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I THANK JIM GORDON for his generous introduction. I want to apologize to him, Cheryl Preston, and Scott Cameron; I have decided not to use their research to talk about the founding of the Law School. Carl Hawkins’s book adequately covers what I might have had to say.

I should know **S** better than to try and speak in a substantive way rather than in pleasing platitudes and clichés at a dinner and reunion affair. I probably should follow my wife, Lucy’s, oft-offered advice that I might as well save my breath to cool my tea. Perhaps I should add a comment by Clarence Darrow. When asked if he ever got in trouble because he was misunderstood, he replied: “Of course—but a lot less than if I had been understood.”

However, my commission was to share my thoughts. They do not run on platitudinal wheels. When speaking of my thoughts, I am reminded of a Tumbuka proverb, which translated says: “Even if you are so poor that you are reduced to eating pumpkin seeds, you should always share some with a neighbor.”

ILLUSTRATIONS BY ANDREW WRIGHT

• • • • • JUDGE MONROE G. MCKAY • • • • •

SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT



Of course I do not speak for the court. And this is not about specific case-related items but only about you as lawyers as a leavening lump in the greater society.

My first thought was to talk about selfishness and greed. I planned to start with a story of an encounter I had with my brother, Quinn, on campus. When I asked him what he was doing there, he replied in Diogenes

fashion: "I'm looking for the Widow's Mite Building." I decided to spare you from that, in part because my point might have been misunderstood as a fund-raising pitch or some political agenda—both of which are off limits for a sitting judge. It is enough to say that getting rich so you can put up seed money in exchange for having a building named after you does not comport with the account of the widow's mite and the account of the rich young man who did not drink tea, coffee, or alcohol and paid his tithe and attended church regularly. I recommend you re-read those two accounts.

Although it is tangentially related to my theme, I decided to spare you from my thoughts about whether anger is an appropriate response in a variety of situations.

What I have settled on is a long-standing concern about our national addiction to a punitive approach to problem solving. I am embarrassed by the fact that we lead the world in per capita prison population—our rate is 745 per 100,000 population. Our nearest competitors are Rwanda and the Russian Federation. Even they are well below us. Other industrialized nations such as Canada, Australia, Greece, France, England, Germany, and Japan have less than one-seventh our per capita prison population; and some of them are pretty nice countries to live in. In our circuit, approximately 55 percent of our cases have to do with the criminal justice system; the other circuits are comparable. You ought to look up the costs.

And yet we seem to be more crime ridden, fearful, and insecure than our competitors in the industrialized world. I cannot help but wonder if our cultural bent for punitive

solutions is not one of the misguided contributors to misbehavior. Perhaps it has caused us to neglect more effective ways of dealing with otherwise disapproved behavior. Sometimes it seems to me that we are more interested in expressing our disapproval than in reducing the problems.

Of course, the courts have nothing to do with setting the policy. We do not initiate prosecutions, and even the trial courts are closely constrained in the decisions about sentencing.

I do not and should not make any specific proposals about what, if anything, we as a country should do about this embarrassment. I only make some suggestions for ways of thinking about problem solving.

I recently read a thought-provoking comment by William Patry, which caught the spirit of my own thoughts. He said:

*If we want effective laws, we can't have that if it's based upon an alleged moral case. For politicians or lawmakers to act in an effective way, they have to act like economists. You have to investigate the real world consequences of what you're doing and decide whether those laws, if enacted, do the things you want them to do.*

I offer you only two thought pieces about ways of thinking about this matter. One is what I call "before" and one is about "after."

To follow my point you need to know that, in my view, a rule is only a rule if it has a sanction for departure from the standard.

My first anecdotal account is about "before." When I became a Peace Corps director in Malawi, Africa, my predecessor had rules to spare. He reportedly had a staff member assigned to patrol that mud-hut country looking for violators. Morale was low, we were in trouble with the host government, and volunteers were distracted from their charitable missions by constant complaints about trivial matters.

I closed everything down and had everyone gather at an old lakeside hotel, where the volunteers spent the first meeting berating my staff and me for every imaginable default. Some of my staff wanted to retaliate or at least make a defensive show. In the evening I went for a walk along the beach to think through whether or not I should just close down the program and send everyone back to the United States.

As I walked along I saw a group ahead gathered around a small fire. Someone spotted me and said, "Shh, here he comes."

Someone else said: "Oh h---! Let him hear it."

I knelt and listened for a while. When the berating ended and a pause seemed to beckon me to respond, I made a critical, on-the-spot decision. I did not reveal the source of what came to me, because it would have discredited my message in their eyes. It was, of course, from Joseph Smith, when he said that the way he governed such an admirable community as Nauvoo was to teach the people correct principles and let them govern themselves.

I reminded them of the visionary mission they had signed up for and that many of them had lost their way in chaffing at the rules and enforcement. I said, "From here on out, there are no rules." That is, I would of course talk to them about how they ought to behave themselves, but there would be no sanctions.

Some chorused, "B.S."

I stated that, as a show of good faith, I was restoring to a certain volunteer present the month's pay and his midterm leave I had docked him for taking, without authorization, a Peace Corps vehicle and wrecking it while driving drunk. He had endangered the life of his counterpart, whom he was supposed to be training to be a medical aid. (I wish I had the time to tell you what an outstanding person he has become.)

For a couple of months a few seemed to be trying to test me. But before long we had a total turnaround. Some of my staff called a meeting to say how wonderful it was that of the nearly 200 volunteers, we had only five miscreants. (I can still remember their names.) They wanted me to send them home. It was clear to me they did not understand the essential element that had brought us to that happy point. They did not recognize that no system can produce zero tolerance—the best possible system can only produce optimal results. If we then turned to sanctions for some, the key element of our success would be lost.

This ruleless system succeeded to the point in which Washington told me we were the only program in Africa not in trouble with the host country (probably an exaggeration). They wanted me to expand the program,

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*The following is the 2011  
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America  
Hotel in Salt  
Lake City  
on August 25.*  
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which I declined. I did not tell them our success was a product of our Ruleless Regime.

That same approach has been followed in my judicial chambers for 33 years. We get our work done in a timely manner and done well (if I do say so myself). We run a ruleless shop—that is, one without sanctions. We do not work for the clock.

My second anecdotal point is about “after.” The setting is South Africa.

After all the depredations toward the black citizens—many of which attacks could properly be described as crimes against humanity—and under the leadership of Nelson Mandela, who had suffered imprisonment for 27 years, the country decided to forgo the retributive and punitive models. They instead established a truth and reconciliation commission. The basic format was that offenders who came before the commission and candidly admitted their part in the persecution and asked for forgiveness would be granted amnesty.

While Lucy and I were serving our mission to South Africa in the 1990s, one man confessed to and demonstrated the torture he had committed. One of his victims was a member of the commission. The vote to grant him amnesty was joined by his former victim.

Compared to other formerly minority-ruled countries in Africa (and with a much more complicated problem of integration and reconciliation than the others), South

Africa—so far as I can tell—is doing the best job of any of them and has the best prospect of succeeding.

My great disappointment when I have given this account has been how frequently many friends and colleagues have responded with something other than admiration. A typical response has been “How can they let them get away with that?”

As an aside, I tell you of a brief experience that may not prove to be too much, but it is a success story in the setting of the LDS Church.

Jim Parkinson, a member of the charter class, and I were traveling in South Africa with a group of African-Americans from Mississippi. We were in Cape Town on a Sunday and decided to go to church. The leader of the group and one other asked to join us. Given our history, I concede I was a little nervous. I saw a number of old friends and visited happily with them. After the meeting, as we stood in the parking lot, Jim asked our leader what he thought. He said he was astonished. He said he had attended church with many mixed-race congregations but that this was the first that did not re-segregate when they sat down. He added that he thought we should do something about our music and our preachers. He used to sing in a black choir. I do not know that it is a cause-and-effect result of the national policy of truth and reconciliation, but I like to think that that policy contributed.

Now don’t leave here and tell people I proposed eliminating prisons or even that punishment is never appropriate. Of course there are some people we need to isolate from the rest of society. I have only suggested some ways of thinking about rules and punishment that might improve our outcomes—particularly about prison as a general deterrent as opposed to a specific deterrent. I have long been persuaded that any plan with an objective of zero tolerance will automatically be less effective (and probably more expensive) than one whose objective is *optimal*.

I do not pretend those two examples are some panacea for our overpopulating our prisons or that they are appropriate in every situation. At most, they are examples of successful thinking against the grain. It would be my hope that you who are among the privileged, you who have influence among the most influential, you who have access to power, will do the creative thinking and courageous acting that will begin to ameliorate this national tragedy.

Finally, I leave you with this—I often use it: When I became chief of the circuit I promoted an investiture program. Judge Ed Dumbauld, an exceptional scholar and federal district judge from Uniontown, Pennsylvania, attended. We had become friends, and he sometimes shared with me poems from the revival of Dutch letters in the late 1800s. He had a degree from Amsterdam University, and I spoke a little Afrikaans, which is derived from Dutch.

At a dinner after the program (probably because he thought I either was or might become a little full of myself), he recited in English this Dutch poem with which I leave you:

*What have you preserved from your frenzy?  
A lamp that flickers; an eye that weeps.*

*What is there from the storm, that you withstood?  
A mournful leaf, that has not yet found rest.*

*What has love done in your heart?  
It has made me understand the pain of the lonely.*

*What remains of all the glory that surrounded you?  
Nothing but a singing memory.*  
[H. W. J. M. Keuls]