

# Criminal Justice Model A Costly Mistake

MONEY, NOT ATTRITISM, DRIES OVERDUE PROGRESS

By TARA KNIGHT

This month marks my 21st year practicing criminal law. I believe criminal defense lawyers have a perspective on, and insight into, a number of important issues. This insight is not shared by the public generally or, even more significantly, our legislators, who ponder and pose shamelessly to be seen as tough on crime before enacting laws that largely serve, at great expense, to make us less safe and our society less just.

Our trip-side seat gives us a sharper appreciation of the roots of criminality. Our perspective also makes it easier to see how many disastrously wrong-headed policies permeate the criminal justice system, creating contempt and disdain for the law instead of fostering the respect required for a more evolved and civilized society.

For years we have been arguing about the unfairness, obvious racism and all-around inanity of crack-cocaine sentencing guidelines and mandatory minimum sentencing that disproportionately affects minority defendants. We have tried to get judges and legislators to recognize systematic abuses of police power, particularly in the realm of search and seizure, and to see how these abuses foster resentment, especially in minority communities.

These abuses give rise to anger, distrust of authority, and a loss of respect for the police and

the courts, which persistently look the other way. We have tried to call attention to the faults of most eyewitness identification procedures, and the enormous risk of erroneous conviction which results from them.

These efforts have, by and large, been met with incredulity and disdain from trial courts that consistently refuse to permit juries to hear expert testimony concerning the unreliability of eyewitness identification. We have long known about the abuses by some police departments in obtaining confessions and have argued, mostly without success, that suspects do, in fact, confess to crimes they did not commit, as several recent high-profile exonerations demonstrate. We have argued that our approach to the punishment of young offenders fails to recognize that their decision-making capability is stymied by their biology.

We have also complained about the tendency especially among young prosecutors, to insist on felony convictions for first offenders. Short on life experience and clobbered with incredible power, they apparently need to demonstrate their toughness as somebody else's expense. Those convictions effectively consign defendants to the underbelly of the job market, thereby greatly increasing the likelihood they will re-offend.

We have argued that the burgeoning prison system is counterproductive because it decimates families, is needlessly cruel, and is an enormous drain on government budgets. But those arguments have foundered on our legislators' need to appear ever-tougher on crime, whether or not their decisions actually contribute to public safety. Indeed, some legislative maneuvers actually increase the likelihood that released prisoners will return to criminal behavior because they are left with few other options.

We have fought against the senseless proliferation of laws needlessly criminalizing behavior ranging from bullying in school to using a cell phone while driving, which are enacted by politicians who feel the need to be tough. Finally, we have championed the repeal of the death penalty, arguing that it is anachronistic, barbaric, vengeful and has no place in an evolved and enlightened society. Virtually every other developed country in the world has already adopted this position; indeed we stand shoulder to shoulder with such paragons of respect for human rights as Iran and China.

## Signs Of Progress

I am happy to report that in some limited respects there are actually signs of progress. I would like to flatter myself with the thought that my efforts, and those of other members of the criminal defense bar, have prompted this. Instead, I think the reason is principally money. If there is any silver lining to the black cloud of our economy and public finances, it is that legislators and ordinary citizens are being forced to consider the enormous costs of some misguided criminal justice policies and our resultant inability to adequately fund other important programs, such as education and healthcare.

Although many mandatory minimum sentences remain on the books, and are routinely used as hammers over the heads of defendants, the trend seems to be toward a realization that these policies are both wrong and enormously

costly. Mandatory minimums, like the conspiracy charge, are the darling of the prosecutor's nursery.

Many judges don't like them because they constrain judicial power. Some legislators are beginning to recognize they must be reconsidered and, at a minimum, narrowed because of cost. According to a 2006 study by the Office of Legislative Research, the average annual cost of incarceration in Connecticut was more than \$44,000 per inmate in fiscal 2006. It is undoubtedly considerably higher now.

Some in the legislature have finally realized how erroneous eyewitness identifications are the foundation for wrongful convictions, something that should be anathema to our system. Beginning Jan. 1, police departments throughout the state will be required to enact changes leading to sequential and double blind procedures during photo line-ups. Although our efforts to require that interrogations and confessions be videotaped have failed, the legislature and the public are becoming increasingly aware that false confessions are a real phenomenon.

It is progress, albeit meager, that people are talking about this as a real issue. Unfortunately, this is an issue which could and should have been addressed in *Sire v. Peter Kelly* in 1974, in which a son was wrongfully convicted of killing his mother.

There is also recognition that juveniles should be treated differently than other defendants, and many teenage arrestees are now under the jurisdiction of the juvenile system. Legislators and the public appear to be grasping that too many individuals are on prison or under supervision and that operating prisons and probation departments is a very costly venture. As a result, there is a trend toward giving judges discretion, through safety-valve type exceptions, to mitigate sentences involving mandatory minimum sentences.

Further, the legislature has brought back good time credit and is allowing home confinement for certain Driving Under the Influence offenders so that their lives, jobs and families are not decimated by a prison sentence. The legislature, with the support of Mothers Against Drunk Driving, also enacted a statute allowing for the implementation of interlock ignition devices, essentially a Breathalyzer in the car.

This represents much-needed recognition of the fact that people need to drive in order to work in order to support their families. The Department of Correction is also moving ahead with a procedure allowing probation officers to formulate community release plans for certain inmates serving minimal sentences to serve out a portion of their sentence outside of prison.

At the same time, the Probation Department is pushing for the removal of non-violent, compliant offenders from their rosters so that they can focus their resources on the more dangerous inmates. The granting of ex-

prisonment and provisional pardons has increased in the state with the recognition that a felony conviction greatly impairs a person's employment. The legislature has also finally decriminalized possession of small amounts of marijuana.

## Disturbing Trends

Were it not for Cheshire (like Columboe and Waco, a heinous case now known by its one-word location) the death penalty would, in all likelihood, have already been repealed in Connecticut. Thankfully we have an under-earned legislator willing to press the issue and a governor who has signaled a willingness to sign the bill if the legislature can muster the political courage to pass it.

On a personal note, from my observations and discussions with colleagues, I can attest to the continuation of some disturbing trends. They include the tendency of the judiciary to suspend disbelief in denying meritorious motions to suppress and to automatically believe police officer witnesses, no matter how far-fetched and transparently preposterous their testimony.

Other judges have actually ordered people arrested if they are not in court at 10 a.m. (long waits in metal detector lines are no defense). Still others rarely rule in favor of a defendant in a violation of Probation processing because, after all, a prosecutor only has to prove a violation by a preponderance of the evidence. The trend for judges these days is to push numbers (they have to report case disposition numbers to Hartford) forgetting that, really, their jobs involve far more important concerns than that.

On the other hand, juries do seem to be convicting less often. Maybe those CSI shows have actually imparted the notion that prosecutors must prove their cases with reliable and probative evidence. The rise of social media and internet search engines is providing lawyers with a treasure trove of useful information in jury selection and beyond. Unfortunately, and not surprisingly, it seems that jurors are also tempted to employ the same mechanisms to check out lawyers' defendants and witnesses.

It also seems to me that trials are becoming even sorer, discouraging the development of superior litigators among the younger criminal defense ranks. Who can become an expert trying one or two criminal cases a year? Judges with little or no criminal experience are sometimes assigned to busy criminal courts a situation that benefits no one.

The fact that progress on some fronts seems largely driven by money, or the lack of it, and not because the changes simply represent the right thing to do, does not mean we shouldn't be grateful for it.

So much remains to be accomplished, however, I believe an important role for the criminal defense bar is to look beyond the individual client, use every opportunity to reach out to the public, and to convince people that the hard-edged and purely punitive criminal justice model we employ is wrong, counter-productive, and comes at great cost to other important public needs and objectives.

Tara Knight is the founding member and senior partner of Knight & Cartelli L.L.C. in New Haven and is a past president of the Connecticut Criminal Defense Lawyers Association.

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