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Review of “Justice Is the Crime,” By Lewis R. Katz, Lawrence B. Litwin, and Richard H. Bamberger

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JUSTICE IS THE CRIME. By Lewis R. Katz, Lawrence B. Litwin, and Richard H. Bamberger.¹ Cleveland: The Press of Case Western Reserve University, 1972. Pp. 386. \$6.95.

Important, incisive, yet disturbingly insular, *Justice Is the Crime* decries congestion in the courts as the cynosure of a system's collision with disaster. The criminal justice system, manacled with procedures designed for yesteryear and crippled by interminable delay, is said to be simply incapable of dispensing justice. As courts choke on felony dockets, judges aspire at best for the mere appearance of justice; they cannot restructure a system which holds them captive.²

In a detailed factual exploration of a system which serves neither the interests of society nor those of the accused, Katz, Litwin, and Bamberger point out that the criminal law is "the dumping ground for all of society's problems."³ The caseload caused by overcriminalization results in intolerable demands on the resources of criminal courts. To prosecute all felons is impossible, so criminal laws are unequally enforced. Whether a particular offender is arrested is determined by the police, ordinarily according to the officer's perception of the interests of the police department; the arrest is later justified by the officer in court by whatever distortion of the facts may be necessary.⁴ After be-

1. Katz, a professor of law at Case Western Reserve Law School, has written some of the better pieces on the administration of justice. *E.g.*, Katz, *Gideon's Trumpet: Mournful and Muffled*, 55 IOWA L. REV. 523 (1970); Katz, *Municipal Courts—Another Urban Ill*, 20 CASE W. RES. L. REV. 87 (1968). Litwin and Bamberger are former students of Katz.

2. The authors quote a judge who is disenchanted with the necessity of accepting plea-bargains: "I feel like a fool and a clerk in a bargain basement . . . helping in the denigration of our brilliant judicial heritage." L. KATZ, L. LITWIN & R. BAMBERGER, *JUSTICE IS THE CRIME* 219 (1972) [hereinafter cited as *JUSTICE IS THE CRIME*].

3. *Id.* at 4. It is further explained:

The laws of the states and federal governments, moreover, are replete with too many criminal offenses. Each time a new social problem arises that angers the majority, legislatures are all too willing to enact additional criminal offenses. . . . The decision to label marijuana users as criminals forced the police and the courts into the center of the generation gap

Id. at 90-91 (footnotes omitted).

4. "Distortion of the facts becomes the most persuasive and the most significant of abuses." *Id.* at 96 n.25. See *People v. Dickerson*, 273 Cal. App. 2d 645, 650 n.4, 78 Cal. Rptr. 400, 403 n.4 (1969). See also *Miranda v. Arizona*, 384 U.S. 436, 504-05 (1966) (Harlan, J., dissenting); *Harris v. United States*, 331 U.S. 145, 172 (1947) (Frankfurter, J., dissenting); *Williams v. Adams*, 436 F.2d 30, 36 & n.4 (2d Cir. 1970) (Friendly, J., dissenting), *rev'd*, 441 F.2d 394 (2d Cir. 1971) (en banc), *rev'd*, 407 U.S. 143 (1972).

ing arrested for what might appear to be a single offense, a man may later be unfairly charged with additional felony counts, further congesting court calendars.

Although presumed innocent, many arrested persons are incarcerated because they are financially unable to post the bail imposed by the court. An individual in jail can hardly assist in the preparation of his defense. But whether an accused is able, for example, to help counsel locate witnesses is of slight consequence; the courts accord the cherished right of trial by jury to less than one defendant in ten.⁵ Indeed, the caseload is so staggering that "the very survival of the criminal justice system requires that the overwhelming majority of defendants do not have trials."⁶ Defendants who desire jury trials are dissuaded by threats of harsh sentences.⁷ Guilty pleas lead to most convictions; this is said to be because "plea bargaining is necessary to the operation of the system."⁸ When a person pleads guilty he is sentenced according to whatever whims inspired the bargain; the needs of the community are ignored, judicial guidelines are conspicuous by their absence, and the touchstone is "quantity, not quality."⁹ In short, the system is a shambles.

In the face of this distressing exposition, the primary thesis of *Justice Is the Crime* is somewhat bizarre. As promulgated by Katz, Litwin, and Bamberger, "The problem in the system is the inordinate amount of time that elapses between the time an arrest occurs and final disposition is made of the case."¹⁰ Though they recognize the need to restrict the operation of the criminal law to truly criminal behavior, thus reducing the astronomical number of cases which crush the courts,¹¹ the au-

5. JUSTICE IS THE CRIME 183, 190; accord, e.g., R. CLARK, CRIME IN AMERICA 196, 207 (1970) [hereinafter cited as CLARK].

6. JUSTICE IS THE CRIME 183. Moreover, "the system demands for its preservation that all but a small fraction of cases result in pleas of guilty or in dismissal. It has a compelling interest in reducing this fraction still further and in ensuring that processes for disposing of cases without trial are equitable." *Id.* at 191.

7. *But see* United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 410 U.S. 966 (1973) (reflecting on the impropriety of District Judge Carr's use of his sentencing power as a carrot to clear his congested calendar).

8. JUSTICE IS THE CRIME 202. "Dealing is the essence of the criminal process . . ." *Id.* at 148.

9. *Id.* at 209.

10. *Id.* at 2.

11. See note 3 *supra* and accompanying text. As a result of the legislative tendency to attempt to resolve all social problems through criminal sanctions, "criminal courts throughout the country have more cases than can be intelligently handled, and

thors assert that "legislatures that tackle the morass in the courts will find that *delay* is the greatest problem"¹² This curious conclusion is apparently supported by nothing more than scholarly fiat. There is no doubt, of course, that inordinate delay permeates the judicial process. And though others may assess delay as, for example, a product of gross overcriminalization,¹³ the fact that Katz, Litwin, and Bamber-

these cases move slowly through the maze of legal procedures towards disposition." JUSTICE IS THE CRIME 4. Courts lack the ability to deal effectively with the myriad of social problems; with the insufficient number of "legal personnel to cope with the existing high crime rate, the additional role of social arbiter makes decisions about allocating the available resources even more difficult." *Id.* at 92. Resource-allocation decisions are made without reason and foster "the chaos that exists in the criminal justice process." *Id.* More succinctly, "in order to make the law more meaningful to the existing society, the wisdom of the legislature should be directed towards reviewing all offenses and repealing many now outmoded laws." *Id.* at 102. Clogging the courts with marginal offenses ensures "that the more serious crimes . . . will not get the scrutiny they deserve." *Id.* at 105.

12. JUSTICE IS THE CRIME 5 (emphasis added).

13. Fortifying their thesis by reference to an American Bar Association study, criminologists Norval Morris and Gordon Hawkins maintain:

The expenditure of police and criminal justice resources involved in attempting to enforce statutes in relation to sexual behavior, drug taking, gambling, and other matters of private morality seriously depletes the time, energy, and manpower available for dealing with the types of crime involving violence and stealing which are the primary concern of the criminal justice system.

N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 6 (1970). This overreach of the criminal law, for example, with respect to public drunkenness, "overloads the police, clogs the courts, and crowds the jails." *Id.*

Ramsey Clark assays that "the proliferation of the corpus of law, the failure to distill and refine, to reduce to minimums, can hurl the system out of control." CLARK 202. Specifically, and not surprisingly, "The evidence to date does not support criminal sanctions against the use of marijuana." *Id.* at 95. Generally referring to "overreliance on criminal justice to control antisocial conduct," *id.* at 116, Clark concludes that "neglect and a demand that it do the impossible are the principal reasons our system of criminal justice is failing." *Id.*

It was once opined by Thomas Jefferson that the Constitution tolerated congressional legislation against "treason, counterfeiting the securities and current coin of the United States, piracies and felonies committed on the high seas, and offenses against the laws of nations, and no other crimes whatever" Jefferson, *The Kentucky Resolutions of 1798*, in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 540 (2d ed. J. Elliot 1861), reprinted in 4 *THE ANNALS OF AMERICA* 62-63 (1968). But federal law today authorizes prosecution for a "numerous series of offenses from a single alleged criminal transaction." *Ashe v. Swenson*, 397 U.S. 436, 445 n.10 (1970). See J. MILL, *ON LIBERTY* (1859); E. SCHUR, *CRIMES WITHOUT VICTIMS* (1965); B. TARLOW, *SEARCH WARRANTS* 82 n.214 (1973); MORRIS, *The Proper Role of the Criminal Law*, in *THE GREAT IDEAS TODAY* 22 (1972); cf. Will, *Overloading the Judicial Circuit*, 30 *ANTIOCH REV.* 235, 238-39 (1970). Compare Junker, *Criminalization and Criminogenesis*, 19 *U.C.L.A.L. REV.* 697 (1972), with Kadish, *More on Overcriminalization: A Reply to Professor Junker*, 19 *U.C.L.A.L.*

ger subscribe to the harebrained idea that delay itself is the cause of court problems¹⁴ should not dismiss their thoughtful and provocative analysis of delay.¹⁵ Aside from its undiscerning central premise, *Justice Is the Crime* is a valuable, if not unimpeachable, work.

Surely, swift justice must be sought.¹⁶ At present, it is not unusual that from a person's arrest to the disposition of his case some eight months will elapse.¹⁷ By reasonable standards, the disposition should be completed in less than three months;¹⁸ yet the median period appears to be increasing. Katz, Litwin, and Bamberger painstakingly delineate each factor which contributes to these inordinate time lapses, carefully evaluate the utility of each component of the criminal justice procedure, and set forth a rational reform for each time-absorbing step.

For persons released from custody after arrest, extended pretrial delay is arguably beneficial. Not only may a released defendant help counsel investigate and prepare for trial, but he may also earn the funds necessary to retain counsel and, through employment and family activities, establish a pattern of good behavior which can help garner a lighter sentence if he is convicted. Moreover, released defendants may await the optimal plea-bargain, perhaps refusing one prosecutor's offer in the hope of another's more lenient offer.¹⁹ Some defendants may right-

REV. 719 (1972), and Skolnick, *Criminalization and Criminogenesis: A Reply to Professor Junker*, 19 U.C.L.A.L. REV. 715 (1972).

14. At times, perspective is nearly attained. For example, sandwiched between assertions that delay is the darkest evil is the recognition that "the great number of cases makes delay inherent . . ." JUSTICE IS THE CRIME 2.

15. Indeed, upon consideration of the system's existing inadequacies, it is not improbable that even with minimal criminalization the caseload would not be so insubstantial as to eradicate delay. Additionally, careful consideration should always be given to any proposal which might hasten the administration of justice. See CLARK 119-23, 211.

16. In Robert Bolt's *A Man For All Seasons*, Sir Thomas More advises that a prospective litigant will receive justice just as if she were More's own daughter—"fairly and quickly."

17. Katz, Litwin, and Bamberger concentrate on statistics compiled in Cuyahoga County (Cleveland), Ohio, but supplement the figures with accounts from other jurisdictions.

18. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 86-87 (1967), cited in JUSTICE IS THE CRIME 36 n.5.

19. To illustrate, suppose that one Sidney J. Freem is arrested in September 1969 and charged with possession of nine kilograms of marijuana. In November, at the time of the pretrial conference, Freem is unemployed. The prosecutor offers a disposition of a felony conviction and a maximum of one year in custody. The offer is refused by defense counsel, who then proceeds to obtain continuances for the next ten months.

fully surmise that a sufficiently long delay will tend to facilitate the disappearance of adverse witnesses. Thus, as the authors point out, persons who are freed from custody "are in no hurry because delay works to their benefit."²⁰ Further, "a mystique has developed among criminal defense attorneys that if a defendant waits out the system long enough, he may never be held accountable for his crimes."²¹ In their wholesale condemnation of pretrial delay, however, Katz, Litwin, and Bamberger refuse to credit a *right* to delay on behalf of released defendants. The authors argue that irrespective of bail status, a defendant must be processed quickly.²² For those accused held in jail pending adjudication, the proposal appears valid; it is clear that for these persons the benefits of delay are nonexistent. If denied release, a person must endure sub-human jail conditions.²³ Family ties may be decimated. Job and income are lost.²⁴ A jailed defendant cannot assist in the preparation of his defense, cannot properly confer with counsel,²⁵ and is amenable

By the time the case comes up again, Freem has built an enviable record of good behavior, including employment in a respectable position for nine months. Moreover, the head prosecutor is on vacation, and a new assistant handles the case. In these circumstances, the prosecution agrees to a misdemeanor conviction with a sentence of informal probation which allows Freem to continue in his job. Delay has clearly inured to Freem's benefit and not only saved society the cost of incarceration but filled its coffers with Freem's tax dollars. But under the scheme advanced by Katz, Litwin, and Bamberger, Freem would have been jailed *ab initio* and would not have had the opportunity to prove himself a valuable member of society.

20. JUSTICE IS THE CRIME 125 (footnote omitted).

21. *Id.* at 70.

22. "Strict overall time requirements, demanding disposition or trial within 60 days if the defendant is in jail or 120 days if he is free on bail, must be enacted to cover the entire case and each separate stage of a case." *Id.* at 221. Part of the rationale is that the perceived deterrence function of the criminal law requires that "punishment must follow swiftly upon the wrongful act and the apprehension of the wrongdoer." *Id.* at 53.

23. "[P]retrial detainees are jailed in far worse conditions than those convicted of crimes." *United States v. Cowper*, 349 F. Supp. 560, 566 (N.D. Ohio 1972) (footnotes omitted). See *Brenneman v. Madigan*, 343 F. Supp. 128, 133-35 (N.D. Cal. 1972).

24. One advantage of pretrial release is that a person may earn the money necessary to pay counsel. Katz, Litwin, and Bamberger recognize that many delays are occasioned by counsel's need to be paid for his services, but they do not explain how defense money is to be raised in the brief period allowed under their proposal.

25. In *Stack v. Boyle*, 342 U.S. 1, 4 (1951), the Supreme Court said that the "traditional right to freedom before conviction permits the unhampered preparation of a defense." Justice Jackson explained that defendants confined pending trial "are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense." *Id.* at 8 (concurring opinion). See *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970). It has been reported that at least one judge ordered an accused released

to constant pressures to plead guilty. Yet it is not unlikely that an indigent's court-appointed counsel will delay the case without regard to incarceration.

Few would suggest that a jailed defendant's right to a speedy trial²⁶ should not be scrupulously enforced. Katz, Litwin, and Bamberger advocate a strict time parameter of sixty days; if charges against a person in custody have not been disposed of, or if he has not at least been brought to trial, within sixty days of his arrest, the charges must be dismissed.²⁷ With less persuasiveness, the authors recommend a stringent 120-day limitation for cases in which the defendant has been released on bail. To achieve this goal, Katz, Litwin, and Bamberger suggest an unprecedented convolution of the sixth amendment's guarantee of a speedy trial. Under the proposed system a defendant would be *compelled* to exercise his right to a speedy trial; unlike other constitutionally secured rights, the right to a speedy trial could not be waived.²⁸ Perhaps alternatively, the enterprising authors would obtain a constitutional amendment to provide what they describe as "the community's speedy trial rights."²⁹ Anyone who has struggled under the language of the sixth amendment knows that the right to be brought to trial within a reasonable time is vested in the defendant and may not, as yet, be exercised by the state.

Various other proposals detailed by the authors for streamlining the criminal justice process appear to be sound and attainable. Even their advocacy of abolition of the historic prosecutorial function of grand juries³⁰ in favor of a mandatory preliminary hearing should not meet

from custody so that he would be able to consult with his lawyer free from eavesdropping jailers. *Lanza v. New York*, 370 U.S. 139, 147, 149 (1962) (Warren, C.J.).

26. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."

27. No dismissal would be in order if the defendant has somehow contributed to the delay. *See, e.g., People v. Ochoa*, 9 Cal. App. 3d 500, 506-07, 88 Cal. Rptr. 399, 404 (1970); CAL. PENAL CODE § 1382 (West 1970).

28. JUSTICE IS THE CRIME 221: "The key to revitalizing the criminal justice system and its ability to deliver a speedy trial must be standards that make a speedy trial mandatory and that would deny to defendants and defense attorneys the opportunity to choose delay as a tactic."

29. *Id.* at 173.

30. The grand jury is a mere rubber stamp for the prosecutor, fails to weed out groundless charges, and is a far less effective screening device than the preliminary hearing. Thus, when a defendant has been arrested and a preliminary hearing is conducted, the grand jury serves no function and should be abolished. In an evaluation of manifest presence in light of Watergate, however, Katz, Litwin, and Bamberger

with violent disfavor outside an occasional prosecutor's office. But in enumerating the means of implementing reform, *Justice Is the Crime* at times strays beyond the pale. For example, not content to impose near herculean burdens upon defense counsel to proceed expeditiously with every case, Katz, Litwin, and Bamberger recommend that if an attorney persists in efforts to maximize delay, "then a jail sentence may be appropriate."³¹ Similarly, under the new regime, if a released defendant delays justice he "may be withdrawn from bail and incarcerated"³² Furthermore, while initially disavowing so-called preventive detention, the authors somehow manage to reverse their position, joining John Mitchell and other erstwhile civil libertarians who favor this vast incursion of fundamental rights.³³

For defendants who are not to be preventively incarcerated prior to trial, Katz, Litwin, and Bamberger advocate a more expeditious system of setting bail. Instead of the present rote bail assessment by a magistrate at the initial court appearance, a comparable amount would be fixed by the booking officer at the police station. Any accused unable to secure release after forty-eight hours would receive judicial review

suggest that "the grand jury could continue to function, albeit on a much smaller scale, investigating criminal activity where there has been no arrest and overseeing public officials as a check against official misconduct." *Id.* at 135. Indeed, Jeb Magruder testified in June 1973 before the Senate's "Watergate Committee" that his visions of prison bars commenced when the grand jury announced it would reconvene for further investigation.

31. *Id.* at 86. The authors intimate that continuances should be denied even to the extreme of compelling a person "to defend without counsel." *Id.* at 85 (footnote omitted).

32. *Id.* at 174.

33. See Mitchell, *Bail Reform and the Constitutionality of Pretrial Detention*, 55 VA. L. REV. 1223 (1969). Katz, Litwin, and Bamberger point out quite correctly that there has yet to be divined any adequate basis for predicting a person's future behavior so as to justify pretrial incarceration. See Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 372-73 (1970). The authors suggest, however, that if preventive detention reduces delay, "then the program will have made a substantial contribution to society." JUSTICE IS THE CRIME 143. Jailing people prior to an adjudication of guilt or innocence "may help to lessen the oppressive fear of crime that hangs so heavily over the American society and is inhibiting the life of American cities." *Id.* at 175.

It is unfortunate, but not inexplicable, that the authors manifest a Mitchell mentality and quote generously from police-state citadels like Richard Nixon and Warren Burger. Precursing the book's doom is a notation on the copyright page that "*Justice Is the Crime* was originally prepared as a report to the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration." When one is funded by the werewolf, the echo of its cry may be omnipresent and

inescapable.

of the police bail-setting. Clearly, such a revised procedure would conserve court resources and allow immediate release of persons arrested at untoward times such as Friday night. Nevertheless, if reform is in the offing and the police are to be instrumental, it would seem more appropriate to consider dismantling the extant arrest, jail, and bail program in favor of a process in which an accused person may execute a simple promise to appear.

The delay-causing bail process, as well as other historical procedures which the authors probe, tends to maim rather than further contemporary interests. If, as Katz, Litwin, and Bamberger maintain, the present criminal justice system cannot adequately serve present needs, a reasonable solution would be either the creation of a new system or a reduction in needs. Wholesale replacement of the existing system is undoubtedly precluded by the nation's traditions; time-saving steps articulated in *Justice Is the Crime* at best would provide an expedited morass. But a reduction in demands is theoretically viable. To return, for example, to the uncodified criminal law would result in far fewer arrests and would unclog court dockets to the extent that a concept like trial by jury could mean more than some obscure alternative to a plea-bargain. Concerned solely with the most important anti-social behavior, courts could fulfill their function of dispensing justice.

Yet, because one must accept the improbability of a massive repeal of useless laws,³⁴ *Justice Is the Crime* must be accorded the attention of anyone seriously pursuing court reform. It is one of the most comprehensive and thoroughly documented works of its kind.³⁵ Its recom-

34. Attorneys Mel Albaum and Walter H. King have issued a realistic and inspired, albeit whimsical, challenge to the horror-monger critics of court congestion:

Inefficiency in the administration of justice is a prerequisite for our survival as a free nation. . . . "Free" meaning not incarcerated.

If the law were applied equally, efficiently and persistently by competent police and prosecutors with adequate numbers of personnel properly equipped, the great majority of our population would be behind bars. The rest, of course, would be on probation.

Albaum & King, *Legal Loops*, L.A. Free Press, Aug. 20, 1971, at 15, col. 3. To the degree that court congestion diverts police attention to serious crime and causes judges to dismiss cases involving technical or moral offenses, "it serves a valid social function." *Id.* Moreover, when court traffic exceeds that of Kennedy International, defense lawyers' coffers are lined. Thus, "our present system is perfect." *Id.*

35. In addition to massive citations of relevant authority in the footnotes, *Justice Is the Crime* contains a thirteen-page bibliography, a twenty-page appendix of convincing court statistics, and a 119-page compilation of state criminal procedure statutes and case authority. The statute and case outline extends from Alabama to Wyoming and

mentations for alleviating delay in the criminal court system are specific and frequently susceptible of implementation. But, largely because of its parochial focus on delay as the singular affliction of the judicial process, *Justice Is the Crime* cannot be deemed to have realized the full promise of its imaginative title.

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presents pertinent materials from each state under the following headings: bail, preliminary hearing, grand jury, pretrial discovery, and speedy trial. It is an uncommonly thorough and unquestionably useful reference piece.

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