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Stephen A. Saltzburg

George Washington University Law School, ssaltz@law.gwu.edu

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Where Is Criminal Justice in this Presidential Year?

BY STEPHEN A. SALTZBURG

For many months we have witnessed interesting campaigns for the nomination of candidates of the Republican and Democratic parties for president of the United States. Senator John McCain, who was virtually broke and written off as old history, secured the Republican Party nomination more easily than anyone predicted in an amazing comeback. Senators Hillary Clinton and Barack Obama have excited Democrats, produced record primary and caucus turnouts, and fought a sustained battle for the Democratic nomination. As I write this column, the outcome of the Democratic battle is unknown. But, I write to make a recommendation to whoever the next president may be.

What is remarkable to me is that throughout the campaigns there has been little emphasis on criminal justice and few serious proposals by candidates for changing or improving the way in which the federal government enforces criminal law. There has been little discussion about the respective roles that the federal government and the states should play in law enforcement.

The absence of focus on criminal justice is explicable in part by the candidates' concerns about terrorism, national security, the wars in Afghanistan and Iraq, and foreign threats to the United States. But, as large a problem as international terrorism is,

STEPHEN A. SALTZBURG is the 2007-08 chair of the Criminal Justice Section and the Wallace and Beverley Woodbury University Professor at George Washington University School of Law in Washington, D.C. Contact him at ssaltz@law.gwu.edu.

it is a mistake to turn a blind eye to what has happened to criminal justice in America. We have close to 2.2 million people incarcerated in American jails and prisons on any given day. Although estimates vary and are subject to question in view of the accuracy of reporting by other nations, it appears that approximately 25 percent of the world's prison/jail population is found in the United States and that we incarcerate more people than any other country. There is statistical evidence to support a prediction that one of three African-American men born in the United States will spend time in jail or prison. We know that two-thirds or more of those incarcerated are African American or Latino. And the increase in the number of incarcerated women is

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startling. The impact of increased incarceration has decimated some neighborhoods, especially in urban areas. These statistics are cause for concern for all of us.

Because of the ever-increasing size of our prison/jail population, the obvious fact is that most of those incarcerated will be released, and the release of a large number of convicted offenders poses difficult challenges for them, their families, and their communities. Yet, the candidates are largely silent on the subject of reentry.

In some respects their silence is a blessing. Too many times in presidential and other elections, both state and federal, candidates who address criminal justice issues appear to make a special effort to scare voters, to exaggerate crime rates, and to consistently call for new legislation criminalizing more behavior,

providing for more incarceration, and ensuring longer prison terms. It is difficult to recall a candidate who suffered politically by creating an image of being “tough on crime.” It is equally difficult to recall a candidate who suffered politically by creating an image of an opponent as being “soft on crime.” Certainly, silence is preferable to more of the “same old, same old.”

As I move toward the end of my term as chair of the Criminal Justice Section, I find myself both sad and disappointed to find too little national leadership on criminal justice issues. Notwithstanding the passage of the Second Chance Act with substantial support from the American Bar Association, there is little discussion at the federal level about what is wrong with our criminal justice system and how it could be improved. My sadness and disappointment can be explained in two sentences: (1) I have been pleased and proud to have had, and to continue to have, the opportunity to work with elected prosecutors at the local and state government levels and with creative criminal defense attorneys, judges, and public interest organizations to candidly address what is wrong with our criminal justice system and how to improve it. (2) I have seen no movement at the federal level—not in Congress or in the executive branch—to recognize the innovations that have been made in the states, cities and counties; to consider promoting, supporting, and adopting those innovations at a national level; and to reexamine the proper balance between federal enforcement and state/local enforcement.

During the last several years, discussions within the Criminal Justice Section have demonstrated consensus approaching unanimity on several points and have resulted in thoughtful debates about matters on which consensus is more difficult to reach. The discussion and debates have provided an opportunity for each of us to reexamine our judgments about American criminal justice. Having done so, I discover that among the most important concepts—based on both my experience and what I have learned from those with more experience—that I believe to be true are these:

1. Communities are well served when we reduce the number of victims of crime, and the best criminal justice policy making involves a combination of approaches to crime that offer the best chance of reducing the number of people who will be victims in the future.
2. Crime is not necessarily reduced and a community is not always made safer by locking up as many people as possible. Alternatives to incarceration, properly funded and implemented, may reduce crime more than knee-jerk adherence to a philosophy of increased incarceration.
3. Properly funded and implemented mental health and substance abuse treatment programs can reduce crime. District Attorney Charles Hynes has demonstrated that this is true in Brooklyn, New York, and other prosecutors in cities and counties, large and small, have become believers. I do not have the space to list the many prosecutors whose imagination and courage in adopting new policies deserve recognition. I single out Charles Hynes, because he is the nominee for chair of the Criminal Justice Section in 2009-2010, and I know and trust that he will be more successful than I have been in changing the American conversation about criminal justice.
4. Incarceration is required, and substantial terms of incarceration are appropriate and necessary, for the most dangerous offenders and for those who have committed the most serious offenses. But not all offenders warrant the harshest possible treatment or the longest possible sentences. Often the most important decision that the criminal justice system makes with respect to an individual is deciding in the first instance whether he or she should be incarcerated or be treated. We need to pay more attention to how this decision is made.
5. When an individual is incarcerated, the first day of incarceration should be the first day in which a plan for reentry is begun for that individual. If a person enters prison with mental or emotional problems, or with substance abuse problems, and no treatment or counseling is provided to assist in changing past behavior, that person will leave prison worse off than when he or she entered. The likelihood is recidivism. That means more crime and more crime victims. This is unacceptable. Correctional officers need to communicate and work with probation and parole officers so that programs begun in prison can be continued upon release. It is time to make the criminal justice system work as an integrated unit rather than as separate entities paying little attention to each other.
6. When an individual with a criminal record, particular one who has served time, cannot find housing and a job, the individual often sees few alternatives to survival other than criminal activity. Society cannot close its eyes to the needs of those who have paid their dues if it wants to reduce crime and the number of crime victims.
7. In the 50 states, where prosecutors who do not have the budget of the Department of Justice and where legislatures cannot borrow an unlimited amount of money, officials have recognized the wisdom of

being “smart on crime” while also being appropriately tough. Efforts that began as cost-saving measures have been demonstrated to also reduce crime. The most successful of these programs should be models for other jurisdictions. Although programs may have to be nuanced to fit the particular needs of a community, the basic components of a successful program can often be replicated in many jurisdictions.

8. Federal sentencing guidelines and mandatory minimum sentences often produce sentences that are draconian and unnecessarily harsh when compared to state sentences. Too many crimes are now federal offenses, and decisions to bring a federal rather than a state prosecution are often haphazard and inconsistent.
9. In some cities, the related problems of gun violence and gangs have so frightened potential witnesses that homicides and other major felonies cannot be successfully prosecuted. The threat to witnesses is genuine, and the end result is communities or pockets of communities living in fear. For many young males, “serving time” has become a badge of honor more significant than an educational degree and a rite of passage that is most regrettable. The explanations are complicated, but it is clear that over-reliance on incarceration has contributed to the problem. Our military has learned in Afghanistan and Iraq that to stem violence in a community, it must win the hearts and minds of the people. The same is true for law enforcement in every community in America.
10. No matter how much we learn about crime and punishment, what works and what doesn't, experience teaches that one highly publicized murder, sexual assault (especially of a child), or other serious crime is likely to produce a call for greater penalties across the board, more prosecutions, and longer sentences regardless of whether these measures make us safer or put us at greater risk. As difficult as it is, those of us who work day after day on criminal justice issues need to encourage elected officials not to overreact to isolated criminal acts. Horrific crimes have occurred in the past and undoubtedly will occur in the future. They warrant severe sentences. But the isolated act of depravity should not drive all decisions governing prosecution and punishment.

With these points in mind, I call for the next president, whoever he or she may be, to convene a national congress

on criminal justice. It is long past time for a president to bring together prosecutors, defense counsel, judges, legislators, law enforcement, correctional officials, probation and parole officers, academics, victims advocacy groups, other public interest organizations, and ordinary citizens to reexamine and establish our criminal justice priorities, to propose reforms that will identify more clearly those whose criminal acts warrant long prison sentences and those who are better served by treatment. The national congress should be inclusive. It is important for prosecutors, defense counsel, judges, correctional officials, bar leaders, and lawmakers to come together not only to talk but to listen. We might learn much from listening to successful business leaders who have experience in setting and meeting goals within prescribed budgets; representatives of victims' organizations who can speak to the benefits of restorative justice and the needs of victims; spiritual leaders and community organizers who have developed programs to find housing and jobs for individuals with criminal histories; and even from those with criminal histories who can speak about the difficulties in changing their lives and the measures that helped them restore their lives after being punished.

It is time to be smart as well as tough. It is time to accurately determine the measures that hold the promise of reducing the number of future victims, assisting those who break the law in avoiding the downward cycle of recidivism and becoming contributing members of their communities, and to ensure that taxpayer dollars are spent wisely.

There have been times when the federal government has been a great leader and teacher on criminal justice issues, and there have been times when the states have served as criminal justice laboratories and have demonstrated new and better ways to deal with crime, victims, and offenders. Now is the time for the federal, state, and local governments to come together to address criminal justice issues that affect them all. A national congress in which the federal government sits down with state and local governments in the presence of broad constituencies of the American criminal justice system and the American people to have an honest conversation about crime and punishment is much needed. There is no silver bullet that will make crime disappear. But there are programs that work and there are individuals and groups who are committed to improving criminal justice in America.

I ask those who read this column, whether or not you agree with any or all of the specific observations I have made, to join me in urging the next president to make the commitment to a national congress on criminal justice. It is a conversation that needs to be had. ■