THE MATHEW O. TOBRINER MEMORIAL LECTURE*

It's Time to "Unfix" the Criminal Justice System

By ABNER J. MIKVA**

One could not be interested in the prison system (as I have been since my earliest days in the Illinois legislature) without coming across the contributions of Justice Tobriner. I was part of a congressional delegation that visited some of the California prisons in the early 1970s, and I recall a brief meeting with Justice Tobriner in which he expressed his concern that we send people to prison without really knowing what we expect to accomplish.

Sending someone to prison clearly has the effect of protecting society from further wrongdoing by that particular person for the period of confinement. Once we leave that given objective, the other things we hope to do by imprisonment are in controversy, doubt, and conflict. Do we expect to reform wrongdoers at our reformatories, make them penitent at our penitentiaries, correct them at our houses of correction? If those are our expectations, we flunk. We cannot agree as a society as to what we want to accomplish through our criminal justice system. Every tool we use is fraught with controversy, whether it is the death penalty, furloughs, halfway houses, parole, or conjugal visits.

I would like to concentrate, in this lecture, on one such controversy, and that is the period of confinement we assign to convicted felons to our

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* This lecture was presented at Hastings College of the Law on October 19, 1992. The Mathew O. Tobriner Lecture, in honor of Justice Mathew Tobriner of the Supreme Court of California, was established by close friends and relatives of the Justice to serve as a memorial to him and his life's work.

** Chief Judge, U.S. Court of Appeals for the D.C. Circuit. As one who has always striven for innocence by association, the author is particularly grateful for the invitation to deliver the Tobriner Lecture. He remembers the strong impression that some of Justice Tobriner's opinions and other writings had on him, and how he assigned Justice Tobriner to the category of great American jurists who have greatly influenced and molded our profession, our courts, and our laws.

federal penal institutions: the relationship between the crime and the punishment. It is not a new controversy. The Old Testament speaks of "an eye for an eye" and "a tooth for a tooth." While this concept is used as the basic historical justification for capital punishment (the ultimate sentence) and for the general "toughness" of our punishment provisions, some rabbinical scholars state that the Bible commandment really proposes restitution: that the offender must use his eye or tooth to perform substituted service for the victim. Hammurabi, in his famous Code, picked up the "eye for an eye" concept in a strict sense, but we have to take Hammurabi with some grains of salt. He also ordained that "if a man has stolen a sheep or ass or pig or ship, whether from the temple or the palace, he shall pay thirtyfold. If he be a poor man, he shall render tenfold. If the thief has nought to pay, he shall be put to death."[1] There were not too many *en forma pauperis* pleas during Hammurabi's time.

Over the thousands of years since the rabbis and Hammurabi held forth, we have continued to dispute the function of punishment in an organized society. The current federal criminal laws synthesize this dispute by including all of the functions that the Congress thinks are served by punishment. Title 18, Section 3553(a)(2) declares that federal courts shall impose sentences which reflect the seriousness of the offense, promote respect for the law, afford deterrence to future criminal conduct, protect the public from further criminal conduct by that particular defendant, and provide "correctional treatment" to the defendant. At the very end of the section, restitution is thrown in, almost as an afterthought function of the sentence to be imposed. This section of Title 18 provides the conceptual framework for the federal sentencing guidelines, a reform which Congress enacted in 1984. While I was not present for the enactment, I was present for the implementation, and the history of the sentencing reform effort is useful to explain how we came to our present troubles. It will also confirm the need to "unfix" our criminal justice system.

As I have already indicated, we have never been able to agree, as a country, upon what we seek to accomplish by the punishment phases of criminal law. As a result, whatever regimen is in place has always been in disfavor. In the late 1960s, the current disfavor concerned the "indeterminate sentencing" regimen that had been in place for some time in this country. That system, you may recall, allowed judges considerable flexibility to sentence within statutory limits set by Congress and further allowed parole authorities to put a convicted felon out on "parole" after some portion of the sentence had been served. These two separate flexi-

1. CODE OF HAMMURABI § 8 (C.H.W. Johns trans., 1903) (c. 2250 B.C.).

bility engines led to widespread and numerous complaints. Hardliners railed against the soft-hearted judges who gave sentences at the low end of the permissible range. They railed against the soft-hearted parole boards that turned recidivists loose to sin some more. Obviously there were no headlines to proclaim the success of a parolee or the rehabilitation of a felon who served a short sentence. The press fully reported the long parade of horribles who committed further crimes while out on parole or after serving a short sentence given out by "Judge Softy."

There were other complaints, to my mind more legitimate. Over my years as a legislator, I had visited a large number of state and federal prisons all over the country. The most common criticism among the prisoners, aside from the complaint that they were convicted despite their innocence, was the disparity of their sentences in relation to other felons in the institution. Obviously, with several hundred federal judges and thousands of state judges, all exercising independent discretion in their sentencing procedures, the resultant sentences varied. There was and is dispute as to how many "Judge Softys" there are. There is no dispute that there were and are many "Judge Maximums." The parole boards were being criticized legitimately because of the growing recognition that the task that had been assigned to them—predicting the future conduct of convicted felons—was virtually impossible. Also, crime was rising generally, and like the Willie Horton of later years, parole boards became scapegoats for the increasing insecurity of the American public. Parenthetically, I am sure that most Americans would gladly go back to the insecurity level of the 1970s that led to these far-reaching reforms, compared to the insecurity level that we have since the reforms. I claim no causal nexus between the current level of insecurity and the reforms, but rather an obvious absence of any such nexus between the reforms and the security level.

Thus the stage was set for Congress to "do something" as the crime issue continued to percolate. As is true of most reform efforts, there were numerous actors and threads to the sentencing reform effort. Time does not permit me to go through all of them; indeed I probably am unaware of many pieces that went into the buildup for change. Let me recite very briefly a little bit of the history that I know.

Senator Ted Kennedy was Chairman of the Senate Judiciary Committee in the 1970s and at least entertaining thoughts of a run for the presidency. Some of his staff were eager to show that he was not a "knee-jerk" liberal on the issue of law and order, and the Senator was talking about the abolition of the indeterminate sentencing scheme in favor of a "flat-time" alternative. I had visited enough prisons, and had been

beaten over the head enough by constituents and opponents who accused me of being "soft on crime," that the idea was very intriguing to me.

I recall that in 1978, Dan Lungren, the current Attorney General of California, was elected to the Congress and took his place on the House Judiciary Committee. I was then on the Committee and as we discussed our agenda for the coming session, he stated that he was an advocate of "truth in sentencing." That was the first time that I had heard the term, but I told Congressman Lungren that if he was talking about getting rid of indeterminate sentencing, I was very interested. We agreed that in order to go to a "flat-time" system, we needed to reduce the statutory ranges to something approximating the actual "sitting time" that convicted felons had to do. We asked a staffer to make such comparisons, and when he presented his work to the two of us, I remember that Dan Lungren turned very pale. One of the crimes we had compared in our study was bank robbery. The statute had a range of up to 20 years. The average sitting time for convicted bank robbers was 3 years. "If you think that I am going back to the people of Orange County and explain to them why I proposed to reduce the penalty for bank robbery from 20 years to 3 years, you're crazy," he said. That was the end of truth in sentencing for that term of Congress.

But the problems didn't go away. The disparities in sentencing could not be defended by anyone, and the emotional charge of the other issues became stronger. No one in Congress, however, wanted to bite the bullet that Congressman Lungren found so unappetizing; no one wanted to propose actual reductions in the statutory maximum in order to move to a flat-time system. Yet, even the most hard-line legislator was not advocating that we convert all of the statutory maximum sentences to actual prison sentences. The debate dragged on for several years after I left the Congress to become a judge. Finally, in 1984, Congress did what it frequently does to resolve such political dilemmas: it punted to a commission.

This was no ordinary commission. The Sentencing Commission created under the 1984 statute was intended to be and has become the substitute policy maker for the Congress. The statute abolished the parole mechanism, and the Commission was charged with creating a precise set of "guidelines" to cover every variable in the sentencing scheme. Without any effort to reconcile the obvious tensions created in the "purposes of sentencing" section that I mentioned earlier, the Commission created a grid system which gives mild rewards to those who accept responsibility for their crimes or who cooperate with the government in convicting other felons, the "flipping" process, as it is known in the criminal court

corridors. In virtually all other cases, the new guidelines were based on the premise that longer is better. When coupled with the minimum-mandatory sentences that Congress has ordained for more and more crimes, we have created the largest prison population in our history, and currently, in the world. The dramatic rise in the federal prison population has been mind-boggling. In 1981, soon after I left the Congress, we had 26,000 inmates. By 1985, when we initiated the sentencing guidelines, the number had risen to 36,000. By 1992, the number of federal inmates was 71,000, a virtual doubling of the prison population in just seven years.

The costs of this reform have been staggering. It costs us approximately $25,000 per year for each felon in the federal system. That is more than the annual cost of sending somebody to Harvard Law School. And while one could argue about which institution inflicts more harm on its inmates, Harvard is not paid for with taxpayer dollars.

The other costs may be even more enormous. We have flooded the federal courts with criminal trials, partly because the federal sentencing guidelines are so much more attractive to prosecutors. In previous days, many of the drug offenses that now find their way to federal court were tried in the state courts, which usually have nearly concomitant jurisdiction. Not any more. In the District of Columbia, for example, where the prosecutor is the same person for both the local and the federal system, he freely acknowledges that more cases are prosecuted in the federal courts because of the stiff sentencing guidelines.

The guidelines and the minimum-mandatory sentences, having removed most of the discretionary play in the sentencing system, make it much more difficult to plea bargain. However one may feel about the ethics of plea bargaining, it is beyond doubt that the existence of the device saves a lot of cases from going to full trial. However, if the statute prescribes a mandatory, fixed sentence for a crime, there is little with which the parties may bargain.

Because criminal cases must be tried within a fairly limited period of time, it has become almost impossible, in many federal courts, to get a civil case tried at all. The district courts, the jewel of the federal court system, if not of the court systems of the world, have been turned into assembly line operations where drug peddlers are ground up and spewed out into an overcrowded and ineffective prison system. District court judges are frustrated beyond measure as they try to juggle the unjuggleable; they derive little satisfaction from a job that changed from one of the best to one of the most onerous. Last term, one of our district judges imposed an added sentence on a defendant because the defendant insisted

on going to trial even though he did not have much of a defense to offer. To my dismay, a majority of a panel of my court found that this was not improper. While I sympathize with the judge in his frustration, I cannot reconcile the constitutional right to a trial with the added punishment meted out to a defendant solely because he exercised a constitutional right.

Have we won the war on drugs? Not in my town and not in any town that I know. Are we more secure in our homes and on our streets? Not even an incumbent politician would take much credit for the good that sentencing reform has done for his constituents. Are we making any efforts to leave this path that has so beaten us? Not one whit! The crime bill that was recently before the Congress and which some attacked as being too "soft" on crime contained still more minimum-mandatory sentencing provisions. The Sentencing Commission, charged with the responsibility of revising the guidelines periodically, holds hearings, listens to the almost universal litany of complaints from the trial judges and others, and tinkers at the edges with the grid system that has locked us into the most ineffective punishment mechanism known to our history.

After all these years of trying a plan that works so poorly, it is time to junk it. It is time to charge Congress, or some commission that it punts to, with the responsibility of devising a system that works. That probably means that we have to forge a consensus on what it is that we want to accomplish with the criminal justice system and its sentencing component. If we want to use the criminal justice system to win the war on drugs, we probably have to build a lot of new prisons, create a lot of new federal courts, and put even more of our young population in jail for very long periods of time. I still am not sure that we could ever win that way, but at least we would have a shot.

If, on the other hand, we want to use the system and its sentencing component to promote a more secure society, we probably have to go back to square one. We need earlier intervention in the criminal syndrome. A teacher colleague of my wife insisted that she could determine which of the third graders in her inner-city classroom would end up in our penitentiary. She was probably more right than wrong. If anti-societal tendencies can be spotted at such tender years, shouldn't we address these issues early on, when it is easier and far cheaper to do something? When the violator being processed is a first offender, don't we need to apply more sophisticated remedies than either our present probation system or the reform schools offer? Both of them have turned out to be great tools for culturing recidivism and not much else. We need special schools, boot camps, job training centers, and job placement programs.

But mostly, we have to go back to the drawing boards and figure out what it is we are buying when we impose draconian sentences to our federal prisons. If the felon is young enough, the longer sentence only provides a better finishing school education in the crime business. If the felon is old enough, we are paying a pretty penny to confine somebody who at worst would probably add to our homeless population if we turned him loose. Crime basically is a young person's game, and the older felons tend mostly to get sickly and expensive to imprison. The current figures suggest that prisoners over fifty cost almost $60,000 per year to keep because of the added medical costs. If we really are passing out those long sentences just to vent our spleen, I am not sure that we can afford such expensive spleen.

I would hope that the Congress could appoint still another commission—not to review the actual sentencing grids, but to take the testimony necessary to look at our punishment system honestly—to see what it accomplishes and where it fails. Maybe such a commission could give the Congress enough cover to propose a wholly new system of punishments that doesn't start with punishing society. I think the first ingredient of such a new system would be restitution, rather than using that aim as an afterthought to our punishment goals. First and foremost, the criminal justice system should consider and make whole the victim. Were we to put restitution first, such a reform would have one immediate benefit: we would have to establish a real work program as the beginning of our new system.

Secondly, the length of sentence should have some meaning. How long does it take to teach a felon how to read and write? To learn a real trade? How long does it take for a felon to "burn out" age-wise? Does length of sentence really affect deterrence? If so, how long does a deterrent sentence have to be? We don't have the answers to any of these questions, and we have never really looked for such answers.

Finally, the type of institution and length of sentence both must be related to the kind of person we are sending there. If the person is totally incorrigible—a Specht, a Hinckley—let's not turn him or her loose at all. If we know we are going to have to live with the felon again, let's figure out how to make him more acceptable to our society by providing a job, an education, and a place to live.

Above all, we must stop trying to use the criminal justice system for problems that it can't cure, such as drugs, poverty, and gambling. The price of just hating our rule-breakers and meting out long prison sentences is hurting us in our pockets and everywhere else.

A primary reason for leaving our caves and forming a society was to protect ourselves from the animals that threatened us, whatever number of legs they had. We likewise created a legal system to protect us and to punish the two-legged species who broke our rules. The criminal justice system, as it evolved over the thousands of years since that exodus from the caves, never really settled on the rationale for that punishment. Vengeance, deterrence, rehabilitation, restitution—all are mixed up in a crucible and poured into the system without a recipe or a measuring cup. Currently, it is a very bad cake that we are asked to digest. We sorely need some better bakers in the Congress and the state legislatures if we are to end our national stomachache. And having baked a tortured metaphor long enough, I am done.