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Randolph N. Stone

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CRISIS IN THE CRIMINAL JUSTICE SYSTEM*

*Randolph N. Stone***

Most observers agree that there is a crisis in the criminal justice system today. But it is not simply a crisis in terms of escalating case loads, inadequate funding, and jail overcrowding. It is not simply a crisis in law enforcement, prosecution and defense services, the judiciary, or our penal system. I believe that most of us would agree that the problems confronted by all of these elements are overwhelming. But even beyond that, I think that there is a crisis in the legal profession today. And even more to the root, there is a crisis in the rule of law. The problem was stated concisely years ago by Chief Justice Earl Warren of the Supreme Court: "[T]he crime problem is . . . an overdue debt that the country must pay for ignoring for decades the conditions that breed lawlessness."¹

What is this debt and what are those conditions? The question goes to the very heart of crime and punishment in America. But before I answer that question, I will outline for you what I believe to be the crisis in the system. In doing so, I would like to share with you my experiences as a trial lawyer and current manager of one of the largest law offices and public defender offices in the country, with 492 lawyers and 241 staff members defending over 200,000 people a year in Cook County, Illinois.

The traditional view of the components of the criminal justice system includes law enforcement, prosecution, defense services, the judiciary, and corrections. Today, these criminal justice system elements are at the center of our national attention. The media, cinema, television, and novels continually focus on crime and punishment. Crime control is currently the most rapidly increasing expenditure of our federal, state, and local governments.² The criminal justice industry has evolved and sustains the surge in prison and jail construction.³ It is against this

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**Public Defender of Cook County, Illinois. B.A. University of Wisconsin, Milwaukee 1972; J.D. University of Wisconsin Law School 1975. The author wishes to express his gratitude for the contributions of the staff of the Cook County Public Defender's Office, particularly those of Barry Weisberg, Thomas Stanley, Nik-ki Whittingham, and Monica Smith.

1. Earl Warren, *CROWN'S BOOK OF POLITICAL QUOTATIONS* 41 (Michael Jackman ed. 1982).
2. ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY, *TRENDS AND ISSUES 90: CRIMINAL AND JUVENILE JUSTICE IN ILLINOIS* 113 (1990).
3. Tom Wicker, *An Ungrand Total*, N.Y. Times, Oct. 13, 1989, at A33, col. 6.

background that I would like to outline some of the factors influencing the criminal justice system crisis.

First, law enforcement policies clog the system. In most cities, counties, and states, new criminal laws and vigorous arrest and charging policies have produced a massive escalation in the number of court appearances.⁴ Most of this increase stems from drug arrests. This is where the problem begins. The police utilize massive street sweeps to arrest users, addicts, and small-time dealers. The criminal justice system is attempting, under coercion of the law, to deal with what in reality is a medical and social problem.

Second, the policies and practices of the prosecution lead to a great deal of overcharging and inequity. An undue emphasis is placed on conviction rates and dispositions as opposed to meaningful diversion opportunities. Resolutions and statements by the Attorney General and other prosecutors contend that they should not be bound by rules of professional responsibility, or any other professional standards contrary to their perceived self-interest.⁵ In addition, prosecutorial exclusion of racial minorities from jury service still persists.

Third, excessive caseloads and systematic resource deprivation combine to seriously undermine the effective assistance of counsel. In my office today, we have lawyers in our juvenile court system with pending caseloads of three hundred cases or more. Lawyers in our felony trial division have one hundred pending cases, while those in our Homicide Task Force handle twenty-three pending murder cases each; one-third to one-half of those homicide cases are death penalty cases. Yet when federal and local government officials consider increasing resources for the police, the courts, and the prosecutors, there is no mention of resources for defense services. This is appalling in light of the fact that seventy to ninety percent of the people swept up and arrested cannot afford to hire private counsel.⁶ Who is going to represent these people? Are we instead going to abolish the Bill of Rights and no longer provide counsel?

In addition to these excessive caseloads, systematic resource deprivation is tolerated at an alarming level. If a state were to pass laws denying pre-trial investigation, client conferences, legal research, or laws otherwise limiting the opportunity for effective assistance of counsel, even today's Supreme Court would declare such laws unconstitutional. But countless defendants are denied effective representation due to inadequate defense service resources and the federal government's refusal to allocate more resources for defense services in this so-called war on drugs.

Fourth, the judicial system has become an assembly line. Judges are pressed to move ever larger caseloads as quickly as possible. The drive for judicial efficiency, with rapid case processing as the overriding goal, is often inconsistent with the constitutional necessity to provide a fair trial.

4. Estimate of the Office of the Public Defender of Cook County, Illinois.

5. William Glaberson, *Thornburgh Policy on Ex Parte Talks With Defendants Leads to an Ethics Battle*, Chicago Daily L. Bull., Mar. 1, 1991, at 1.

6. Estimate of the Office of the Public Defender of Cook County, Illinois.

Fifth, as everyone knows, our correctional facilities are bursting at the seams. We already have a record one million people in jails and prisons in the United States.⁷ We have a higher incarceration rate than any other western industrial nation,⁸ one on par with that of both the Soviet Union⁹ and South Africa.¹⁰ Half of the people incarcerated in our country are African-American males.¹¹ In the past ten years we have doubled the number of people placed in prison.¹² We pay the equivalent of a college education to incarcerate an inmate for just one year.¹³ Currently, there are more African-American men in our prisons and jails than in our colleges and professional schools.¹⁴

Sixth, criminal law in general and criminal procedure specifically are today working to diminish fundamental rights which we have so long taken for granted. A recent article in the *National Law Journal* reported that the 1980s were a "prosecutor's dream," noting that an overwhelming number of the decade's Supreme Court decisions restricted some element of the Bill of Rights and increased the oppressive power of prosecution and law enforcement officials.¹⁵ In the last Supreme Court term, we have seen new powers given to the police to search the homes of arrested suspects,¹⁶ cutbacks on the right to a criminal appeal,¹⁷ and curtailment of self-incrimination protection for people accused of child abuse.¹⁸ U.S. agents may now search foreign homes of non-U.S. citizens without warrants.¹⁹ Police officers now have the power to stop and question a person on the basis of an anonymous tip,²⁰ stop an automobile without probable cause in order to combat drunk driving,²¹ and search a home without a warrant when they mistakenly believe that they have the consent to do so.²² With the resignation of Justice Brennan, the Supreme Court certainly cannot be expected to exhibit increased concern over Bill of Rights questions focusing on the poor and minorities.

Seventh, public policies on the federal, state, and local level are based on the needs of the elected official and not on rational solutions to the problems of the criminal justice system. The rhetoric to get tough on crime may assist a candidate in gaining election, but it later serves only to escalate the crime debt. The death penalty has become a political litmus test. Incumbents brag about the number of people who have

7. Marc Mauer, *Americans Behind Bars: A Comparison of International Rates of Incarceration*, THE SENTENCING PROJECT 3 (Jan. 1991).

8. *Id.*

9. *Id.*

10. *Id.*

11. Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem*, THE SENTENCING PROJECT 3 (Feb. 1990).

12. *Id.*

13. Calculation based on average public university tuition compared to incarceration costs of \$11,302 per inmate per year. *See id.*

14. *Id.*

15. Nat'l L.J., Dec. 25, 1989/Jan. 1, 1990, at S14.

16. *Maryland v. Buie*, 110 S.Ct. 1093 (1990).

17. *Butler v. McKellar*, 110 S.Ct. 1212 (1990).

18. *Baltimore City Dept. of Social Services v. Bouknight*, 110 S.Ct. 900 (1990).

19. *U.S. v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990).

20. *Alabama v. White*, 110 S.Ct. 2412 (1990).

21. *Michigan Dept. of State Police v. Sitz*, 110 S.Ct. 2481 (1990).

22. *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990).

been put on death row and executed, while the challengers promise to do even better. Recently the former Governor of Illinois announced that one of his major achievements was that he had built more prisons than had all of the previous governors in the history of the state.²³

Eighth, while most of us believe that there is a crisis in the criminal justice system, few of us understand the nature of the crisis or its solution. Television, cinema, and literature perpetuate inaccuracies with their fictional depictions of crime in the courtroom and stereotypical portrayals of the people who inhabit the criminal justice system. Willie Horton was used to symbolize the criminal defendant.²⁴ In our so-called war on drugs, the war is being fought on the wrong battlefield. The war should not be fought against the addict, but against the sources of addiction. The battlefield certainly cannot be the courtroom. The war on drugs has devastated the criminal justice system. It has also devastated some segments of the African-American community. Today, we have new policies where families in public housing are evicted because one of the family members is allegedly involved in drugs.²⁵ Prosecutors are locking up pregnant mothers and taking children from women accused of drug abuse.²⁶ The AIDS element of the drug problem has proved to be particularly devastating; already our jails are overtaxed by the need to care for AIDS patients. This is going to be a severe problem in the 1990s.

Finally, it is essential that we relate the criminal justice crisis to the legal profession. From top to bottom the legal profession has not prepared us to rationally address the issues of crime and punishment. Each year many poor and minority youth who could be good lawyers, and who might be more likely to give some attention to the criminal justice system, are kept out of law school by entrance requirements and high application and tuition costs. Our law schools are producing assembly line lawyers who are content to recite a case or draft a memo, but are either ill-prepared or uninterested in defending liberty. The faculty of the law schools have failed to diversify, causing one distinguished professor at Harvard to take a leave of absence without pay until a minority woman of color is hired.²⁷ The major law firms of America follow the same pattern. In Chicago, for example, of the 700 partners in the five largest firms there are only two Blacks.²⁸

23. Address by Governor James Thompson to the Illinois Criminal Justice Authority, Illinois town meeting on drug abuse and crime, July 10, 1990.

24. Willie Horton, an African-American inmate of the Massachusetts Correctional System, committed a violent crime while on furlough. President Bush, during his 1988 presidential campaign, used Horton to suggest that his opponent, then Massachusetts Governor Michael Dukakis was "soft on crime." See *Now the Red Flag of Racism Has Been Unfurled*, Chicago Tribune, Oct. 26, 1988, at 23 (Perspective).

25. See *Disarming Tenants for Peace in Project*, N.Y. Times, Dec. 23, 1990, at A14, col. 1; but see *Judge Bars Plan By U.S. on Immediate Evictions*, N.Y. Times, Dec. 20, 1990, at A24, col. 5.

26. See generally *Mother Cleared of Giving Cocaine to Child at Birth*, USA Today, Apr. 3, 1991, at 2A; *Stronger Net of Protection Sought for Babies Born to Addicts*, Wash. Post, Dec. 3, 1990, at D1 (Metro).

27. Lynn Hecht Schafran, *When Bias is the Norm*, Nat'l L.J., May 28, 1990, at 13.

28. David Rubenstein and Jennifer Juarez Robles, *Law Firms Still Lag in Minority Hiring*, CHICAGO REPORTER, July/Aug. 1990, at 3.

The profession in large part has ignored the crisis in the criminal justice system. Less than eight percent of all lawyers and legal professionals are in any way concerned with criminal law.²⁹ Moreover, of the 800,000 lawyers in the United States less than one percent represent the indigent accused.³⁰ The difficulty in instituting pro bono work standards further demonstrates the reluctance of the profession to address the problems confronted by poor people.³¹ Salaries to recent law school graduates exceed the compensation to state court judges. Thus, the profession is being structured so that a smaller and smaller percentage of lawyers are serving the people most in need of legal services.

In summary, we have a crisis that is many-faceted and propelling the country toward a major catastrophe. Already one state, Vermont, has closed the doors to its civil courtrooms in order to accommodate its criminal caseload.³² What is going to be the future for a society dedicated to surveillance, capture, and confinement, with its state and local governments spending more to incarcerate than to educate? What kind of country is this going to become? Is it not probable that a country which exercises cruel and extensive punishment is bound to produce a tendency or penchant for cruelty and punishment in its people? Do we not already see this in the violence and sadism which saturates cinema and television? Does this not mean that the very system dedicated to establish criminal justice is actually a major factor in creating the criminal justice crisis? Current federal, state, and local policies, combined with the war on drugs, undermine the rule of law and justice. We have created such pressures on the criminal justice system and the people in it, that both the exercise of law and the goal of justice have been reduced to virtual arbitrariness.

The criminal justice system has become a dragnet. It collects the ever growing numbers of neglected, uneducated, and unemployed people who face costly addictions and mistakenly view crime as their only alternative. The net will not hold. It is asked to bear not only the weight of social failures but also failures within the criminal justice system itself. If we were to take this crisis seriously, we would have to address the conditions that Earl Warren raised: poverty, racism, miseducation, inadequate health care, and hopelessness.

Long ago a philosopher stated that poverty was the mother of crime.³³ Today in America we cannot understand crime and punishment if we do not understand the impact that our racial history has upon crime. Surely it is no coincidence that three-quarters of those in our Chicago courtrooms are African-American males.³⁴ In this country, forty-two percent of those in our jails and prisons and forty-six percent

29. Estimate based on membership statistics from the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association.

30. *Id.*

31. Claudia MacLachlan, *Pro Bono Shortfall*, Nat'l L.J., Oct. 15, 1990, at 2.

32. *Lightening the Load*, Nat'l L.J., July 2, 1990, at 12.

33. Marcus Aurelius, CROWN'S BOOK OF POLITICAL QUOTATIONS 40 (Michael Jackman ed. 1982).

34. Barnaby Dinges, *Black Youths Are City's Top Murder Risk*, CHICAGO REPORTER, Feb. 1990, at 9.

of the 2300 people on death row are African-American males.³⁵ Yet African-Americans constitute only five percent of our law school student bodies³⁶ and less than one percent of those that are involved in major law firms.³⁷ Minorities (statistics are not specifically available for African-Americans) constitute less than ten percent of our law school faculties.³⁸ Clearly, one of the conditions that breeds lawlessness is racism. It is an accumulated debt of inequality which has been piling up for 400 years. Racism is the single biggest factor preventing this country from paying the crime debt. The United States has long acted on the assumption that it is more appropriate to lock up African-Americans than it is to educate them. Are we capable of paying the debt?

As a country there are some debts we choose to pay and some we choose to ignore. We will pay the one-half-trillion-dollar savings and loan debt,³⁹ but we will not attempt to solve the criminal justice problem, or at least take steps toward the solution, by recognizing the crime debt and determining to pay it. We must, as a nation, address the factors that breed lawlessness: poverty, miseducation, inadequate health care, and racism. Unless and until this country addresses these problems we cannot expect the crisis in criminal justice to abate.

The entire focus between crime and punishment in America must be re-evaluated. What we need is crime prevention, not law and order. Crime prevention means ameliorating the conditions that breed lawlessness. We need to stop building prisons. Every person convicted of drug abuse or in need of drug treatment must be provided with the appropriate medical care. We need to create a genuine crime prevention and crime control strategy at the national, state, and local levels. Instead of evicting people from public housing, we could create a scholarship tuition fund for residents of public housing. This country is already committed to spending a half a trillion dollars to bail out the savings and loan industry.⁴⁰ We could take one billion dollars per year from the defense budget and designate it to be spent on a local basis to eliminate some of the conditions that breed lawlessness. This would mean, for example, targeting minority communities in New York, Chicago, and Los Angeles (for a start) for new pre-natal care, child care, drug treatment, employment training, education, and job opportunities in each city's depressed communities.

The options listed above are realistic avenues to address the conditions that aggravate and stimulate crime. It makes more sense, because it is both easier and cost effective, to try to prevent rather than control crime. Why allow an epidemic to break out and then treat the plague, when you can inoculate people against the disease to prevent the outbreak? As a society we can pay now, or we can continue to pay much more dearly in the future. Despite this bleak outlook, this is the starting

35. Charles-Edward Anderson, *Racism and Entrapment*, A.B.A.J., Nov. 1990, at 33.

36. AMERICAN BAR ASSOCIATION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES 66-68 (Fall 1989).

37. Doreen Weisenhaus, *Still a Long Way to Go For Women, Minorities: White Males Dominate Firms*, Nat'l L.J., Feb. 8, 1988, at 1.

38. AMERICAN BAR ASSOCIATION OF LEGAL EDUCATION, *supra* note 36.

39. John Greenwald, *No End In Sight*, TIME, Aug. 13, 1990, at 50.

40. *Id.*

point we must address. I am reminded of Frederick Douglass, who said, "those who profess to favor freedom, and yet deprecate agitation, are men who want . . . rain without thunder and lightning."⁴¹ Clearly there will have to be a lot of thunder and lightning before we see any clear skies in the criminal justice system.

For me, the issues are personal as well as professional. In 1985 close to fifty percent of all African-American children lived below the poverty line.⁴² Since 1960 the percentage of white high school graduates attending college has risen to sixty percent while the percentage of African-Americans decreased to thirty-five percent.⁴³ I have a fifteen-year-old son, and I know that the number one cause of death for African-American males between the ages of fifteen and twenty-four is murder.⁴⁴ I know that one out of every four African-American males between the ages of twenty and twenty-nine is involved in the criminal justice system, either in jail, on parole, or on probation.⁴⁵ I want the chances of my son being killed on the streets or locked up in jail reduced. I do not want to go to a criminal courtroom or county jail and see his face among the sea of African-American faces that I see in today's urban courts. I want my son to have a better chance for admission in the legal profession, or any other profession, than for incarceration in the penitentiary. Today these are dreams. We will see what tomorrow brings. Twenty years ago the Kerner Commission stated:

Our nation is moving towards two societies, one black, one white—separate and unequal The alternative is not blind repression or capitulation to lawlessness. It is the realization of common opportunities for all within a single society.⁴⁶

The complexion of our criminal justice system is an indication of the direction our society has taken.

The greatness and durability of most civilizations has been finally determined by how they have responded to challenges from within. Ours will be no exception.⁴⁷

41. Frederick Douglass, *POLITICAL QUOTATIONS* 254 (Daniel Baker ed. 1990).

42. *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 279 (Gerald David Jaynes & Robin Williams eds. 1989).

43. Approximation based on statistics from *id.* at 339.

44. Seth Mydans, *Homicide Rate Up For Young Blacks*, *N.Y. Times*, Dec. 7, 1990, at A26, col. 1.

45. Mauer, *supra* note 11, at 3.

46. *REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS*, Mar. 1, 1968, at 1.

47. *NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT: TO ESTABLISH JUSTICE, TO INSURE DOMESTIC TRANQUILITY* xxxii (Dec. 1969).

