Broken Scales: Reflections on Justice

By Joel Cohen. ABA Book Publishing, 288 pages, $29.95

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The story is told of the mayor from the fabled village of Chelm, in which dwelled all of the world's fools. The mayor set himself to the task of determining what kind of prison should be built in Chelm and traveled to see what others had done. When he returned, he told the Chelmites of his travels and his conclusion: "After speaking to many persons in many prisons, I have been told by half of those that they are guilty, and the other half say they are innocent, so here in Chelm we should build two prisons—one for those who are guilty, and one for those who are innocent."

We would like to think that our jurisprudence was not developed in Chelm. In the United States, we believe that those who commit crimes should be found guilty, and those who do not commit crimes should not be charged at all. Unfortunately, that is not the case. Joel Cohen, who practices law at the venerable Stroock law firm, in his latest book, "Broken Scales: Reflections on Injustice," gives us an insight of just how tragically flawed our justice system is.

Cohen brings us to this observation of injustice not as a theorist or academician, but through narrative and the words of those who suffered or who were party to perpetrating those injustices. We all have read of prosecutors who have abused their authority and ignored the admonition of then-attorney general, later Supreme Court Justice, Robert Jackson uttered 75 years ago: "The prosecutor has more control over life, liberty, and reputation than any other person in America." Unfortunately, prosecutors seem unaware, as "Broken Scales" illustrates, that even the filing of a charge can do serious damage to a person's life and the lives of those close to him. The book reminds us that, although a prosecutor has an obligation to use every legitimate means to bring about a just conviction, he has an even greater obligation to refrain from using improper methods calculated to produce a wrongful one.

In reading Joel Cohen's interviews, we can sense the anger and despair of those who have been subjected to unjust treatment by a system which prides itself on fair and equal justice free from political or popular influence. This is particularly relevant when we hear the solutions to inner-city violence by our "Law and Order" president. But in order for our justice system to work, it must function independently, free from the passions of the moment and free from the passions of the crowd. Cohen writes of the case of Chief Justice Marsha Ternus, of Iowa's Supreme Court. She was rejected in a public vote led by "Iowa For Freedom"—not retained in office because she was part of her court's unanimous but unpopular decision regarding gay marriage. As she noted: "when you vote against judges because they make an unpopular decision, you are sending a message. You are telling judges *** [to] look to public opinion polls or the Bible rather than to the Iowa Constitution."

And then there is the case of Steven Pagones. In "Broken Scales," Pagones reveals to the reader the pain caused by the false accusations of Al Sharpton and his minions in the Tawana Brawley case.
Instead of the justice system protecting him from vicious public denunciation, he was put in the position of having to prove his innocence, something which no one should have to do. Again, the clamoring of the mob clouded the justice system. Whether it be "Iowa For Freedom" exerting outside influence, or Al Sharpton, or President Trump, the message is clear: the justice system must not be influenced by the passions of the moment or the passions of the crowd.

John Adams successfully defended British soldiers who, arrested after the Boston Massacre (the "Bloody Massacre") were accused by the mob of being massacristers and murderers. In doing so, his summation reminded the jury: [the law] is deaf, deaf as an adder, to the clamors of the populace.

As "Broken Scales" illustrates, and as we should have learned: public pressure, a mob howling for "No Justice, No Peace," and populist rhetoric demanding convictions only distorts the justice system. The burden of proving a defendant's guilt beyond a reasonable doubt has been the prosecutor's burden since that Boston Massacre trial; however, it was not until 1970 that the U.S. Supreme Court was to embrace this standard as a constitutional imperative. Its development was considered as a fair way to express the belief that only when a jury is very certain of a defendant's guilt should they convict. As the Supreme Court expressed it in 1979: "In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring ... that the state prove the guilt of an accused beyond a reasonable doubt."

Joel Cohen has done a masterful job of synthesizing some of the reasons why the scales of justice are broken. We may never see the day when public opinion, political ambition, or dishonest populism will take its thumb off the scales of justice; but Joel Cohen's "Broken Scales" bring us a long way toward that goal.

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