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Book Review - When Brute Force Fails: How to Have Less Crime and Less Punishment

John J. Donohue, *Stanford Law School*



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SANDERS KORENMAN
City University of New York

K Law and Economics

When Brute Force Fails: How to Have Less Crime and Less Punishment. By Mark A. R. Kleiman. Princeton and Oxford: Princeton University Press, 2009. Pp. xxi, 231. \$29.95. ISBN 978-0-691-14208-1.

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Two of the most dramatic social phenomena of the last half century in the United States are the substantial rise in crime that occurred during the 1960s and the equally dramatic drop in crime that began roughly contemporaneously with the advent of the Clinton Administration. The good news is that we have improved things from the violent and crime-filled days of the late 1980s and early 1990s; the bad news is that we have increased our prison population immensely in the effort. We may now be enjoying the return to the crime levels of the early 1960s, but we also have a prison and jail population that is almost seven times larger.¹

In his lucid and insightful new book, Mark Kleiman, a Professor of Public Policy at UCLA, offers a set of proposals designed to do better: he wants to cut crime in half over the next ten years, but this time while reducing rather than increasing the prison population. In addition to his comprehensive understanding of the criminal justice system and the areas of social spending that also might favorably influence crime, Kleiman is broadly knowledgeable about the relevant theoretical and empirical research, candid, politically pragmatic, and astute. I have long admired his ability to pull together disparate strands of research and select reasonable point estimates from the din of conflicting empirical studies in order to provide a cogent assessment of the costs

and benefits of competing policy choices, and this skill is on display throughout the book. Unlike so many who write in the area of criminal justice, Kleiman is relentlessly nonideological and non-doctrinaire, so he doubtless steps on the toes of many ideologues from both left and right.

Since Gary S. Becker (1968), economists have embraced the first broad theme of Kleiman's book—that we should be thinking in a more consequentialist manner about crime and how to reduce it at reasonable cost. (John J. Donohue 2005.) Once that proposition is established, almost everything turns into an empirical question about what works and how much it will cost. Kleiman artfully distills literatures and resolves scholarly debates while acknowledging (in discussing the relationship between drugs and crime) that the issues are “conceptually complex and empirically obscure” (p. 155). This description applies to issues throughout the book, from the impact of guns, police, and incarceration on crime to questions about the potential crime-reducing effect of programs from preschool enrichment to lead paint abatement. Many of his proposals are based on Kleiman's best read of the very conflicting evidence, which means that it is unlikely that he will get every call correct—he comments with some appropriate restraint that a “well-evaluated experiment” showed that nurse home visitation for expectant mothers reduced the arrests of their high-risk children by 69 percent compared to the matched control group! (p. 127)—but I suspect he will have a much higher batting average than most.

The main theme of Kleiman's book is that the United States has poured too much money down the mass incarceration sinkhole, and that by changing direction through a combination of better criminal enforcement practices and prudent expenditures on numerous social programs, we can achieve the desired 50 percent reduction in crime while inflicting less pain on our citizens. Economists will be very comfortable with Kleiman's call for a clear focus on the goal of reducing the total costs of crime, including direct victimization costs, precautionary and avoidance costs, as well as enforcement costs. But although Kleiman doesn't mention it, those who followed some of the suggestions of George J. Stigler in his seminal 1970 article on optimal enforcement

¹ There were 332,945 prison and jail inmates in 1960 (Justice Policy Institute 2000). According to the Bureau of Justice Statistics, there were 2,304,115 prison and jail inmates in 2008.

of the law will be at odds with Kleiman's other broad theme that the most important way to change behavior through the criminal justice system is through swift and certain punishment.

In 1764, Beccaria published a famed treatise "On Crimes and Punishments" in which he stressed that greater criminal deterrence results from certainty and swiftness of punishment rather than from increased severity. Unfortunately, some have interpreted Stigler's work as reversing the Beccarian prescription by arguing that risk-averse criminals could be deterred at least expense by catching fewer criminals (thereby reducing detection and trial costs), while punishing the few that are caught more harshly. According to Stigler (1970), "increasing the punishment would seem always to increase the deterrence" (p. 527), which is true if other things remain equal. Unfortunately, they do not. As Kleiman stresses, "severity is the enemy of certainty" and swiftness. (p. 173–74). The Stiglerian recipe means costly and delayed punishments with far less certainty than is optimal. Sadly, apparent Nobel-level "advances" in economics actually undermined previous knowledge, but it is good to see Kleiman restoring the enlightened thinking on criminal justice to where it was—almost 250 years ago!

One of Kleiman's favorite examples of how important it is to get these concepts right stems from the development of a Hawaiian probation program, called H.O.P.E. An unusually enterprising judge perceived the abject failure of the Stiglerian recipe of catching only a few probation violators and hitting them hard, and switched to a Beccarian approach of providing much less severe but immediate sanctions to almost all violators. The result, Kleiman tells us, was a dramatic move from a high-crime, high-punishment equilibrium to one of low crime and low levels of punishment. H.O.P.E. reduced probation violations by 90 percent, and has grown from its original 35 probationers to 1,000. Kleiman envisions this program could be scaled up nationally to include 400,000 probationers, with major benefits for crime reduction, although he judiciously concedes that until we try no one knows whether crack users on probation in Los Angeles would respond in the way that meth users on probation in Hawaii did.

Interestingly, Becker once announced at a University of Chicago Law School seminar that he and Stigler had disagreed on another point that is central to Kleiman's analysis, again with Stigler championing what Kleiman strongly argues is the incorrect position. The issue is whether one should count the pain inflicted on prison inmates as a social cost in conducting the cost-benefit analysis of incarceration. Becker stated that, while he thought you should, Stigler thought you shouldn't, since the point of incarceration was to inflict pain on the criminals. The problem with Stigler's view, however, is that it can lead a society to inflict tremendous pain even though the same crime reduction could be achieved from equivalent expenditures that did not impose such suffering. We lock up one percent of our adult population, while concentrating that burden on certain minority groups. Tens of thousands of prisoners in the United States are in long-term solitary confinement. Kleiman argues it is a moral imperative to consider whether different approaches can achieve similar crime reduction benefits at lower cost. Presumably, if one billion spent on, say, reducing the amount of lead in the air could reduce crime as much as one billion spent on more solitary confinement, we should be opting for the improved air quality. Ignoring the costs imposed on prisoners and their families will lead to too much "brute force."

These are important lessons, and hopefully, legislators, judges, and prosecutors—who are often blind to the strategic ways in which criminal law and enforcement can be intelligently structured to reduce crime—can absorb them. Of course, some of the problems are more structural: for example, heavy expenditures on preschool enrichment programs that will reduce crime in ten or fifteen years are not attractive to politicians more concerned about the next election than the next generation. (Donohue and Peter Siegelman 1998.) With some acidity, Kleiman notes that "The sheer impatience of citizens and politicians demanding that Something Be Done About Crime right this minute has in it an ironic echo of the inability of many criminals to take the future fully into account in deciding whether to commit a crime today" (p. 126). Academics and citizens who are concerned about crime will also profit from reading Kleiman's book, which is

clearly written in crisp prose with no equations and relatively few graphs. One could easily stimulate student discussions on how to attack crime by reviewing Kleiman's final chapter, which offers sixteen pages of suggestions arrayed in ten categories, ranging from policing, prosecution/courts/sentencing rules, and corrections to drug policy, guns, and social services.

Fighting crime is all about choices and sacrifices. It is conceivable we could engineer the desired 50 percent drop in crime while cutting the prison population by 500,000 by simply legalizing marijuana, cocaine, heroin, and methamphetamines. We already know that ending Prohibition in 1933 paved the way for enormous crime drops by eliminating a massive illegal market. But even if widespread legalization of currently illicit substances dramatically reduced crime and criminal justice enforcement (and corrections) costs, it would come at the expense of dramatic increases in the number of addicts and substance abusers, of which we now have roughly 18 million, most of whom abuse alcohol (Donohue, Ewing, and Peloquin forthcoming).

Kleiman, who has previously written extensively on drug issues, doesn't want to follow this complete-legalization approach, but instead sets forth an elaborate set of recommendations that he thinks can achieve a major crime reduction with fewer disruptive social consequences than we would observe in a world in which substances as harmful as cocaine were legal. (Note cocaine and other drugs prohibited in the United States have been pretty close to legal in Portugal since 2001 with little sign of dire consequences, but then again the United States tends to be more out of control than most European countries these days. What works in Portugal may not be advisable given the large and vulnerable U.S. underclass.)

Contrary to Kleiman, some have argued that the U.S. increase in incarceration has been clearly beneficial, and indeed should be expanded further. (John DiIulio championed this position in a 1996 article "Prisons Are a Bargain, by Any Measure.") To give a sense of the manner in which Kleiman analyzes various policies, consider whether even *greater* levels of incarceration could achieve his desired 50 percent crime reduction. If one believed the relatively high elasticity estimates suggesting that an increase in incarceration of 50 percent would lead to a crime

drop of 10 percent, we would need six doses of 50 percent inmate-population increases to get close to Kleiman's desired fifty percent cut in crime (the result would be a 47 percent drop in crime). Starting from roughly 2.5 million in prison today, this would leave us with 28.5 million in prison at an added cost of roughly \$780 billion (at \$30,000 per inmate per year). While Kleiman doesn't go through this precise calculation, one can distill his likely response from his general discussions on mass incarceration.

First, Kleiman would note that, while the costs of crime today are enormous, they probably are less than \$1 trillion now that crime has already fallen so dramatically. Therefore, spending \$780 billion to get a 50 percent crime-reduction benefit valued at less than \$500 billion is not a sound investment. Second, Kleiman would note that the elasticity estimate of 0.2 (which on p. 113 he attributes to Donohue 2009a) is likely too high, so that the real crime drop from the move from 2.5 million inmates to 28.5 million would yield less than the desired 50 percent crime drop. For example, with an elasticity of 0.1, the added \$780 billion expense in housing 26.5 million more prisoners would buy a reduction in crime of only 22.5 percent, which would further degrade the appeal of prison expansion. Third, the costs of prison are greater than simply the budgetary cost of running the prison and feeding the inmates. Lost productivity of inmates who could have legitimate jobs is a nontrivial cost and the suffering of those behind bars as well as of their families, however measured, would only add to the social costs of the prison buildup strategy (Donohue 2009a). The bottom line is that we are unlikely to get another 50 percent drop in crime via greater punitive harshness, and even if we could, it would not be cost effective to do so, since the pain would be worse than the gain. Thus, we must look elsewhere and Kleiman canvasses the entire array of strategies, big and small, that might help cut crime at reasonable cost.

The death penalty is actually a perfect illustration of Kleiman's two broad themes that severity is the enemy of swift and certain punishment and that our policies should focus on crime reduction, rather than the pointless infliction of suffering. The best empirical work reveals not a hint of deterrence from capital punishment, yet death penalty regimes prolong the agony of the victim's family

(not to mention the convict's family) while fostering contempt for the criminal justice system, cost many times what life imprisonment would cost, deepen apprehensions of racial discrimination, and inflict gratuitous pain on too many wrongfully convicted inmates who are ultimately exonerated while (worse still) occasionally executing the innocent.² Talk about lose-lose. But somewhat oddly, Kleiman never mentions capital punishment anywhere in his otherwise comprehensive assessment of all aspects of the criminal justice system.

The world is too complicated to have best policies line up uniformly with the views of left or right, and Kleiman picks and chooses judiciously among the best from each in a way that is rare. Ordinarily, if you hear how a person feels about, say, gun control, you know how they will come out on almost everything, but Kleiman is too truth-oriented and knowledgeable to be cabined in this way. Kleiman is unusual in his call for extending right-to-carry laws to the entire nation while expanding the Brady Bill to require background checks on all gun transfers. No wonder the Brady Bill had little impact on crime given the gaping loophole that private transfers are exempted. This enables criminals to simply show up at gun shows and other venues to buy all the guns they need, beyond what they steal in the roughly four million burglaries that occur each year in a country in which 34.5 percent of American households have guns.³

Before endorsing the Kleiman's right to carry (RTC) suggestion, policymakers should consider many additional issues beyond those raised in his book. Would a national RTC law deter crime as some have argued (indeed, Becarria himself felt this way, although that was at a time when there were no police forces or even prisons) or trigger more gun toting by criminals in the type of arms race that government intervention should try to stop? Would more lawful gun carrying

mean more lost and stolen guns that end up in the hands of criminals, or are we already so gun-saturated in this country that increased criminal access to guns will not be noticeably enhanced by a policy that leads to more guns left in automobiles in a world with over one million annual auto thefts?⁴ (See Donohue 2003).

Moreover, if the best research suggests that RTC laws have no net effect on crime, as Kleiman asserts, does this mean that the benefits and harms are sizeable but largely offsetting, or that there is just no effect? If the former, does it matter if the gun owners or the non-gun owners fare worse? Ordinarily, economists don't like expenditures that shift burdens to others, but perhaps the gun owners are paying out of their own pockets only to shift the burdens to themselves. In fact, some of the most recent, admittedly "obscure," evidence may be a bit worse than Kleiman believes: aggravated assaults do seem to rise when RTC laws are passed (Ian Ayres and Donohue 2009; Donohue, Abhay Aneja, and Alexandria Zhang 2010). If we are all in fact a bit less safe, while some gun owners incorrectly feel *much safer* and some gun opponents erroneously feel *much less safe*, are RTC laws a good thing?

Perhaps being a bit less safe on the RTC margin is worth the gain of the political trade-off that Kleiman advocates—the left gives up on RTC laws but gains on the Brady Bill extension to private transfers. But this involves speculation on two fronts. From a political standpoint, one must conjecture that, by conceding on the RTC issue, the left could get a gun control measure through over NRA opposition. But the NRA has mastered the art of gutting gun control measures, as the Brady Bill itself and the assault weapons ban have shown. One must also speculate empirically that the Brady extension would help more than a national RTC law would hurt. The most spectacular crime drop in the country has come in New York City at a time of relentless opposition to gun carrying. While Kleiman would be willing to allow Plaxico Burress to carry his initially Florida-registered gun in a New York City

² See the recent symposia in *Criminology and Public Policy*, "The Impact of the Death Penalty on Murder," and in the *American Law and Economics Review*, "Introduction to the Death Penalty Symposium."

³ According to the FBI's Uniform Crime Reports, there were 2.2 million burglaries in 2008 that were known to the police, but roughly half of the burglaries went unreported. The General Social Survey found that 34.5 percent of households owned at least one gun in 2006.

⁴ According to the FBI's Uniform Crime Reports, there were 950,000 motor vehicle thefts in 2008. The true number is over one million when one accounts for nonreporting.

nightclub, city prosecutors put the former New York Giants' receiver in prison for two years.

Should New York City be allowed to experiment with a tough anti-gun approach or is a national rule on guns appropriate despite the widely different conditions throughout the country? These are indeed complex questions and, while Kleiman is very thoughtful in analyzing these issues, the reader must keep in mind that he is frequently divining best estimates from complicated and frequently contradictory empirical literatures. Still, Kleiman has his eye on the ball and knows and cares about the research, which almost certainly suggests his views should be more accurate and well-grounded than those of virtually any politician, who (with the exception of New York City Mayor Michael Bloomberg) often seem to sacrifice crime reduction either for political gain or because of ignorance.

Kleiman stresses the important lesson that the goal of the criminal justice system is to reduce crime, rather than to inflict pain, and while the latter can be a means to achieve the former, at times they are in conflict. Recognizing these conflicts and understanding that reducing crime should triumph over any atavistic desire for punishment would be an important step to more sensible and effective crime-reduction policies. The budgetary crises that states such as California are now confronting will make many policymakers interested in finding ways to restrain crime at lower cost. Hopefully, Kleiman's excellent book will help them achieve this goal.

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- JOHN J. DONOHUE III
Yale University
- Regulating Vice: Misguided Prohibitions and Realistic Controls.* By Jim Leitzel. Cambridge and New York: Cambridge University Press, 2008. Pp. xv, 301. \$85.00, cloth; \$29.99, paper. ISBN 978-0-521-88046-6, cloth; 978-0-521-70660-5, pbk. JEL 2008-1367

There is a long history of societies grappling with whether and how to regulate individual behavior. Particularly when it comes to behavior regarded as "vice," this philosophical and practical question is at once interesting, difficult and important. *Regulating Vice: Misguided Prohibitions and Realistic Controls*, by Jim Leitzel, presents both an historic context for government regulation of vice, and a proposed set of guiding principles for how societies should handle the problem.

In the book, Leitzel outlines a set of principles on which he argues vice regulation should be based. Leitzel uses as a jumping off point John Stuart Mill's "harm principle," which Mill describes in *On Liberty* (1859). In Mill's own words, ". . . the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent