

## Review of *Usual Cruelty: The Complicity of Lawyers in the Criminal Justice System* by Alec Karakatsanis

MICHAEL MELTSNER\*

---

A polemic is “an aggressive attack on or refutation of the opinions or principles of another” or “the art or practice of disputation or controversy.”<sup>1</sup> Perhaps because the origins of the word are from the Greek hostile or warlike, polemics are often regarded as negative. In truth, a strong, “aggressive attack” is only negative if it is your ox that is gored. *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System* convincingly trades in polemical outrage. Three essays of only 161 pages (and 64 of notes; the volume has no index) bring the reader’s blood to the boiling point with compelling examples of the systematic perfidy of lawyers, judges, and police and analysis of the choices that have brought us the senseless incarceration of millions.<sup>2</sup>

The allegations in this indictment are not new—not that this detracts from their force—and recently we have seen a few green shoots suggesting reforms are on the way. In the final analysis, however, it is the system-normalizing impact of half-baked, halfway, over touted political compromises in the face of a record of blindness to the results of what the author sarcastically calls “law enforcement” that constitute the gravamen of his charge: The legal profession in its many forms has brought about this usual cruelty, though, of course, lawyer behavior must be understood as reflecting the social and economic values of the society in which lawyers operate.

---

\* George J. & Kathleen Waters Matthews Distinguished University Professor of Law, Northeastern University School of Law. The author was first assistant counsel to the NAACP Legal Defense Fund in the 1960s, co-founded the clinical program at Columbia Law School, and served as the dean of Northeastern University School of Law from 1979 to 1984. This review was accepted by the Review in 2020; publication has been delayed by the pandemic.

<sup>1</sup> *Polemic*, MERRIAM-WEBSTER’S DICTIONARY, <https://perma.cc/3BJJ-5CY6> (last visited Oct. 2, 2021).

<sup>2</sup> ALEC KARAKATSANIS, *USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM* (2019).

Knowing, for example, something of the five-decade struggle to rid the criminal process of money bail—a system that not only empowers private businesses to allow those with money to go free and those who are poor to remain jailed, thus predictably facilitating widespread loss of employment, separation of families, and coerced guilty pleas—I am put in mind of the comment of an English Lord of the 1840s who was sick of hearing about the need for reform—“Reform Sir, reform! I’ve heard enough about reform. Things are bad enough as they are.”<sup>3</sup>

In 1966, when I was the in-house director (for the NAACP Legal Defense Fund) of the criminal law program of the National Office of the Rights of the Indigent, we managed in a matter of months against the odds to bring a constitutional challenge to the money bail system on equal protection grounds all the way to the Supreme Court. The Court denied certiorari, Justice Douglas dissenting. Ironically, the New York Court of appeals decision we appealed did not really reject our arguments about discrimination but instead passed the buck to the legislature, where it was ignored. In a moment of candor, however, the Court opined that even if our constitutional challenge was largely successful, the defendant might still not deserve release because he was charged with “a vicious crime.” In fact, the offense was hardly that, but, at any rate, despite the charge under the money bail system then in force, all Mr. Gonzalez needed to walk the streets until trial was a few bucks and the complicity of a bail bondsmen.<sup>4</sup>

Too long a sacrifice

Can make a stone of the heart.

O when may it suffice?

That is Heaven’s part, our part

To murmur name upon name[.]<sup>5</sup>

Karakatsanis does not “murmur” —he calls out. One group of reformers he labels “punishment bureaucrats”<sup>6</sup> include big names usually thought to be open to progressive change. But their good works are not referenced in *Usual Cruelty*. Preet Bharara, Eric Holder, Sally Yates, and Kamala Harris are former prosecutors who have “devoted a career to mass human caging.”<sup>7</sup> Bharara became a drug prosecutor, “a job devoted to putting human beings

<sup>3</sup> Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 335 (1982).

<sup>4</sup> The story of *People ex rel. Gonzalez v. Warden*, 21 N.Y.2d 18 (1967) is told in my memoir *WITH PASSION: AN ACTIVIST LAWYER’S LIFE* 229 (2017).

<sup>5</sup> William Butler Yeats, “Easter, 1916,” POETRY FOUND., <https://www.poetryfoundation.org/poems/43289/easter-1916> (last visited Oct. 2, 2021).

<sup>6</sup> KARAKATSANIS, *supra* note 2, at 74.

<sup>7</sup> KARAKATSANIS, *supra* note 2, at 74.

in prison cells” and his Wall Street prosecutions targeted the “impoverished.”<sup>8</sup> Holder “pioneered the now-ubiquitous strategy of police stopping young black men based on pretextual reasons in order to search their bodies.”<sup>9</sup> Sally Yates “overruled or refused to act on the Pardon Office’s recommendation for clemency.”<sup>10</sup> She rejected the Inspector General’s “recommendat[i]ons] for greater compassionate release” of the terminally ill.<sup>11</sup> Kamala Harris used the “cash bail system in California to illegally jail thousands of impoverished people.”<sup>12</sup> She “laughed about sending ‘gang’ and ‘homicide’ prosecutors to threaten poor mothers of truant children.”<sup>13</sup>

You can tell Karakatsanis takes no prisoners. A similar reaction applies even to the recently elected wave of urban “progressive prosecutors” who ran as reformers. His reaction: “None of them have reported reducing prosecutions by more than a few percentage points, and most of them have not reported any reductions at all.”<sup>14</sup> As a former public defender in Alabama and Washington DC and now founder of a human rights NGO he calls the Civil Rights Corps, Karakatsanis is not looking for a job in the next administration. But he claims that his efforts are forward looking.

Examples of cruelty point the way to change. Each of these prosecutors, as well as myriad officials who have joined the bandwagon, can be counted on to support reform, but reform as it has been understood just will not do. Only big changes are acceptable because they are necessary for any semblance of justice. The systems of criminal justice are so bad—run by a “punishment bureaucracy”—they need to be totally dismantled.<sup>15</sup> It is notable that in these pages, he makes little effort to include positive aspects of the reformer DAs’ criminal justice records. The most he can summon is to say:

To their credit, many with whom I have interacted genuinely believe that reforms need to be made. . . . But almost uniformly, they lack what is necessary for big change: critical analysis of structural problems, genuine self-reflection and organized political support from groups powerful enough to hold them accountable.<sup>16</sup>

Back in the day, I argued a criminal case before the New York Court of

---

<sup>8</sup> KARAKATSANIS, *supra* note 2, at 74.

<sup>9</sup> KARAKATSANIS, *supra* note 2, at 76.

<sup>10</sup> KARAKATSANIS, *supra* note 2, at 77.

<sup>11</sup> KARAKATSANIS, *supra* note 2, at 76.

<sup>12</sup> KARAKATSANIS, *supra* note 2, at 77.

<sup>13</sup> KARAKATSANIS, *supra* note 2, at 77.

<sup>14</sup> KARAKATSANIS, *supra* note 2, at 87.

<sup>15</sup> KARAKATSANIS, *supra* note 2, at 13.

<sup>16</sup> KARAKATSANIS, *supra* note 2, at 80.

Appeals in Albany. The successful prosecution was handled by lawyers from the New York County District Attorney's office headed by its long-time chief Frank Hogan. The issue before the Court was technical—whether the jury had been correctly instructed about a lesser included offense. It had nothing to do with the violence *vel non* of the crime, yet the DA's brief began with a full description of the charged offense, implying in quite misleading but perhaps effective fashion that my client was a serious offender. When I asked the young prosecutor handling the case why the brief had gone off in this "poisoning the well" direction, he told me candidly it was office policy to always begin an appellate brief regardless of the issue with such a recitation.

American lawyers, prosecutors most of all, are so embedded in the values of the adversary system they rarely question the behavior it calls forth. If you need a helpful metaphor, just watch a football game. As Vince Lombardi put it, "Winning is not a sometime thing, it is an all the time thing." But while prosecutors hold enormous power, Karakatsanis's indictment encompasses all the players in law enforcement—legislators, police, lower court judges, Supreme Court justices, government administrators, and even defenders. The insensitivity, the cruelty, is rampant.

The Alabama woman sitting with her children when police entered was arrested in her home, put in metal restraints, and jailed when too poor to pay old traffic tickets. She "sat out" her debts in prison at the rate of fifty dollars a day, increased to seventy-five if she was lucky enough to be selected to clean the bathrooms and jail walls.<sup>17</sup>

The Louisiana man was jailed for three years because he could not meet a five-hundred-dollar bond "while he waited for the state to run lab tests" on a small quantity of drugs.<sup>18</sup>

The children were restrained in metal chains "including their hands, feet, and waists" as they awaited hearings on charges of juvenile delinquency in the District of Columbia,<sup>19</sup> a venue where the incarceration rate for Black Americans is nineteen times that of white people.<sup>20</sup>

A federal government that finally moderated the differential treatment between sentences for powdered and crack cocaine (a good thing) but could not bring itself to either eliminate the entire difference (one totally based on racial usage disparity) or make the change retroactive, thus continuing the

---

<sup>17</sup> KARAKATSANIS, *supra* note 2, at 14.

<sup>18</sup> KARAKATSANIS, *supra* note 2, at 4.

<sup>19</sup> KARAKATSANIS, *supra* note 2, at 7.

<sup>20</sup> KARAKATSANIS, *supra* note 2, at 15.

incarceration of thousands (a morally reprehensible one).<sup>21</sup>

The absurdity of three strike laws imprisoning for life after a trivial theft. The infamous life sentence for stealing golf clubs.<sup>22</sup>

The lack of effective judicial oversight over prosecutorial discretion to charge and the common and almost never challenged practice of imposing greater prison sentences on defendants who refuse to plead guilty, a consequence of which is to legally coerce waivers of the right to a trial.

These are just a very few of the horrific examples marshalled in these slim pages, examples I even hesitate to repeat because they might suggest to the untutored reader that they are a list of *unusual* occurrences, but as Karakatsanis puts it to us in his apt title they are all too *usual*. The litany of cruelties is so extensive, so present to anyone who cares to look into the matter, as to leave us as the author puts it—desensitized. In short, numb.

While the legal profession is “complicit” in adopting and maintaining the system from debtors’ prisons to mass incarceration, dismantling a “mammoth system” will take a social movement.<sup>23</sup>

What to do?

Here the author struggles with replacing well-meaning but limited efforts at change with his goal of transformation. It is an approach to transcend present political forces that you might think doomed to failure. To begin with, Karakatsanis insists, we must recognize that the problems of criminal justice do not exist in a “silo”; they are closely linked to a whole range of obstacles and disparities—white supremacy, access to health care and education, etc.<sup>24</sup> Sending additional resources to institutional actors who operate with punishment and incarceration in mind will not “shift centers of power and control.”<sup>25</sup> Indeed, fewer resources should go to the “punishment bureaucracy.” These resources should go toward “dismantling incarceration and . . . alternative community-based wellness” programs.<sup>26</sup>

With these changes in present approaches, Karakatsanis provides a “small list” of the sort of interventions that he favors and which presumably serve as models for future change agents—worker owned cooperatives, stopping new jail construction, reserving marijuana licenses for members of communities previously targeted for drug arrests, affordable housing, “reparations for police torture,” restorative justice approaches “when a person harms another person,” individual supportive alternatives to the

---

<sup>21</sup> KARAKATSANIS, *supra* note 2, at 26–7.

<sup>22</sup> KARAKATSANIS, *supra* note 2, at 104.

<sup>23</sup> KARAKATSANIS, *supra* note 2, at 92.

<sup>24</sup> KARAKATSANIS, *supra* note 2, at 93.

<sup>25</sup> KARAKATSANIS, *supra* note 2, at 94.

<sup>26</sup> See KARAKATSANIS, *supra* note 2, at 95–6.

money bail system, cultural programs to build personal and community strength for those “who are survivors of human caging.”<sup>27</sup>

I think most observers, even progressive observers who share his outrage at what the justice system looks like today, will be skeptical that we are likely to arrive at any version of the new world Karakatsanis has sketched. One lack, an intentional one I assume, in the *Usual Cruelty* narrative is the absence of any serious political analysis of the social, political, and financial obstacles to change that transcends the reform efforts he finds utterly useless. Not all the forces that would be arrayed against his agenda reflect right wing extremists and bigots. Millions believe, for example, they need a muscular police presence for their safety, that there are criminals who should be incarcerated for long periods, that law enforcement players—politicians and judges as well as police and prosecutors—need a rebalanced, more evidence-based, sensitive, and humane approach rather than wholesale efforts to dismantle a complex, contested, and troubled set of still necessary institutions.

The path ahead requires courage and ambition. Although we are currently awash in statements condemning racism from public officials and corporate CEOs, the thousands that have demonstrated in the streets are waiting to gauge the follow up. This time white Americans seem to get that racism is a matter for them to deal with also. But changes in hearts must follow; new laws are necessary but not sufficient. The nation’s record here is at best mixed. As the author Heli Meltsner, who happens to be my wife, puts it, “complacency is complicity.” And the forces of resistance are yet to be fully mobilized.<sup>28</sup> The trail ahead is indistinct, but, heh, who knows what will happen? This is America.

---

<sup>27</sup> KARAKATSANIS, *supra* note 2, at 96–8.

<sup>28</sup> A few examples of what we can expect: Nicholas Bogel-Burroughs & Jack Healy, *Minnesota Lawmakers Vowed Police Reform. They Couldn’t Agree on Any.*, N.Y. TIMES (June 20, 2020), <https://perma.cc/YQQ9-RE8W>; Jan Ransom, *After Rift Over Protests, N.Y.P.D. Pulls Out of Prosecutors’ Offices*, N.Y. TIMES. (June 15, 2020), <https://perma.cc/LQS8-K348>; Joan Vennoch, *Is Beacon Hill Serious About Police Reform? The Mayor of Somerville Has His Doubts*, BOS. GLOBE, <https://perma.cc/3JXR-DM8K> (last updated June 15, 2020, 5:06 PM).