dedication, honesty, hard work, and kindness—but that is the least to which we are entitled from our judges. If I emphasize the negative side of the judiciary, that is because it is more noteworthy than the positive, and also because it threatens to corrupt the integrity of the American legal process. I emphasize the negative as well because most lawyers overemphasize the positive. Non-lawyers are entitled to know the “whole truth” about our legal system, not just the part the legal profession justly boasts about on Law Day.

Rough Justice

In our adversary system of criminal law, the participants—criminal defendant, defense lawyer, prosecutor, police, and judge—seek to maximize their own personal and professional interests. Although nobody in the system seems interested in abstract justice, the irony is that the net result may well be a kind of rough justice.

Despite the prevalence of dishonesty, I have learned that the American system of criminal justice generally produces fairly accurate results: few defendants who are innocent are convicted. Some who are guilty are, of course, acquitted. And a large number are never brought to trial. But that is part of a system that boasts “better ten guilty go free than even one innocent be wrongly convicted.” The corruption lies not so much in the *results* of the justice system as in its *processes*.

Most appraisals of the American criminal justice system tend to be polemical: supporters boast that the system is honest and fair and produces accurate results; critics complain that the system is corrupt and unfair and produces inaccurate results. Throughout this book I try to show that the issues are not that simple or clear-cut. The American criminal justice system *is* corrupt to its core: it depends on a pervasive dishonesty by its participants. It *is* unfair: it discriminates against the poor, the uneducated, the members of minority groups. But it is *not* grossly inaccurate: large numbers of innocent defendants do not populate our prisons. Nor can our system fairly be characterized as “repressive.” There is more freedom to speak, write, organize, and advocate in America today than there is or has