Take a law professor, remove him from the ivory tower of academe, and place him in the grim, grimy, compromised world of day-to-day criminal justice.

Sounds like an idea for a new reality show, doesn’t it? Well, in a sense it is, because that is the experience of Gary Lowenthal, erstwhile criminal law professor at ASU, who took a leave of absence to be a line prosecutor in the Maricopa County Attorney’s Office. His reality is the fascinating subject of this new book. [Full disclosure I have taught with the author and have spoken with him about my experiences in the criminal justice system. This has led to an acknowledgment in this reviewed book.]

How is criminal justice practiced? What are the day-to-day decisions that go into charging, plea offers, trials and sentencing? After years of teaching the subject, Lowenthal felt a need to explore what really went on in a large urban criminal justice system. His past experience as a public defender, decades before, had grown stale, and so he wanted to see firsthand what it meant in practice to do justice.

The Maricopa County Attorney gave him the opportunity, only requiring that Lowenthal go through training and that he adhere to office charging and sentencing policies. His work is a powerful account of our criminal system, what works and what more frequently does not.

Lowenthal plunges into the rough-and-tumble of big-city prosecutions. He chronicles the difficult decisions that urban underfunded, understaffed prosecutors—and really all public agencies involved in criminal justice—face daily. Lowenthal’s experience is not a fictionalized, neat and tidy, made-for-television account. As such, it is more like Law & Disorder. Indeed, it is a southwestern version of such insightful books as Homicide or The Corner, but told from the vantage point of a prosecutor rather than the police.

His tour of duty as a prosecutor meant that he covered a wide array of cases in various courts. He was in justice court and superior court; he was involved in gang prosecutions and major felonies. He soon was introduced to the tremendous discretion, and the enormous power, that prosecutors wield. What cases are charged, and why? Who is let go with a warning, and who is labeled a habitual criminal and prosecuted with the full weight of the law? Frequently overlooked in other accounts is the imperative to ratchet-up charges so as to force plea bargaining. Pleading—not trial—is the imperative in the system.

In this book, the author uses one case to frame the book and trace the course of a prosecution from crime to investigation, to charging, and trial. The case is an aggravated assault/kidnapping, one that is low-profile except for the victim and defendant. That was a good choice. Books that focus on crimes of the century wear thin (who reads the spate of O. J. Simpson accounts anymore?). Big cases make bad books. The typical case—with the typical problems of witness identification, forensic evidence, tensions between police and prosecutor, and defendant and defense counsel—has a resonance that is found here.

Between chapters that trace the case, Lowenthal weaves in his experiences in the many other matters he handles, commenting on the system, the process and the players. He gives vignettes of lawyers toiling in the criminal courts—primarily prosecutors, but also defense counsel and judges. This leads him, in a chapter titled “Rancor’s Seeds,” to lament that the camaraderie that one would expect between opposing counsel is gone: Each side seems to revile the other.

Lowenthal, of course, understands that in “tribes” there is always an us-against-them mentality, and the units of prosecutors and defense counsel can be seen as warring bunches. A healthy distrust between adversaries is a good thing; it is, after all, an adversarial system. In most cases, prosecutors and defense counsel usually do not socialize, buy drinks for each other after hard-fought contests or slap each other on the back.

On the other hand, criminal justice is a “closed system” in the sense that the same counsel, and the same agencies, face each other on a regular basis. At times familiarity may breed contempt, but it also enforces a professionalism and regulates behavior. All are aware that reputations are made and broken with how one acts. Though there is too much destructive animosity, there is
also grudging respect and even some interchange between offices; lawyers do go to the other side. If the antipathy were such that there was true despising, there would not be such side-shifting.

As made clear in Down & Dirty Justice, and in the profiled case, punishment is what drives the charging and ultimately plea bargaining decisions. Not surprisingly, plea bargaining is the norm. The reason is that most defendants are guilty, but the ability to reduce a sentence by two-thirds or more through a plea, which is controlled by prosecutors, is an awesome power. Discretion has shifted over the past generation from the courts to the prosecutors. They have become, in a sense, judge and jury when it comes to mandatory sentencing. It is the prosecutor, more than the judge, who determines “justice.”

The legislature, in shifting such discretion to prosecutors, has itself become unaccountable for the harsh penalties it metes out. This has led recently to calls for rethinking the “lock'-em-up” policies that resulted in the highest per capita incarceration rate of any country.

The County Attorney, of course, is aware of the criminal trends, and there are a number of innovative programs both for drug abuse and for minor crimes. Nonetheless, strict policies are drawn and enforced, and this has led, in this state and throughout the country, to a bulging prison system of many who may not need to be incarcerated for such lengths of time.

It is engaging to watch the professor-turned-prosecutor find that the certainties of a classroom become the uncertainties of a courtroom. Lowenthal makes no overarching recommendation and espouses no grand theories. What he wants us to do is suggested subtly and reasonably throughout the book. He wants us to start taking individual steps, however small, in the pursuit of the ideals of the justice.

It is both a small request, and an overwhelming one. It is one, though, that we cannot ignore. Most of us cannot take leave from our practice to work as a prosecutor or defense counsel. If we could, the practice of law might be the better for it. Lowenthal had that opportunity, and, through this book, we can share it. It is a journey worth taking.

Lowenthal’s time spent as a prosecutor, it seems, left him depressed rather than exhilarated. Lowenthal feels the system is in crisis, and the book certainly supports this fact. He recounts the efforts of the courts’ administration to “move cases” and to deny continuances, despite the fact that the system depends on the delays to manage the deluge. Prosecutors and public defenders are overworked, underpaid and unappreciated.

Nonetheless, many of the prosecutors and defense counsel who enter criminal law do so because what they do matters. Their efforts make a real difference. Portraits that Lowenthal paints of strategies and decisions stick in the mind. There is sloppiness, there is indifference, there is underhandedness, but there is also some fine lawyering and creative advocacy. The reader is left with an impression, despite the bleakness of the book’s subtitle, that there are some fine public servants.

There are some questions that arise in the book. It is clear that the burden of incarceration falls heavily upon minorities. It is surprising, therefore, that race is not more prominent in the book. Maricopa County is a diverse urban mix, and the assumptions of race and ethnicity surely play a role in criminal justice. Yet race as it is played out in the criminal justice system, from investigation through trial and sentencing, largely goes unmentioned. Clearly race is a factor, and Lowenthal certainly must have encountered it in the offices, among courts and juries, and even in the assumptions brought to one’s cases. But little is said.

Lowenthal does a nice job of comparing and contrasting his view as a professor with the realities of the criminal justice system. He is wonderful at discussing the differences between teaching probable cause and the reality on the streets. Yet at times we want more. For example, Lowenthal as prosecutor picks a jury that he is happy with because it is older and middle-class. However, would Lowenthal the professor and former public defender want a more representative one, with more blue-collar or underrepresented individuals? Indeed, the jury system can be said to be skewed, with defendants not facing juries of their peers. Clearly, Lowenthal, as prosecutor, wants to win. The tension in his roles is implicit, but not explicitly addressed.

This account does not deal with the death penalty. Lowenthal’s decision to sidestep this ultimate penalty is a good one. Because “death is different,” capital cases tend to be treated on a whole different track. They are, however, very few in number when compared with the overall case load. It is a wise choice by Lowenthal to focus on non-capital matters. It would have been interesting, though, to have him detail attitudes that he encountered.

The author ends his book with a desperate plea for us to do better. He calls for us as a profession and as a society to become engaged with criminal justice and not to treat it as an underworld from which we turn our backs.

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