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## The Treadmill of Criminal Justice Reform

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# FIFTY-EIGHTH CLEVELAND-MARSHALL FUND LECTURE: "THE TREADMILL OF CRIMINAL JUSTICE REFORM"<sup>1</sup>

THE HONORABLE ABNER J. MIKVA<sup>2</sup>

During my first campaign for Congress on the North Shore of Chicago, I tried to make reform of the criminal laws one of the main issues in the campaign. I was warned by others who knew North Shore politics that at best it was a non-starter, and maybe worse. I lost that campaign, even though I was the incumbent Congressman running against a relatively unknown opponent. The criminal laws have been "reformed" several times since then (some would say "deformed") and none of the ideas that I was then expressing are any better received now than they were then. But I am more certain now than I was then that we are moving in the wrong direction.

We have been trying to protect ourselves from and avenge ourselves on the evil-doers amongst us since we came out of our caves. Almost never do we recognize that there is great tension between those two purposes—protection and vengeance. We have never resolved that dilemma.

In sentencing criminal defendants, there are four objectives traditionally stated:

1. Retribution—getting "even" with the defendant;
2. Deterrence—frightening others from offending;
3. Rehabilitation—reforming the defendant to sin no more;  
and
4. Incapacitation—keeping the defendant from committing  
other crimes—at least while he is in jail.

Of those four objectives, only incapacitation achieves any of society's expectations. As to the others, they are expensive, foolish, or at war with each other.

Let me start with retribution—getting even, revenge. It's very expensive. It now costs \$30,000 per year to keep a defendant in a federal penal institution. That is more than it costs to send someone to Harvard Law School. While we can contemplate as to which institution does the inmate the most harm, at least Harvard is not financed with tax revenues.

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<sup>1</sup>The Fifty-Eighth Cleveland-Marshall Fund Lecture was given on November 16, 1994, at the Cleveland-Marshall College of Law.

<sup>2</sup>Former White House Counsel; former Chief Judge, United States Court of Appeals for the District of Columbia Circuit; United States House of Representatives, 1975-79, 1969-72. University of Wisconsin; Washington University; J.D., University of Chicago. The notes accompanying this article are citations to authority and contain nothing of substance. See Abner J. Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647 (1985).

Those who favor the death penalty, and there are many, would say that retribution—an eye for an eye—is a compelling argument for imposing more capital punishment. Be assured that those cost even more. Put together the costs to the judicial system in the endless, but often necessary, appeals, the extra cost of keeping an inmate on death row, the total lack of evidence that the death penalty has any deterrence value, the obvious lack of rehabilitation potential on any one of our executed felons, and we are left with a very uncomfortable justification for society engaging in "legalized murder"—and that is that we can make sure that the particular sinner will sin no more.

Many earlier civilizations—and some third world countries today—meted out capital punishment for all kinds of crimes. In early England, it was used against pick-pockets. It did not even deter pick-pocketing at the public hangings of other pickpockets, although it took care of the particular pick-pocket being hanged. Today, we are one of the few countries still tolerating capital punishment. A protocol to the European Human Rights Treaty prohibits any signatories from engaging in capital punishment,<sup>3</sup> and makes it very difficult for any signatory to cooperate with those countries which use it. In the United States, the death penalty plays very well. In last week's election,<sup>4</sup> George Pataki helped himself get elected Governor of New York by promising he would implement the death penalty.

A frequent historical justification for our "get even" mentality is the Old Testament's "eye for an eye" and "tooth for a tooth" doctrine. Actually, that biblical reference would more appropriately justify restitution, the talmudists tell us, because the ancient Jewish legal system was not strong on capital punishment or vengeance. The idea was that if someone took your eye, he would have to provide restitution by "seeing" for you in your work.

The "deterrence" factor is nicely getting a lot of play in legal literature. It blends nicely with the cost-benefit analysis that my *alma-mater*, the University of Chicago, has touted so highly. If it works for torts, and adoptions, and environmental laws, why doesn't it make sense to apply it to the criminal law. And so we have the sentencing guidelines, which have federal judges poring over a grid system, which factors in all of the elements of crime—the amount of drugs being carried, the presence of a weapon—as well as the defendant's level of remorse and cooperativeness, and achieves a sentencing range for that person. The sentencing guidelines, coupled with the mandatory minimum sentence provisions that Congress is fond of, appear to rest on the notion that the criminally inclined carry around one of those sentencing grid tables that judges use. Before he perpetrates his crimes, the putative perpetrator sits down and figures out the costs, finds them higher than the benefits, and thinks better of perpetration.

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<sup>3</sup>Sixth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, art. 1, Council of Europe, signed April 28, 1983, at Strasbourg.

<sup>4</sup>The election of November 7, 1994.

It has always befuddled me that we can seriously assume that the members of our society who behave the least rationally will engage in the rational process that underlies the deterrence theory. When coupled with the mathematical computations that the sentencing guidelines require, it is hard to believe that anyone is serious about deterrence. A young 16-year-old in New York is promised \$300.00 for delivering a "package" to someone in Washington. He gets one-half in front, and the other half when the package is delivered. On most occasions, he is nabbed at Union Station in Washington, the package and the \$150.00 is seized, and he is sentenced on the basis of how large a quantity of drugs was in the package. Whether seized or not, there is nothing in our criminal justice system that will deter the next 16-year-old kid from leaping to the same opportunity when it is offered him. And the attractiveness to the next kid will not turn in any way on whether the punishment is five years or ten years or life or death.

A recent survey showed that most black male teenagers, living in the ghettos, did not expect to live until age 30. Most of them had been in jail or had family members in jail. Their life expectations, and life expectancy, were so bleak that jail held no terrors. Factor that into a deterrence formula.

Then there is rehabilitation. We even name our institutions as if we seriously think that our present punishment system contributes to that end. Of course we reform kids in our reform schools, of course we correct first-offenders in the houses of corrections, and of course we make our felons penitent in the penitentiaries. Shall we talk about prison industries? I am always amazed that our prison industry planners are able to anticipate what jobs will become non-existent in our economy, and concentrate our training programs in those fields. In Illinois, for example, prison training concentrated in printing, where there has been chronic unemployment since World War II, in tailoring, where again the unemployment rate has been overwhelming, and in the making of license plates. I have always thought that license plate making was an especially interesting trade to learn in prison. As far as I know, the only place where one might find a job making license plates is in—prison.

There are some literacy programs extant in the penal institutions, but they are very few and poorly-funded. Statistics show that the overwhelming majority of prison inmates have trouble with basic reading and writing skills. How expensive can it be to require literacy training? Nothing near what it costs us not to do it. The recidivism rates throughout our country make it clear that rehabilitation is a bust.

That leaves incapacitation. That works. There are several problems, however, with making that the centerpiece of our criminal justice system. In the first place, if nothing is done to check the flow of new felons, the cost is overwhelming—not just the per capita costs that I referred to earlier—but the additional costs of servicing an increasingly larger prison population. The cost of building new prisons is much higher than the cost of the old prisons. Older prisoners (and we do have to keep prisoners longer if we are really to incapacitate them from further crime: good hardened criminals that have been exposed to the penal system for any length of time need to be kept until they "burn out," which may mean keeping them into their 50's and 60's) cost much more than younger ones in medical expenses alone.

In addition to cost, there is a national shame factor. We now have more people in jail in relation to our population than any other country in the world. Are we really the most lawless nation around? And in addition to the shame factor, there is the limits factor which our body politic will impose. Building all of those new prisons, putting more and more policemen on the streets, finding more and more ways to secure our houses and shopping malls and factories and post offices from criminals, and then finding ourselves even more in fear for our lives and safety than before—at a certain point the taxpayers will say incapacitation is not enough. And it isn't.

The fact is that the criminal justice system is not enough—or even the most relevant institution—to deal with our crime problems. It makes about as much sense to look to prisons to solve our chronic crime problem as it would be to build more funeral parlors to solve a cholera epidemic. A very distinguished judge of the Superior Court of the District of Columbia, Curtis von Kann, recently made a speech on how to solve the homicide crisis in our nation's murder capital. He said:

The criminal justice system in America has never been viewed by knowledgeable observers as the principle force in reducing crime. That is not its job. Rather, its job is to apprehend and try alleged offenders, and upon conviction, to sentence them. While all of that, of course, has been thought to have some impact in reducing crime, sociologists will tell you that in any society the far more important factors working to prevent the commission of crime are societal factors—for example, education, widely shared moral and religious codes of conduct, family structure and support and viable and *lawful* opportunities for employment and upward mobility.

And there is the rub. Those "societal factors" are all expensive and exactly what the voters do *not* want to hear. They could cost a lot of money, and they have no "red meat" appeal to the people who have been terrorized by perceptions of more violent crime. The voters want "here and now" answers to the problem, not some goody two-shoes, bleeding heart alternatives. And so the Crime Bill<sup>5</sup> has fifty new death penalty provisions, a huge number of additional mandatory minimum sentencing provisions, and \$22 billion for more police, more jails, more resources to the "output end" of the crime pipeline. And it engendered a nationwide debate about "pork" spending based on a sociological approach to crime.

Even some Democrats voted against the Crime Bill when it first passed the Senate, 96-4. Senator Paul Simon of my home state of Illinois was one of the four. I admire his courage, but I hope he fares better than I did in 1970 when I was one of 38 members of the House to vote against the Organized Crime Act of 1970.<sup>6</sup> I voted against it for similar reasons to his—the provisions in the 1970

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<sup>5</sup>H.R. 3355, 103d Cong., 2d Sess. (1994).

<sup>6</sup>Pub. L. No. 91-452, Title IX, § 901(a), 84 Stat. 941 (codified as amended at 18 U.S.C. §§ 1961-1968).

Act—like RICO (Racketeer Influenced Corrupt Organizations) and other programs that did nothing about the serious street crime problems we had even then—were totally irrelevant to the problems we were supposedly addressing. I spent the rest of my political career explaining why I voted "for" organized crime. The majority of Congress knows where the politics of this issue lie.

If we really want to get at the input piece of the crime problem, we need to work at the disease. Some of the programs included in the Crime Bill begin to do this. What others called "pork," I would call wise prevention.

When my wife was teaching school in the inner city of Washington, D.C., some of her fellow teachers said that they could predict at the third grade level which kids would end up in prison. They were probably more right than wrong, and the predictions weren't always self-fulfilling prophecies. Early intervention is possible. It is expensive and it does not satisfy the red meat eaters that I spoke of earlier. But it is not a radical idea to suggest that there must be a substitute source for the family values, parental guidance, and societal mores that most kids get at home. We need to give the troubled and anti-societal kids some visions of a good life that includes the good things for which our kids aspire. For one third the cost of keeping somebody in jail after the fact, we could send that somebody to a private school, or better yet, improve the public schools—at a far lower per capita cost and with a greater restoration of the historic first principle of our democracy, a universal, free, public school system that promotes the commonality of our nation.

It would help if we took a bite out of the weapons of crime. No other country has more handguns per capita than the United States. We have kids killing kids for a pair of shoes, or because somebody "dissed" them on the way to class. Those killings and the overwhelming percentage of street crimes are not done with hunting weapons. They are done with concealable weapons, and a serious effort to reduce the accessibility of handguns would make a substantial difference.

Mostly, it would help if we started looking at real solutions. If we really want to reform the criminal justice system, we have to start at the very first intersection that it has with a rule-breaker. Usually, that is in the juvenile delinquency system. If you saw the rap sheets that I have seen, you would agree with me that the juvenile institutions are a disaster. The detention facilities are overcrowded, understaffed and without any discernible mission except to act as a finishing school for young hoodlums. The juvenile courts are not much better. Even when there are sensitive judges who are trying to make some reason out of the system, there are no resources available—no counselors, no mental health specialists, no teachers, no nothing. Back when I was practicing law, on those rare occasions when I represented a juvenile in trouble with the law, I would opt for the adult criminal court. At least there, the judge had some experience with notions of due process, and more important, there were more resources available than at the juvenile court level.

But I am *not* advocating a "soft approach" to juveniles. On the contrary, I want that first encounter with the law, whether it is at the juvenile level or at the adult level, to be treated with the utmost urgency and stringency. I want to do whatever it takes to break the chain *then*, when the rule-breaking may be non-lethal. If it means incarceration for a long period to incapacitate the

If it means extensive counseling, that is still a lot cheaper than subsequent institutionalization. If it means changing the milieu of the juvenile (such as removing him or her from the home where the rule-breaking was bred), let's do it. If it means moving the adult transgressor out of his community to another place—whether it's boot camp or a job in another city, let's do it. Whatever we do at that early time is much more likely to work, and be much cheaper to implement than anything we do after the perpetrator has accumulated a nice long curriculum vitae of crime.

Somehow, we need to fashion a political process that breaks the present linkage between crime and punishments and politics. In the current political environment, it has become almost impossible to craft substantive solutions on the merits. Politics has driven the crime debate for so many years that Washington spends most of its time debating "litmus tests" rather than meaningful solutions. Each party either proposes or fears "wedge" issues: telling votes that supposedly identify the politician who cast it as either "tough" or "soft" on crime. The federal death penalty, habeas reform, and the exclusionary rule: these are idealogical issues that have only a marginal to nonexistent impact on violent street crime, yet they consume weeks of debate every election year when Congress contemplates another crime bill.

Similarly, politics has driven Congress to federalize increasing numbers of crimes. Largely in response to the rise in drug trafficking, which seemingly has overwhelmed the capacity of the states to investigate and prosecute extensive drug networks, Congress has passed numerous new federal offenses. It also has increased federal penalties—especially in the form of the dreaded "mandatory minimums disease" which has infected Congress, even against the better wisdom of some its very proponents—such that prosecutors now often choose the federal over the state courts when concurrent jurisdiction applies. The result has been that the criminal dockets of the federal courts has increased by 46% over the last ten years (1981 - 1991).

Perhaps many of these federal actions have been justified; the investigation and prosecution of large and complex multi-state drug operations requires a federal response. But Congress should have the wisdom to reject other proposals driven by the public's outrage over violent crime—such as a federal carjacking provision or the federalization of every crime involving the possession of a handgun. State courts are perfectly competent to hear these crimes. Passing federal laws will not make them go away. Unless Congress develops a principled basis for distinguishing those crimes that require a federal response, the federal courts may always remain overburdened—with criminal dockets crowding out civil dockets (a priority the federal Speedy Trial Act<sup>7</sup> requires).

Academics could help the situation. My friends in academia tell me that little has been written about legislative responses to our national crime problem. What solutions can be objectively determined, empirically supported,

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<sup>7</sup>18 U.S.C. §§ 3161-3174 (1988).

dispassionately defended? What do academics think about federal versus state responses to crime? If "Law and Society" describes a currently ascendant school of legal pragmatists among our law school faculties, why haven't more academic views been published about American society's Number One concern?

"Three strikes and you're out" perfectly captures the intersection between policy and politics. The President evoked a great response to his "three strikes and you're out" proposal in his State of the Union speech. The federal version passed in the Crime Bill, as it should have been. It is incomprehensible to let serious three-time losers out on the street again. And we don't, with very, very few exceptions. Most of the time, persons who are found guilty of violence go to jail for very long periods.

In fact, who's to say that it should be "*three* strikes and you're out"? The State of Georgia just passed a "*two* strikes and you're out" provision this month. For that matter, if we *know* that someone who has committed a violent crime will commit violence again soon after leaving prison, why shouldn't it be, for that person, "*one* strike and you're out"? In fact, the inexorable logic of incarceration of violent offenders suggests that each perpetrator of an act of violence should receive a presumptive life sentence, only to be returned to society when it is safe for society to do so.

Once you begin to think this way—once fear of violence and safety from its perpetrators become the absolutes—the whole concept of imprisonment can change. Rather than figure sentence length on the basis of deterrence, and given that rehabilitation doesn't work, perhaps we should end sentences only when we can estimate that society offers something other than a violent outcome to a particular prisoner's return to the outside world. In this way, sentence durations would be based partly on the presence of "social defects": the conditions prisoners would face if released that would cause them to commit crime again—high unemployment in the inner-cities, lack of job-training programs. Of course, this would be making the criminal pay for society's shortcomings. Is that fair?

This idea—of keeping prisoners in jail until society is ready for their release—may be bonkers, but it's no more bonkers than some of the other proposals that might be offered and seriously debated in the politics of crime. How do we seriously address the crime problem? I must say, I was at a loss to do so when I ran for Congress 20 years ago—and I'm at a loss to do so now. I can only encourage the academics in this room to turn more of their attention to this problem. Perhaps academics can persuade where well-meaning politicians have failed. Thank you.

