

REMARKS OF DAVID L. RAYBIN¹ TO THE SENATE JUDICIARY COMMITTEE
SEPTEMBER 15, 2014
CRIMINAL JUSTICE REFORM HEARINGS

A.

As in all things it is appropriate to know where we have been to determine where we might be going. In early colonial times there were no penitentiaries – criminals were hung or whipped. One of the favorite punishments was branding. If the person was a horse thief, then the sheriff would brand the offender with

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David Raybin served on the Tennessee Sentencing Commission for nine years. David also chaired the Tennessee Supreme Court Criminal Rules Commission and has been a member of the Tennessee Rules Commission for two terms.

A frequent contributor to legal publications, David has authored numerous articles on criminal law. He was twice awarded the Justice Joe Henry Award for outstanding legal writing by the Tennessee Bar Association. He is also the author of the three-volume treatise Tennessee Criminal Practice and Procedure.

David has lectured on various substantive and ethical criminal law topics to the Judicial Conference, Leadership Nashville, police departments, and legal organizations such as the TBA and the NBA as well as various local bar associations throughout Tennessee. He served as a guest instructor in the Criminal Jury Trial Project in Moscow, Russia. David also gives presentations to religious, school, and civic youth groups about the criminal justice system.

David Raybin is a 1973 Order of the Coif graduate of the University of Tennessee College Of Law where he was a member of the Law Review. After graduation he served as an Assistant State Attorney General in the appellate division for three years. Then he was hired by Tom Shriver to serve as an Assistant District Attorney for seven years. He eventually became team leader in Division II.

After his service with the government, David joined what was then Hollins Wagster and Yarbrough. Following the reorganization of the firm, David is now the senior partner of Hollins Raybin and Weissman.

David is rated as "AV" by Martindale-Hubbell. He is also listed in Best Lawyers in America and has been recognized by Business Nashville magazine as one of "Nashville's Best Lawyers." Business Tennessee magazine has consistently rated him as one of the "Top 150 Attorneys in Tennessee." He is a Fellow of the Nashville Bar Foundation and a Master in the Harry Phillips Inn of Court.

David is a member of the Tennessee and Nashville Bar Associations and has served on the Board of Directors of the Tennessee Association of Criminal Defense Lawyers. He is admitted to practice in Tennessee and the U. S. District Court for Middle District of Tennessee, the U. S. Court of Appeals for the Sixth Circuit, and the Supreme Court of the United States.

the letters HT on the brawn of the thumb inside the right hand. This served two purposes. First, of course, it was painful. Secondly it served as a very permanent record of who was a convicted felon. You see, back then, judges would not let people testify if they were convicted of a felony. However, the only way to tell for sure was for the individual to hold up their right hand when folks took the oath to see if there was a brand denoting the person was incompetent as a witness. We still have that ceremony today when witnesses take an oath even though we no longer brand people and felons are now competent to testify.

Back in the early 1800's whipping and branding eventually was perceived as brutal. So much so that in early Tennessee history juries were declining to convict people.

In 1826 Governor Carroll wrote to the governors of other states to see what alternatives were available. Tennessee – like other states — adopted a prison system in 1829. It took two years to build a prison out in west Nashville.

The governor proclaimed the “penitentiary law” in effect as of January 1, 1831 and all persons convicted after that date were subject to the new penal law. Twenty-four days later, one George Washington Cook was convicted in Jackson

and was promptly deposited in the penitentiary. Cook, a tailor, was required to cut and make his own suit, the first work ever done in the penitentiary.

In September 1831, Governor Carroll, extolling the virtues of the new system, remarked:

If reformation of a man can be produced it is most reasonable to expect it to occur under the influence of the penitentiary system. The violator of the law is shut up within the walls of a prison secluded from a knowledge of the passing events, obligated to labor throughout the day, without an opportunity of holding converse with his fellow convicts and when his daily labor is over, is locked in a cell with no other companion than his bible and his own thoughts. Surely in his retirement he will reflect on the follies of his past ill spent life.

This new prison system with its bibles, work, silence and solitary confinement contemplated that the prisoners would be reformed by doing penitence for their crime. It is – by the way – from the word penitence that we get the term penitentiary.

B.

Under the early prison system there was no probation. There was no parole. Every felon received a determinate, fixed sentence imposed by the jury.

Every prisoner served 100%. Sentences were measured in years and decades much as they are now. Eventually cost became an issue.

The early governors sent messages to the legislature indicating that the prison system cost as much as \$12,000.00 per year but they hoped that the labor of prisoners might offset the cost of the system. The thought was that once the prison population hit about 50 inmates the penitentiary would be self-sustaining and no money would need to be appropriated.

As you are aware the State capital building was built by prison labor in the 1850's. However, there was great resistance to the type of work prisoners could perform. In 1853, Governor Andrew Johnson opposed the practice of teaching inmates stone masonry which enabled "the criminals to engrave names upon the tombs of the departed." He requested that convicted felons be excluded from those persons having charge of the cemeteries. He said: "if it is degrading to be associated with a felon while we are living, it must be more so to be associated with them after we are dead."

Unfortunately, by 1850 the prison was now seriously overcrowded and, coupled with the poor sanitary conditions, was described as bordering on "slow murder." A prison report deemed it miraculous that only twenty-seven deaths

had occurred from among the prison population. By 1860, the comptroller reported that, since its establishment, the penitentiary “had been a vampire upon the public treasury.” In the late 1800’s the state put the prisoners to work in the coal mines but that caused riots by the civilian population since the government was competing with private enterprise.

C.

Remember in the early Tennessee prison system everybody served virtually their entire sentence less some minor credits for good behavior. In 1903 Governor Benton McMillin complained that “there are so many applications for executive clemency as to consume time which might be profitably devoted to other important interests of the state.” By the turn of the century many states adopted statutes which permitted the “parole” of prisoners after they had served a portion of their sentence. In 1905, Governor James Frazier proposed such a system for Tennessee:

While the primary object of the law in inflicting punishment for crime is to prevent the law-breaker from a repetition of his wrong, and by his example to deter others from committing like offenses, it should also have for its purpose his reformation and restoration to useful citizenship. No penal system is perfect that does not have as one of its objects the reformation of the criminal. Many persons violate the law and must be punished who are not at heart

criminals. Many who commit crime for the first time and are sent to prison, particularly the young, become penitent and, if given a chance, would reform and make useful and respectable citizens. Some system of paroles should be provided under which the governor could give such prisoners a chance to make useful members of society, without granting an absolute pardon, so that if the prisoner violated the confidence reposed in him he could be retaken and again committed to prison

Parole as we know the concept was instituted in 1913 as part of the new “indeterminate sentence law.”

In 1931 the legislature enacted, for the first time, statutes permitting probation. The trial judge was now granted the authority to “suspend” a sentence and place the offender on supervision for the duration of his or her sentence. The enactment of probation statutes was a result of an earlier decision of the Tennessee Supreme Court rejecting the practice. In *Spencer v. State*, 125 Tenn. 64, 140 S.W. 597 (1911) the Court had held that, while it might “promote much good,” probation was open to much abuse because to place “hundreds of men” under the personal power of a single judge, “is nothing short of despotism.” In its earliest form, the statute permitted probation for misdemeanors or any felony for which the maximum punishment did not exceed five years.

The prison system slowly expanded through the years until about 1970 when the first serious attempt at sentencing reform was considered. A committee was formed much like the current governor's committee to come up with some new sentencing laws and statutes. The result of that was the Tennessee Law Revision commission which made its report in 1973. This was the first comprehensive revision of our substantive and sentencing laws since 1829. There was no political support for the proposal and it went absolutely nowhere. Instead, the legislature authorized the jury to double the minimum indeterminate sentence and the prison population started increasing dramatically.

D.

In 1974 I graduated law UT Law School and went to the Attorney General's Office. I was there about a year or so when the General Assembly asked the Attorney General to draft a new death penalty law. I was tasked with the job. That was my first experience in drafting legislation for the General Assembly and the first time I appeared in front of the Senate Judiciary Committee.

By the mid-1970 a law and order mood was sweeping the country. We had a proliferation of drugs as did the rest of the nation. Also the baby boomers started reaching the age where they were starting to commit crimes in record

numbers. The result of these demographics was the enactment of probably the most draconian set of criminal laws ever created in Tennessee. This was the Class X felony law of 1979. I am very familiar with it. I helped write it when I was an assistant DA in Nashville.

We abolished or restricted parole and various forms of work release and added all sorts of mandatory sentences for this crime or that. Plea bargaining was restricted, bail following conviction was eliminated. There was even a sticker which was printed up and put in the windows of 7-11 markets. It said, "Class X Protects."

After Class X went into effect there were no problems. At least at first. What we learned was that any time you increase the penalty it takes about a year or two for the new law to actually filter through the criminal justice system and for folks to commit crimes and be tried and be sentenced.

A few years later the Class X Felony Law was a disaster. Then we had another sentencing law in 1982. By that time all of these law and order statutes had gotten so out of hand that we had riots in the prisons and TDOC was taken over by the federal court.

E.

Mr. Tigue has told you about the Tennessee sentencing commission and our work there. I served on the commission for its entire existence. I am proud of what we accomplished and for the years that the commission existed, the sentencing laws worked.

For the first time we had a rational sentencing system. We had a sentencing grid with sentencing reports and aggravating and mitigating factors and appropriate appellate review.

Part of the work of the sentencing commission was also to make recommendations about sentencing proposals. If some legislative proposal would come along that had an enormous negative impact on the prison population we would say so. This upset a lot of people even though that was our job.

By 1995 we had another crisis. There were some who demanded, "Truth in sentencing" and so the sentencing commission was tasked with coming up with some new scheme to satisfy that concept. We had hearings all over the state and produced a report. I found my copy of the report and I gave it to your chairman and he has disseminated it to all of you.

By 1995 the perception was the sentencing commission work was not harsh enough. All we really did was to hold up a mirror to say that: If you pass this law which triples the penalty for such and such a crime it will have such and such an effect on the prison population. Folks didn't want to hear that. The government's response to the recommendation of the sentencing commission was to abolish the sentencing commission.

In 1995 the soul and conscience of the criminal justice system passed out of existence. There was no longer a system. It was just a free-for-all except, of course, it wasn't free.

In 1995 the legislature considered a vast array of crime bills sponsored by the governor which did away with parole for many offenses without reducing the sentence, enacted life time supervision for sex offenders, and came up with the school zone statute which I will talk about here in a minute.

I was asked to testify here about these proposals. I still have my notes. I advised this body that the current legislative proposals were completely contrary to the sentencing commission recommendations and would result in significant sentence increases. My exact words were that the proposals were nothing less than an "orgy of crime legislation." I advocated that what we needed was not so

much truth in sentencing but stability in sentencing so that a statute enacted today would not be changed tomorrow and people would have more confidence in our system as a result.

The sentencing commission was now gone. Nothing I said made any difference. The wheels came off the bus and now twenty years later we have yet another commission to review our laws.

We have been there before. We have done that before. The legislation enacted in 1995 was no different than what we had done with the Class X Law of 1979 and the results are exactly the same. I know this – I lived it.

F.

The people who are sitting behind me are all experts in the criminal justice system. But the most important word that I utter today is the word “system.” It cannot operate unless it works as a meaningful whole and is coordinated.

You have commissioners of education and commissioners of roads but the commissioner of corrections only houses prisoners and has no impact whatsoever on who goes into his penitentiary system. I suggest that we do what other states have done. I suggest that we do what the federal government has done. I

suggest that we do what we did in Tennessee between 1986 and 1995. We should have a full time sentencing commission made up of professionals in the criminal justice system with judges, defense lawyers, prosecutors and citizens such as we had before. Perhaps we should add an ex-offender or two to give us some perspective. We need that.

There should be a staff and an executive director and a budget which would be a whole lot cheaper than housing a number of prisoners for no reason. Whatever the sentencing commission recommends the legislature still has to accept or reject but still it is an appropriate conscience and it is an appropriate screening tool for radical legislation which accomplishes nothing or spends a fortune.

A sentencing commission is also a tool for finding out about problems before they get out of hand. After being in this room on and off for 40 years I can assure you that that a full time sentencing commission is the only solution to making meaningful progress. We cannot have committees or commissions who come together every 20 years to fix the system. We advocate routine maintenance on our cars – why not our criminal justice system?

Earlier I said I wanted to address the 1995 school zone drug law. Everybody thought that was a great idea and that it would protect children. Unfortunately it is the harshest school zone law in the entire United States the way it is structured. The way it is written it can apply to a person who has some pot who merely passes by a school at midnight in the middle of the summer when there are no children present. Perhaps those who enacted the law thought it would be to protect children from drug dealers who were selling drugs to students. What it actually does is enhance almost every drug case that happens in our state because there are not that many places left which are not 1000 feet from the boundary of some school. It is statutes like that which drive your prison population numbers through the roof. The school zone statutes have mandatory minimums which are simply outrageous and the sentences are immune to probation and parole. And executive clemency is a dirty word. Its 1900 all over again.

The cost of the penitentiary is staggering. It now cost almost \$ 900,000,000 with millions more in cost for local jails. The total state and local budget could shortly approach a billion dollars a year.

The number of imprisoned people in TDOC in Tennessee on June 30, 2014 included 21,246 offenders. More than 8000 are locked up in jails all over the state. We now incarcerate more people in Tennessee than does the entire content of Australia which has four times the population.

The abolition of parole in 1995 for many offenses has had far reaching effects. We never designed the grid for a no-parole system. Its fine to do away with parole but you need a corresponding decrease in the length of sentences so you have some parity in prison population. The 1995 laws had no significant impact for years since even under the old law the prisoners would have been there for a decade or more anyway . But under the old law some of those folks would have come up for parole by now and some might be gradually released. But since there is no parole none will be released and they are starting to stack up with zero opportunity for release.

What is worse is that when these prisoners are released they will not be under any supervision. Imagine that – the worst offenders hit the street after decades in prison without any gradual reintegration. Where is the public safety in that? Its 1850 all over again. We are going backwards.

Without a sentencing commission the people in the field have no idea what is going on. In 1995 you passed a law imposing a mandatory surcharge on sex offenders. There was nobody to tell the clerks in the field that the mandatory surcharge schedule was repealed in 1996. Only until I pointed out to a criminal court clerk that it had been repealed did they stop imposing the tax of \$2,250 per offender. That was last week: they have been collecting this tax illegally on citizens for almost 20 years.

G.

We can do better. Every proposal. Every suggestion. Every statistic. Every alternative that will be addressed over the next few days has been discussed or addressed before over the last two hundred years. Listen to the folks behind me but unless you make it a cohesive whole another committee will be here in a few decades starting from scratch again.

In 1835 after the penitentiary law had been in effect for some four years Governor Carroll sent a message to the General Assembly as it was debating funding the prison for another year: He said: "That since the penitentiary system has been adopted in this state by the representatives of the people that an ardent hope is entertained that it will answer all the purposes of usefulness that

were predicted by its friends and those who have honestly opposed it , will be disposed to give it a fair trial and not assail or abandon it until we have clear manifestation of its non-utility.” Mr. Chairman I am not sure we are far from that point today.

The most influential legal writer who ever lived was Sir William Blackstone whose commentaries on the laws of England formed the bedrock of our jurisprudence and was the treatise which educated generations of lawyers and judges in America. Writing in 1770 he said this about formulation of criminal laws:

The enacting of criminal penalties, to which a whole nation shall be subject, ought not to be left as a matter of indifference to the passions or interests of a few, who upon temporary motives may prefer or support such a bill; but be calmly and maturely considered by persons, who know what provisions of the law already exist which will remedy the mischief complained of, who can from experience foresee the probable consequences of those laws which are now proposed, and who will judge without passion or prejudice how adequate they are to the evil. It is never usual in the house of commons even to read a private bill, which may affect the property of an individual, without first referring it to some of the learned judges, and hearing their report. And surely equal precaution is

necessary, when laws are to be established, which may affect the property, liberty, and perhaps even lives, of thousands of our citizens.

I agree with Blackstone. We need to stop this endless orgy of crime legislation and perhaps repeal two laws for every one we enact. Perhaps we should impose prison quotas for each judicial district to encourage experiments in sentencing reform at the local level. But before we start reforming individual laws you need to put the “system” back into the criminal justice system. Only by learning from our past can we protect our future. Thank you for giving me the opportunity to address you.

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