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## International Perspective

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going to be more than difficult under current systems, more than improbable under the current political conditions. And this is not a prediction which is based upon the dynamic statistical analysis of growth in imprisonment. That's not something you get when you look at the time patterns. Because the volatility of this should be a two-way street. You look at stock charts and you say "Hey Zimring, do you think the Dow Jones is going to come down much from 11,000?" You look at that stock chart and you turn it upside down and you say "Oh, it could go a long way down." And I believe that.

Imprisonment is just as volatile and just as conditional, but I don't think it's going down, and the reason I don't is not found in the dynamics of prison population fluctuation, it's found in the political conditions which are now governing policy fluctuations. If this were simply a law of physics, anything that goes up that fast can come down fast as well. But physics ain't where we're at, folks. We're dealing with a political short-circuiting process that has removed the insulation that used to exist between political sentiments—where burglars have never been popular in American life, even down there in 1973 before Al Blumstein published his article—and the punishment outcomes that used to be determined a considerable distance from the legislative sentiments and the popular support. Once that short-circuiting process has occurred—and I think that's really a lot of the story of the last seven years—putting the toothpaste back in the tube turns out to be a very delicate surgical procedure. And a very difficult one to get optimistic about in the near or even middle-range policy future of the United States.

### AN INTERNATIONAL PERSPECTIVE

DOUGLASS W. CASSEL<sup>†</sup>

I don't think it's accurate to say this panel has six experts on incarceration. I think we really have five experts and one dilettante. I know a bit about international human rights law. I am not an expert on prisons and I am overwhelmed by the expertise and the statistics that we've just received and about which I hope to learn a great deal more. So I apologize to you in advance for supplying nothing more than impressions of the international realities of incarceration. I will then skip quickly ahead to the law.

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On the reality, internationally speaking, it is my impression that no country in the world relies as heavily as the United States does on imprisonment as a crime control technique. Statistically speaking, I think we may be outpaced by Rwanda, where for some years over a hundred thousand people have been imprisoned for genocide out of a total population of, I think, six million, but that's aberrational, a particular response to a genocide which hopefully will be a non-recurring event.<sup>9</sup> But in terms of ordinary crime for which incarceration is imposed in countries around the world, I think it's true that we are not only world-class, but the world leaders.<sup>10</sup>

Now why is that? Well, I think you have to compare us on the one hand to developed countries, and on the other hand, to developing countries. If the comparison is with developed countries, I think that I'm on safe ground saying that the rates of poverty and of economic and social inequality, and the crustiness of that inequality—that is, it has lasted longer—we now have third, fourth, and fifth generations of the underclass locked not only in seemingly permanent poverty, but also in hopelessness and despair—I think that in all of those categories we are the unparalleled leader among the developed countries of the world.<sup>11</sup> If that is true, small wonder, then, that we have higher rates of imprisoning that underclass, which responds in violent and criminal forms to the lack of opportunity and lack of hope by committing crimes, and we have few qualms about finally taking the Zimring approach of simply “throw away the keys, who cares about them?” And another factor that comes out of this of course is the drug problem, about which I'll say no more because I think the point is obvious.

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9. “According to government statistics at the start of 1999, Rwandan jails held some 150,000 persons: 135,000 were charged with genocide and 15,000 with other crimes.” Human Rights Watch, *HRW World Report 2000, Rwanda*, accessible at <<http://www.hrw.org>>. Rwanda's 1997 population was six million. U.N. Development Programme, *Human Development Report 1999* (hereafter HDR) 200.

10. The U.S. reported to the United Nations Committee Against Torture in October 1999: “The United States currently has the largest prison population and the highest incarceration rate of any country. Sentenced inmates numbered about 436 per 100,000 residents. By mid-year 1997, 1 in every 155 United States residents was incarcerated.” U.N. Committee Against Torture, *Consideration of Reports Submitted by States Parties, United States of America*, Report dated 15 October 1999, UN Doc CAT/C/28/Add.5, 9 February 2000, p 23, par 79, accessible at <[http://www.unhcr.ch/tbs/doc.nsf/0/fd58acc3c4d77447802568cf0030f212/\\$FILE/G0040656.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/fd58acc3c4d77447802568cf0030f212/$FILE/G0040656.pdf)>.

11. The most recent U.N. ranking places the U.S. dead last on the Human Poverty Index among 17 industrialized countries ranked in the “High Human Development” category. Based on income data from 1989-94, 19% of Americans had income below 50% of median income, versus less than 14% in the United Kingdom, 12% in Canada and Japan, 8% in France and 6% in Germany. The richest 20% of Americans had 8.9 times as much real gross domestic product per capita as the poorest 20%, versus 7.1 in Canada, 4.3 in Japan, 7.5 in France and 5.8 in Germany (the U.K. was slightly higher at 9.6). HDR at 149.

So if we look at other developed countries, we see much lower rates of violent crime.<sup>12</sup> We see much higher rates of social cohesion. More members of the society are considered to be members of the family, or at least members of the species, and therefore it is considered less acceptable to lock 'em up and throw away the keys.

If we look at developing countries, and that's most of Latin America, practically all of Africa, and a good part of Asia—and that is to say that most of the people of the world live in these countries<sup>13</sup>—an important factor, I think, and I don't know how to measure it, is that there is far less capacity in the criminal justice system than we have. If you look at rates of violent crime, the murder rate in El Salvador, or Guatemala, or parts of Brazil is now higher than it is in Chicago, or major cities in the United States.<sup>14</sup> That wasn't always true, but it is now for a whole variety of reasons. And yet the criminal justice systems of those countries are almost complete failures in terms of catching, convicting, and imprisoning murderers,<sup>15</sup> again for a whole series of reasons.<sup>16</sup> The police are underpaid and undertrained and lack proper forensic laboratories. The systems are so thoroughly corrupt and ineffective in terms of catching criminals and protecting people that both victims and witnesses are afraid to come forward. There is a generalized distrust of public institutions. And so one reason for the far lower rate of incarceration in much of the developing world is not that the upper classes in those countries—which are much smaller than in ours—have a more benign view of the underclass than does the Republican party of the United States—and I should throw in New Democrats and probably a good many Old Democrats as well—but that they simply don't

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12. A World Bank report lists the U.S. as having 8.4 intentional homicides per 100,000 for the period 1970-94. P. Fajnzylber, D. Lederman and N. Loayza, *Determinants of Crime Rates in Latin America and the World: An Empirical Assessment* (World Bank Latin American and Caribbean Studies: Viewpoints) 37 (1998). The U.N. Development Programme reports 1994 figures of 1.9 per 100,000 for Canada, 1.0 for Japan and 4.7 for France. No figures are given for the U.K. or Germany. Most highly developed nations have fewer than 5 per 100,000, although there is a broad range from Ireland at 0.7 to The Netherlands at 14.8 per 100,000. HDR at 221.

13. Of the world's 1997 population of 5.7 billion, only 840 million lived in industrialized countries, while 4.5 billion were in developing countries (of which 570 million were in the "least developed countries") and about 400 million were in Eastern Europe and the former Soviet states. HDR at 200.

14. National law enforcement sources reported 82 homicides per 100,000 population in El Salvador 1998, and 77 per 100,000 in Guatemala (unpublished manuscript on file with author).

15. See generally, Elissa Germaine and Erik Langner, *Violent Crime in Latin America* (1999), pp. 10-14 (unpublished manuscript on file with author).

16. Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 *Law & Contemporary Problems* 197, 199 and nn. 12-13 (1996).

have the tools and aren't willing to pay the taxes to support a public sector capable of achieving such impressive rates of incarceration as in the U.S.<sup>17</sup>

Another factor which is probably far more minor is that the rates of police killings in places like Rio de Janeiro again put to shame the rate of killings by the Chicago police and others in our large cities.<sup>18</sup>

So the reality is a complex picture, but I don't think you can begin to analyze the phenomenon of the higher incarceration rate in the United States by beginning with the prison system or criminal justice policy. I think you have to start by looking at the structure of the society if you want to find out why we have come to such a different endpoint at this stage in time than other countries in the world.

Let me turn then briefly to what international law, and particularly international human rights law, has to say about all this. In practical terms of course in the United States it is not a significant factor in terms of our politics, our public policy, our law, or our public opinion. Even most law students today are ignorant of international human rights law. The United States Supreme Court, and the State Department except when it suits its convenience, are downright contemptuous of international law.<sup>19</sup> And the United States is now the only country in the world, with the possible exception of China, that is capable of the self-delusion at the turn of the millennium that international law simply doesn't matter from our point of view: we're strong enough to get what we want, so who cares what other countries might wish to put in international law?

That is not the case for most other countries in the world where international human rights law is much more of a factor than it is here. So here it is perhaps a small chip on the hoof on the front leg of a Trojan horse that is going to take a long time to roll into the consciousness of our judges, of our legal community, and of our public. But it behooves institutions like the University of Chicago Law School and Northwestern, where I teach, to try to make sure that our students and faculty are increasingly aware of that hoof so as to speed its arrival inside the walls of the superpower.

The principal source of international law on this subject in the United States is the International Covenant on Civil and Political Rights, the main United Nations treaty dealing with a broad range of political and civil human

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17. For example, Michael Gavin and Ricardo Hausmann, *Fiscal Performance in Latin America: What Needs to be Explained?*, in K. Fukasaku and R. Hausmann, eds, *Democracy, Decentralisation and Deficits in Latin America* 33, 35-38 (Inter-American Development Bank and OECD Development Centre 1998).

18. See generally, Ignacio Cano, *The Use of Lethal Force by Police in Rio de Janeiro* (Institute of Religious Studies 1997).

19. See, for example, *Breard v Greene*, 523 US 371 (1998); *US v Alvarez-Machain*, 504 US 655 (1992).

rights.<sup>20</sup> It has now been ratified by something like 140 out of the 190 or so member states of the United Nations,<sup>21</sup> including by the United States of America under President George Bush in 1992. The treaty in its literal terms does not have a whole lot to say about mass incarceration or about using heavy-handed incarceration as a policy response to crime. Article 9 of the Convention does provide that there is a right to liberty, of which no one may be deprived except in accordance with law.<sup>22</sup> But a literal reading of that, of course, means that nations are free to pass laws of the sort that this country has, that allow you to lock up eight percent of the Black male population, if I've got that right. However, there is jurisprudence and there are interpretations of that right of liberty, which suggest a strong bias in favor of looking at options other than deprivation of liberty as a way to respond to any policy problem.<sup>23</sup> So there is an opportunity to use international jurisprudence, if not the terms of the treaty, to argue against imprisonment as the easiest quick response to crime.

Article 10 of the International Covenant provides a number of standards which provide useful tools for policy argument and eventually for potential litigation. Basically they are, first of all, that incarceration to the extent it is done at all must be done in a way which reflects humanity and respect for the inherent human dignity of the person being incarcerated.<sup>24</sup> This standard, for example, led Amnesty International to criticize the supermax prisons in this country where people in some of them are locked up for 23 hours a day, and in small cells that have no natural lighting and no windows.<sup>25</sup>

The Covenant also provides that accused persons must be separated from convicted persons and must be treated as merely accused and not as already convicted criminals.<sup>26</sup> It provides that juveniles must be separated from adults, with the treatment appropriate to their age and their legal status, and they must be brought to trial or to legal resolution as soon as possible.<sup>27</sup> And importantly, the Covenant says that penitentiary systems shall comprise treatment systems, the essential aim of which is reformation and social

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20. Opened for signature, Dec 19, 1966, 999 UN Treaty Ser 171, entered into force, Mar 23, 1976.

21. An updated list is maintained at <<http://untreaty.un.org>>.

22. Art. 9.1.

23. For example, the U.N. Human Rights Committee, which monitors and administers the Covenant, advises, "Pre-trial detention should be an exception and as short as possible." General Comment 8: Article 9 (Sixteenth Session, 1982), accessible at <<http://www.unhchr.ch>>.

24. Art. 10.1: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

25. Amnesty Int'l, *United States of America. A Briefing for the UN Committee Against Torture*, AMR 51/56/00 (May 2000), 15-17.

26. Art. 10.2(a).

27. Art. 10.2(b).

rehabilitation.<sup>28</sup> Sounds like something from the reformers in this country almost a century ago, but that's what the treaty that we ratified in 1992 says.

Now when we ratified that treaty we took a number of reservations to it, meaning that we don't commit to fully comply with it.<sup>29</sup> I won't mention them all, but among them are a contention by us that in addition to the goals of reformation and social rehabilitation, there are other goals of imprisonment such as punishment, deterrence, and incapacitation.<sup>30</sup> Well, that may be true, one can argue sentencing philosophy, but I would suggest that in practice in the United States it's very easy to find punishment and incapacitation as purposes of imprisonment—I'm not so sure about deterrence—but I have considerable doubts at this stage about reformation and social rehabilitation. When we threw away the keys, did we also throw in the towel on these human beings?

Another important legal point is that the United States took a further reservation saying that the treaty is non-self executing,<sup>31</sup> meaning that the Mandel Legal Aid Clinic and other clever litigators cannot simply run into federal court here, find multiple violations of the treaty in almost any U.S. prison—which would be easy to find—and file a lawsuit. Non-self executing means that you can't sue based directly on the treaty, you can only sue based on legislation that exists within the country or within our own Constitution.<sup>32</sup> However, there is an exception to that exception, and it is a principle that has been in U.S. jurisprudence since the beginning of the Nineteenth Century and has the imprimatur of no less than Chief Justice John Marshall. It is a general principle of law that whenever a law of the United States can be interpreted to be consistent with international law, it must be so interpreted.<sup>33</sup> So notwithstanding the effort by George Bush and the Senate to say that you can't enforce this law, I would suggest you can try enforcement through the back door, by using the treaty as an interpretive guide for all of the U.S. law ranging from the Constitution through the statutes to the prison manuals on down.

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28. *Id.*

29. See generally, David Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L Rev 1183 (1993).

30. See Stewart at 1199 (cited in note 21).

31. See Stewart at 1202-03.

32. This is one implication of "non-self-executing," among others. See generally, Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM J INT'L L 695 (1995).

33. *Murray v The Charming Betsy*, 6 US (2 Cranch) 64, 118, 2 L Ed 208, 226 (1804); see generally, Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND L REV 1103 (1990).