Cultures of Impunity

BY PAUL STARR

It is sometimes hard for us to recognize problems in our own society that we can readily identify abroad. International human rights and anti-corruption reformers talk about "cultures of impunity" in Third World countries where murder, the looting of economic resources, and other crimes by the powerful regularly go unpunished. The police, high government officials, and their cronies in the private sector not only abuse their power; they do so knowing that they will never be held to account and that their victims know that, too. In such situations, establishing the rule of law involves far more than instituting formal legal procedures. It requires transforming everyday expectations about equality and demonstrating in practice that the powerful can and will be brought to justice.

One of the themes running through our own recent history is that cultures of impunity are also an American problem. Crimes in the financial and corporate worlds with devastating economic repercussions have been met with slaps on the wrist. The police have not been held to account for unjustified killings in minority communities. From churches and the military to college campuses, sexual assault has long been hushed up. Often it's not just the original crimes but the cover-ups that raise questions about the institutions and implicate their leadership.

In the past, we probably would not have known about many of the episodes that have recently exploded into scandals thanks in some cases to new technology (phones with video), to courageous victims of abuse willing to step forward, and to communities no longer willing to suffer in silence. The disclosures and protests are a positive sign. But we have a long way to go in ending impunity and assuring that the law applies to everyone.

Changing settled expectations about exemptions from legal accountability is no simple matter. In all these areas, there is a tension between justice for individuals and reform of the institutions.

On the one hand, when individuals violate criminal laws, we expect them to be held accountable. Individual punishment has a singular value as a deterrent. It also serves as a public statement that the lives and liberties of the victims count in the eyes of the government and that they enjoy the same dignity and respect accorded their fellow citizens.

On the other hand, it is sometimes all too easy to focus on a few bad actors and avoid the larger institutional implications of long-standing patterns of abuse. A culture of impunity is likely to develop only if the leaders of organizations have turned a blind eye to malfeasance or actively concealed it. The top leadership may, in fact, find it convenient to pin responsibility on a few lower-level employees. Punishing individuals may not solve anything in the long run if there is no organizational change.

From the public's perspective, this should not be an either/or choice. The public has a right to both individual and institutional accountability. But how to get that accountability as well as sustained institutional change is extremely difficult.

THERE IS ALWAYS A seemingly higher rationale for failing to prosecute crimes by the powerful or by subordinates who enjoy their protection: The collateral damage to the community, the nation, or the world would be too great. When the offenses are those of the big banks and corporations, the higher interest is economic stability. "I am concerned," Attorney General Eric Holder told the Senate Judiciary Committee in 2013, "that the size of some of these institutions becomes so large that it does become difficult for us to prosecute them when we are hit with indications that if we do prosecute—if we do bring a criminal charge—it will have a negative impact on the national economy, perhaps even the world economy." Holder later sought to walk back this statement, but his words were clear enough.

Whether it's corporate crime, police homicide, or sexual assault, the issue is the same: Does the law apply to everyone?

Officials in other institutions fear the repercussions of even acknowledging that crimes have taken place. Police superintendents, prosecutors, and mayors can tell themselves that by squelching inquiries into police homicides they are acting in the best interests of law enforcement and the public peace and safety. In cases of sexual assault, religious, military, and university leaders may believe that they are serving a higher purpose by preventing their institutions from being tarnished, their subordinates or students from being disgraced at a young age, and their communities from being subjected to ugly public proceedings.

The biases in this kind of moral calculus are obvious once they are challenged in the public arena. The calculus doesn't include the deep effects of a culture of impunity on either the victims or the perpetrators. Those who suffer abuse suffer again when their voices are not heard. Those who commit abuse come to believe in their own privilege and entitlement. In other contexts, elite leaders would have no trouble recognizing that a failure to punish crimes has dangerous effects on incentives—what economists call "moral hazard." The lack of prosecutions of corporate crime, police misconduct, and sexual assault encourages continued violations of the law. The failure of authorities to bring charges when people take the risk of reporting malfeasance discourages members of those communities from coming

forward again in similar circumstances. Yes, there are collateral damages from prosecutions. There are also collateral damages from failing to prosecute, and they rarely get adequate weight.

Collateral damage as the rationale for not pursuing corruption comes up in a surprising way in an episode that Sarah Chayes recounts in her superb recent book, *Thieves of State: Why Corruption Threatens Global Security*. After the September 11 attack, Chayes went into Afghanistan as a reporter for National Public Radio and decided to stay in Kandahar to work in a nongovernmental aid effort, an experience that convinced her that corruption in the Afghan government was fueling the insurgency. In 2008, hoping to shift U.S. policy, she joined the staff of the U.S. commander in Afghanistan, and later became special assistant to Admiral Mike Mullen, chairman of the Joint Chiefs of Staff.

The stunning episode in the book takes place in 2010, when Chayes was working as Mullen's assistant but remained in Afghanistan to help develop an anti-corruption effort for General David Petraeus. The strategy was going to focus not on isolated cases or petty corruption, but on "structured networks" of corruption reaching the highest levels of the government of President Hamid Karzai. The test case was the arrest on July 25, 2010, of an administrative assistant at the Afghan National Security Council, Muhammad Zia Salehi, whom investigators had identified as a key intermediary in influence-peddling. But before the day was over, Karzai—who had supposedly pre-approved the arrest—ordered Salehi's release, and charges were eventually dropped. Chayes and her Defense Department colleagues only learned later that Salehi was the bagman for the Central Intelligence Agency, which was paying Karzai millions of dollars in cash. The whole anti-corruption effort was aborted. The U.S. government was too deeply enmeshed in the Afghan kleptocracy to do anything about it.

THE SPECTER OF collateral damage and the protection of the powerful are a big part, but only part, of the story behind cultures of impunity. Another reason for failures to prosecute lies in public deference to authority and what might be thought of as motivated blindness.

Many people simply do not want to see officials they respect and depend on as being responsible for crimes. They are especially disinclined to accept testimony about such crimes from members of minority groups whom they distrust. If doubt exists or can be plausibly manufactured, those in authority get the benefit of it. Knowing how juries will react, even prosecutors who are sympathetic to victims are unwilling to bring charges unless the crimes are egregious and the evidence is overwhelming. And knowing how unlikely they are to prevail and what the costs to themselves might be, most victims never come forward.

These patterns have deep historical roots. African Americans long had no legal recourse when subject to criminal assaults by whites. The same was true for many women, gays and lesbians, and others for whom the law offered no protection when they were criminally attacked.

Motivated blindness is why video—being forced to see—has been so important in changing public attitudes about police killings. Take the case of Eric Garner, the black man who kept pleading for help and saying, "I can't breathe" on July 17, 2014, when police in Staten Island, New York, put him in a fatal chokehold for selling cigarettes illegally. According to *The New York Times*, the initial police report on the death did not mention the chokehold. "Without video of his final struggle," the *Times* concluded, "Mr. Garner's death may have attracted little notice or uproar." The same is true of the murder in April of another black man, Walter Scott, by a police officer in South Carolina who stopped Scott for a broken taillight. If not for a bystander's video showing Scott being shot in the back eight times, the officer's phony story would likely have been accepted.

Only a small number of police killings—fewer than 2 percent, according to a study by a criminologist at Bowling Green State University—ever result in charges. The Garner and Scott cases suggest that if we had video of more such killings, we'd also find that more were unjustified. Of course, with routine video of police work, as many have called for, there might be fewer such killings to begin with.

Although DNA evidence has sometimes served a parallel function in sexual assault cases, it doesn't resolve crucial questions of consent. Sexual assault is another area where the law falters; only a small fraction of assaults—according to a survey of sexual violence against women, just 5 percent of rapes—are ever prosecuted.

With such formidable barriers to prosecution, the best hope for change probably lies in shaming institutions into internal reforms—changes in their practices and procedures to prevent violence, to make it less difficult for victims to come forward, and ultimately to turn a culture of impunity into a culture of accountability.

UNFORTUNATELY, THE recent efforts to bring about institutional change of this kind in the corporate world are not greatly encouraging. In his important recent book, *Too Big to Jail: How Prosecutors Compromise with Corporations* (reviewed in this issue by Jesse Eisinger), Brandon Garrett explains how federal prosecutors have taken a procedure originally used for juvenile offenders—"deferred prosecution agreements"—and applied it to corporate crime. Under these agreements, a company pays a fine, agrees to reform its internal procedures, and accepts a monitor of its activities in order to avoid a criminal conviction. Usually, no individual executive is prosecuted, even though the same offenses might earn a long prison sentence if committed outside a big corporation. Corporations, we are told, are people—except apparently when it comes to criminal liability.

If the compliance programs were effective, the failure to prosecute individuals might be more defensible. But all too often the reforms are cosmetic, and the companies don't change. In 2002, in a case involving illegal marketing practices, the pharmaceutical company Pfizer entered into a deferred prosecution agreement—and then did so in a second case in 2004, and in a third case in 2007, and in a fourth case in 2009. No executives were ever prosecuted. Recounting this history in *The New York Review of Books*, Judge Jed S. Rakoff wondered "whether the impact of sending a few guilty executives to prison for orchestrating corporate crimes might have a far greater effect than any compliance program in discouraging misconduct, at far less expense and without the unwanted collateral consequences of punishing innocent employees and shareholders." To deal with corporate recidivism, Senator Elizabeth Warren has proposed a simple two-strikes-and-you're-out rule: "No firm should be allowed to enter into a deferred prosecution or nonprosecution agreement if it is already operating under such an agreement—period."

Although some people may see this proposal as evidence of Warren's outrageous anti-corporate views, the underlying issue is nothing more than equality before the law, a principle rooted in our oldest traditions. This year, 2015, is the eight-hundredth anniversary of the Magna Carta, in which the king pledged, "We will sell to no man, we will not deny or defer to any man either Justice or Right." In a system of laws descended from that pledge, it is never too radical an idea to try to fulfill it. ◘