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CRIMINAL LAW

VICTIMLESS JUSTICE

ABNER J. MIKVA

The author was appointed to the United States Court of Appeals for the District of Columbia Circuit in 1979.

Judge Mikva was elected to five terms in the United States House of Representatives, representing portions of Chicago and Cook County, Illinois. As a freshman Congressman, he was appointed to the Brown Commission which provided the main impetus for current congressional efforts to recodify the criminal laws of the United States. Judge Mikva served on both the Judiciary and Ways and Means Committees during his tenure in the Congress. He was a member of five subcommittees, three under the Judiciary Committee—Criminal Justice; Administrative Law and Governmental Relations; and Courts, Civil Liberties and the Administration of Justice—and two at Ways and Means—Trade and Social Security. In the 95th Congress, he was Chairman of the Democratic Study Group which was comprised of over 250 House Democrats seeking political reform.

Judge Mikva served as a navigator in the Army Air Corps in World War II. He received his law degree from the University of Chicago in 1951, graduating cum laude. He was editor-in-chief of the Law Review and a member of the Order of the Coif. He is a member of Phi Beta Kappa. Following graduation, he was selected as a law clerk to U.S. Supreme Court Justice Sherman Minton. After a year in Washington, D.C., he returned to Illinois where he practiced law and became a law partner of Justice Arthur Goldberg.

In 1956, Judge Mikva won a seat in the Illinois House of Representatives—the first of five consecutive terms (1956–66). While there, he served as Chairman of the Illinois House Judiciary Committee.

While he was out of the U.S. Congress for one term, (1972–74), Judge Mikva returned to an extensive commercial law practice, engaging in trial and appellate litigation. Also during this period, he served as Chairman of the Illinois Ethics Board, and taught courses at Northwestern University School of Law.

Judge Mikva has authored several law review articles on subjects ranging from sovereign immunity to the legislative process.

As a member of the American Bar Association, Judge Mikva was on the Governing Council's Section on Individual Rights and Responsibilities as well as the Section on Litigation.

This article is based upon a Commencement address which Judge Mikva delivered at Northwestern University School of Law, May 18, 1980.

I believe it was Langston Hughes who said, "Don't prate to me about the glory of your institutions. Tell me how they work for me." If all of you lawyers in the audience, new and old, can extricate yourselves just for the moment from the institutions which you serve or are about to serve and take an objective look at one of them from the eyes of the citizenry, you will find that the criminal justice system does not work very well.

When we first came out of our caves many centuries ago, we banded together in loose govern-

mental forms in order to protect ourselves from the four-legged animals that preyed on us. As time went on and the number and forms of government increased, the number of legs on the animals decreased. By the time we formed this country, we were able to describe the desire for protection against our fellow man in a Constitution: to "establish justice, insure domestic tranquility, [and] provide for the common defence." The current perception of the average citizen is that we do not do any of those things very well, and perhaps the

gap between perception and fact is not a wide one.

The statistics are striking. For every ten crimes committed, it is estimated that only three or four are reported. That figure reflects the pervading cynicism about the system's capacity to insure justice. Equally dismal is the fact that over 5,000 crimes are reported annually per 100,000 persons, a number which has increased from a level of about 3,700 crimes per 100,000 persons only a decade ago. Considering this rate of reported crimes, the odds that any one of us will be a crime victim in a year's time are better than one out of twenty. Unreported crimes increase these odds to about one out of seven. The really discouraging numbers relate to what happens after a crime is reported. Police estimate that their arrests solve only one-fifth of the crimes reported to them. Moreover, a great many of the defendants are not convicted. For instance, a few years ago in Chicago, only twenty-six percent of those persons arrested on a felony charge were convicted. These statistics present a grim picture when aggregated. Only about one out of every one hundred crimes is successfully processed through the criminal justice system.

The anger and dismay of the average citizen are understandable. He observes obviously guilty defendants released for what seem to be the most trivial reasons: the failure of the police to say particular words when arresting the defendant, the prosecutor's mistake during the trial, a juror's reading of a prejudicial article. Further, the monstrously malfunctioning prison system hardens prisoners and thus compounds rather than corrects the problems. Parole boards exacerbate this assembly line justice by guessing wrong sometimes and releasing those who will commit more crimes.

From a different perspective, the defendant who is ultimately convicted may suffer draconian punishment. We hear accolades for a Dallas judge who meted out 800-year sentences for armed robbery. Never mind the total unreality and absurdity of such a punishment; and never mind the fact that armed robberies in Dallas remain as frequent as ever. Similarly, the United States Supreme Court upheld the life imprisonment sentence given another Texas defendant after three larcenies which *totalled* only two hundred dollars.

One of my favorite examples of the lengths to which we will go under the rubric of "law and order" is the Justice Department's strong insistence on its practice of engaging in what it euphemistically calls "consensual monitoring." Consensual monitoring is the curious label for a practice in which one party to a conversation consents to recording of the conversation without the other

party's knowledge. Such a practice is about as consensual as obtaining the perpetrator's consent to a rape. One other example of "law and order" procedures is the push for preventive detention in Illinois and elsewhere. Certain individuals—for example, in the District of Columbia, those charged with "dangerous crimes" who are found to be unsafe in the community—may be held in jail pending trial despite the criminal justice system's ostensible presumption of their innocence.

These unfortunate devices result from our failure to make the criminal justice system work. We are not a cruel people by nature, history, or religion. Even the Old Testament adage of "an eye for an eye, a tooth for a tooth" is not the vengeful prescription usually imagined. Rather it was a recognition that the loss of an eye constitutes a serious deprivation which the criminal justice system should seek to remedy.

This familiar adage illustrates a glaring omission from the legal equation necessary to "establish justice, promote domestic tranquility, [and] provide for the common defence": consideration of the victim. It would seem that the victim would head the list of priorities in our formula for justice. After all, the victim is the one who was shot, beat up, raped, robbed, burglarized, or perhaps killed, leaving a shattered family to try to pick up the pieces. The victim is the one who has to pay the hospital and doctor bills while missing work, and who may suffer serious psychological as well as physical pain. We created our elaborate and expensive criminal justice system to protect the victim. Some form of restitution or compensation would seem to be in order to render the victim whole again. Compensating for loss of life may be impossible, but that impossibility should not absolve the transgressor from any responsibility whatsoever for the damage he has caused.

Unfortunately, the criminal justice system victimizes the victims once again. At most, it seeks their assistance in apprehending the wrongdoer, often by forcing them to appear in court to testify—sometimes in fear for their lives and well-being, almost always with great callousness, inconvenience, and expense. The criminal justice system seems indifferent to whether the victim lost employment, whether the wage-earner has been killed, or whether there has been an outlay of funds for medical bills. Horror stories abound regarding the added humiliation which some rape victims suffer as details of their past sexual conduct are aired in a public trial.

The system is simply programmed to run criminals through a process which puts them in jail and,

according to a formula, lets them out after a certain period of time with the expectation that they will be more responsible and productive citizens. In short, the system juggles notions of deterrence, vengeance, protection, and rehabilitation in an effort to arrive at a just result, but rarely, almost never, does it require the offender to compensate the victim for his losses.

So we are left with a victim whose contact with the criminal justice system adds insult to injury. It is no wonder that such callous treatment engenders bitterness and hostility from the victims and undermines the administration of justice. Worse yet, such treatment feeds the frustration of the average citizen and increases the likelihood that he will endorse demagogic solutions to crime. Perhaps, then, instead of sending a criminal to jail and ignoring him and the victim, we should seriously consider release programs and alternatives to sentencing which will allow the offender to earn enough money to recompense the victim.

All our efforts, however, seem to be proceeding in the opposite direction. The federal and state governments have largely scrapped prison industries, which could provide offenders with opportunities to learn skills and to compensate victims. Offended by what many persons considered to be exploitation of a captive labor force, Congress effectively abolished prison industries by passing a law preventing goods produced in prisons from traveling in interstate commerce. Consequently, the skills acquired in prison, such as producing license plates, are virtually worthless outside the prison setting.

Just as state and federal governments have abolished prison industries, so too has Congress failed to provide restitution to the victims of crime. To a large extent this failure reflects the differing perspectives of the drafters of restitution legislation and interest groups.

In one such instance, while the drafters of restitution legislation were concerned about street crime and about citizens being victimized by armed youths, an interest group, the Business Roundtable, focused on antitrust, pollution, and environmental concerns. The Roundtable's concerns are important but they could be addressed by excluding white collar crime from restitution legislation. Such an approach is viable because in white collar cases the victim is capable of finding another forum in which to obtain restitution, rather than using the criminal justice system.

Even if support for restitution develops and judges increasingly require offenders to recompense

their victims, there will remain a sizeable class of crime victims who will not benefit. Restitution is not applicable when the offender is not apprehended and found guilty. If the offender is shot by the police and dies penniless, restitution is unavailable. These same problems foreclose recovery by the victim in any kind of civil lawsuit against the offender.

There is a need for a compensation program which operates regardless of whether the criminal is caught or has financial resources. As I have indicated, one of the primary reasons that individuals joined together in society was for mutual aid and protection. Americans pay their tax dollars expecting to be protected. In mutually sharing the cost of crime control measures, we have given up certain rights to self-help and shifted the responsibility for our safety to the Government. When a citizen suffers the misfortune of victimization by a criminal act, the Government has failed that citizen. The least the Government ought to do when its protection fails, is to provide some type of insurance policy. It is unjust and inequitable to make a small minority of unfortunate citizens bear the costs of crime.

This idea is hardly novel. Almost 4,000 years ago, under Hammurabi's Babylonian Code, wrongdoers were required to compensate their victims:

[I]f the robber is not caught, the man who has been robbed shall formally declare whatever he has lost before a god, and the city and the mayor in whose territory or district the robbery has been committed shall replace whatever he has lost for him. If [it is] the life [of the owner that is lost], the city or the mayor shall pay one manch of silver to his kinfolk.

Until the decline of the silver market, a "manch" was a pretty fair settlement.

In the late 1950s, Margery Fry, a British social reformer, drew attention to the lack of such a compensation program in a letter to the *London Observer*. What prompted the letter was her outrage at a court's restitution order which would have fully indemnified the victim only if he lived for another 442 years. She maintained that "the State which forbids our going armed in self-defense cannot disown all responsibility for its occasional failure to protect." In response, the British government established a program for public compensation of victims of crime.

In recent years, similar programs have been adopted by other countries and by half of the states (including Illinois) in this country. But the state

programs are very modest and little noticed. Victims are eligible only for unreimbursed losses from personal injuries sustained in a crime of violence. Overall, it is estimated that less than two percent of violent crime victims actually receive compensation. Obviously, federal contributions for programs compensating victims of crime would extend their reach and impact. Congress, however, has failed to act.

We need some programs that can restore faith in the criminal justice system. We need to believe that lawyers, and courts, and the law are *our* institutions, and that they work for all of us. Ignatius Silone said that “[o]n a group of theories, one can found a school, but on a group of values one can found a culture, a civilization, a new way of living together among men.” That is the task before us—to restore our values.