

Repairing the Broken Infrastructure of Justice in America

Remarks of Gara LaMarche

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I'm grateful and honored to be given the opportunity to share some thoughts on this special occasion before an audience filled with so many leaders in the struggle for justice, and so many friends. And to follow Dahlia Lithwick is a particular challenge, not unlike a talk I gave a month or so ago to a group of reproductive rights funders when the chair of the meeting wanted to take time before introducing me to show everyone a You Tube clip of a sensational performance – the then-unknown Susan Boyle. I always seem to have hard acts to follow!

I want to take a moment to pay special tribute to Nan Aron for her vision in founding the Alliance for Justice 30 years ago, and her myriad demonstrations of tenacity and principle in the years since.

Thirty years! That's an amazingly long run, Nan, and in twenty years or so, if I'm still in philanthropy or activist work, I look forward to a continuing close relationship with the Alliance for Justice when you hand the reins over to your designated successor, your brother Raoul Aron. La lucha continua!

Since the levees burst in New Orleans and the interstate bridge collapsed in Minnesota, we've heard much about the need to repair the nation's physical infrastructure, too much of which is frayed and crumbling due to years of underinvestment. While tax cut after tax cut went to the wealthiest in our society, and billions were squandered on wars of choice and high-tech weaponry, bodies littered the banks of the Mississippi on the Gulf Coast and floated in the wreckage of a highway 1,000 miles upriver.

The recent stimulus bill will begin the process of rebuilding, and at the same time retooling for a greener country. That is a long-overdue correction of our misguided national priorities. But there is another infrastructure that has been at best neglected and at worst assaulted in recent years, and that is our infrastructure of justice.

To some extent that is a physical infrastructure of courthouses and prosecutors' and public defenders' offices and prisons. You certainly can't say we have neglected prison-building in recent years, as draconian sentencing laws have produced a record number of men (and many women) behind bars, the greatest boom-time in recorded history for the prison-industrial complex. But what I am really talking about is the infrastructure of laws and policies and

human capital that far more than bricks-and-mortar, tell the story of the health of justice in America.

Given the nature of the justice system in America, repairing the broken infrastructure is not simply, or even primarily, a matter of federal action. But the same can be said of the nation's physical infrastructure. What is required, though, is an understanding of the pieces, and what needs to happen at various levels, with the right leadership, to put them back together.

Let's start with the courts. I don't need to tell this audience that we are living with the consequences of a forty-year campaign – ever since Nixon – to gut the federal courts of their important role in guaranteeing the protection of constitutional rights. One aspect of this campaign, which has escalated in the last ten years, has been to strip the courts of their very ability to hear the claims of some of the most marginalized and discriminated-against in our society, from prisoners to non-citizens. So one part of a restorative agenda is to remove restrictions on federal court jurisdiction that have been imposed by anti-rights forces to tip the scales away from justice. This is not always the sexiest issue, any more than sewers and dams are on the physical infrastructure side, but it is a vitally important one.

The other big issue with respect to the courts, which is very timely and vital, is to influence who is on the federal bench, and indeed to change the sorry frame of the debate about judges and the roles they play in our democracy. President Obama has begun that process with the nomination of Judge Sonia Sotomayor, who by any measure is among the most qualified nominees of the past century. In stressing her real-world experience, and seeking to overcome the tiresome set of wedge issues over which Supreme Court nominations have recently been waged, the President has taken an important step.

We have lost ground steadily in debates over the Supreme Court, and the role of judges generally in recent decades, because we have allowed those debates to be framed almost entirely in terms of issues like separation of church and state or abortion. I want a court that forcefully upholds those rights. But I also want one that is, as the President has put it to the derision of the right, "empathetic" to those who have been economically marginalized in a society all of whose key institutions have steadily sided in recent years with the rich against the poor. If we can get people to care about the Supreme Court not just because it is going to stop some Alabama judge from putting the Ten Commandments on the courthouse lawn, not just because it is going to force the government to treat a suspected terrorist more fairly, but also because the court has a critical role to play in fairness for working people, we will have made a genuine and important change in this country's politics.

Though watching the performance of the far right – there doesn't seem to be any near right anymore -- in the last few months has been at times amusing and at times disturbing, since even the most partisan among us believe, or should, that the country benefits from a credible opposition, in the last week around the Sotomayor nomination it has been nothing short of appalling. It is hard to do better than Bob Herbert's *New York Times* column yesterday

in capturing the sheer chutzpah of the charges of “racism” coming from the likes of Rush Limbaugh and Newt Gingrich, and we have to hope that the sick tenor of the so-called great debate that the hard right, newly enamored of filibusters, is trying to force upon the Senate is the last desperate gasp of a dying order. I will only say that in seeking a way forward, we have to be diligent in learning and articulating the right lessons from the past.

The right would have you believe – and unfortunately much of the media has embraced this mistaken narrative -- that the low state of discourse on these issues stems from the successful campaign against the Bork nomination in 1987. One of the advantages of being older and having been around the block a bit is that, like Nan, I was there, running around the country for the ACLU speaking against Bork in Texas, North Dakota and Idaho – they gave me the good territory – so I know that the fight against Bork was fairly waged, not on any personal basis, but on the entirely appropriate grounds of judicial philosophy. Bork’s hostility to the very role of the court in protecting the constitution was made plain during those hearings, and on that basis the Senate rejected him. It was a high point of public understanding about the courts, not at all an exercise in personal destruction or “gotcha” politics. I am proud of my small role in blocking the nomination, and every single thing Bork has done in the more than twenty years since his rejection has ratified the judgment we made in opposing his appointment. The same is true of Clarence Thomas and, as Jeffrey Toobin laid out so well in the recent *New Yorker*, of Chief Justice John Roberts.

The *New York Times* tells us that Judge Sotomayor’s nomination has brought back so-called “identity” politics. If so, that is only because those who have a desperate stake in preserving the rightward trend of the courts would like to have you believe that the only people in America who don’t have an identity are white men like me. Is it disturbing that of all the candidates seriously vetted by the White House, it seems all but a handful were women? Not when the nation’s highest court is almost as much of an all-male preserve as the Vatican, not when there is such a plethora of stunning talent among female judges, politicians, scholars and advocates. A strong argument could be made for an all-female court, and while we’re at it, it’s long past time to give women a chance to run the banks and the hedge funds and the car companies, not to mention our various wars. There is no way they could do worse than the men who continue to enjoy a virtual monopoly on leadership in these areas.

On from the courts, in another part of the ecosystem of justice, it is absolutely essential that we have a national commitment to improving the quality of legal representation for criminal defendants and those seeking a fair shake in the civil justice system. Well over forty years since the landmark Gideon decision, as the Constitution Project pointed out in an April report, “sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery ... of the Supreme Court’s soaring rhetoric. Throughout the United States, indigent defense systems are struggling ... due to funding shortfalls, excessive caseloads, and a host of other problems.” The *New York Times* reported in November that public defenders’ offices in at least seven states have refused to take on new cases, so overwhelming are their workloads.

For these failures, it must be bluntly stated, too many of our fellow Americans pay with their liberty, and when access to a constitutional right depends on the size of your wallet, which is far too often correlated with the color of your skin or your ethnicity, that is a moral as well as constitutional outrage. The Constitution Project report, from a bipartisan commission co-chaired by Walter Mondale and William Sessions, provides a blueprint for action by states and the federal government. Implementing these steps is a central element of infrastructure repair for the justice system.

On the civil side, it is at least as bad, in part because we lack a “civil Gideon” as a point of leverage. Kevin Clermont and Stewart Schwab wrote in the recent Harvard Law and Policy Review, based on an extensive review of the data, that the federal courts have become so consistently anti-plaintiff in employment discrimination cases that they are in danger of abandoning their role as a forum in which the powerless can seek redress from the powerful. Add to this the hobbling of federal legal services programs with restrictions on who they can serve that mirror the jurisdictional limits on the federal courts, the virtual starvation of these programs through funding cuts, and the neutering of almost all federal administrative agencies charged with protecting rights, from the U.S. Civil Rights Commission to the EEOC, and there is a huge reconstructive agenda before us.

Just as the physical infrastructure investments we need to make as a country must not simply replicate outmoded and wasteful technologies and approaches, so too must we be careful to approach the renewal of our justice infrastructure guided by new ideas and approaches, with attention to the vibrant movement, particularly at the grassroots level, to incorporate human rights standards and approaches into organizing and legal reform. We are not going back to the mid-1960s, the height of the Warren Court era, where decision after decision pushed forward the frontiers of civil rights and liberties, with judges often leading the way. Nor should we. Our rights will not be secure if we only or primarily rely on the courts, and the new domestic human rights movement points the way to a different future. Here, too, there is a blueprint, “Human Rights at Home,” a collaborative effort of more than fifty organizations moving forward through the Campaign for a New Domestic Human Rights Agenda with a multi-pronged education and advocacy strategy. The administration has been responsive to this movement, and should step up the pace of implementing its recommendations, including a reconstituted and revitalized Interagency Working Group on Human Rights, a restructured and strengthened Civil Rights Commission with human rights added to its name and mandate, strengthened U.S. compliance with the Convention on the Elimination of All Forms of Racial Discrimination, and federal support for coordination of state and local efforts for human rights promotion and compliance.

There is so much more, of course: immigration reform that helps bring irregular migrants out of the shadows and into full democratic participation, ending the bizarre form of American apartheid that has over ten million workers from other countries who have no rights in the nation which depends on their vital labor; reversal of the civil liberties abuses taken in the name of national security since 2001 that have made us, in the ACLU’s memorable and pithy phrase, less free and less safe; and reversing the incarceration policies that have one in

one hundred Americans behind bars, at a cost that has skyrocketed over 300%, *The Economist* recently reported, in the last two decades.

We now have a President who has a strong sense of the big picture and a stunning ability to communicate it. He takes his teaching role seriously and assumes the intelligence of the American people, including our ability to appreciate complexity. We saw this on display in his famous Philadelphia race speech last year, and in his recent talk about the balance between civil liberties and national security. In talking about economic recovery, the President never loses sight of the message that his key domestic initiatives are closely connected and intertwined: health care and climate change and education are not items on a wish list to be deferred to a day when the treasury is fatter, but investments that must be made now to address structural weaknesses in the economy. It is a comprehensive approach which stresses connections among things that might seem to be disparate, prioritizes challenges too long deferred, and takes a long-term view of the path to change.

I believe exactly that approach is called for with respect to justice. We need to knit traditional justice concerns more closely together with a broader progressive agenda, so that working families can see what they have at stake in who sits on the Supreme Court and how they rule, and the cynical use of wedge issues is rejected once and for all. We need to connect investments in education and health and jobs to the justice system, to make clear the consequences of underinvestment in young people, particularly in communities of color, and to show that every dollar spent on prison bars is one not spent on school books. We need to connect the parts of the justice system so that the manipulation of fear that has too long driven our criminal justice policies, and therefore too often our politics, and the manipulation of fears since the terrorist attacks of 2001 are understood as cut from the very same cloth. Most importantly, we need a long-term, strategic plan for restoring the infrastructure of justice, with the necessary political will and the path to get there. I have the hope that President Obama, who shares and exemplifies so many of our values, will find time for this urgent task, some elements of which he has already taken on. But whether that happens depends to a great extent on those of us in this room.

Now I was thinking about how to wrap up my remarks with a rousing closing, since I am the last speaker before you hit the doors, and I was leaning, coincidentally enough, toward an invocation of Martin Luther King's assertion that "the moral arc of the universe is long, but it bends toward justice." Then I realized, and let's be honest, that it's lost some of its considerable poetic and moral power from overuse. I mean, we probably ought to put a moratorium on it, along with that Chinese proverb, or maybe it is a calligraphic character, that people are always quoting about danger and opportunity. And yet, I do have to wrap this up, and that King quote is very tempting. So let me attempt the audacious and deconstruct it a bit.

It's not for me to question Dr. King's optimism about the direction of the moral arc of the universe. It is vital to keep hope alive. But in these matters, I incline – very hard to get away from the metaphor – toward Ronald Reagan's approach to negotiations with the Cold War Soviet Union: trust but verify. By that I mean the arc, if you imagine it, is made of pretty

strong steel. It bends toward justice only to the extent we pull on it, and we can't have much effect except by working together.

If we go about our business and assume the arc will reach its destination without our efforts, there won't be enough pressure for it to get there – to get to the state of justice in which race and gender and ethnicity aren't the determinants of who ends up in prison or put on an ICE bus to the Mexican border, or dead at the hands of an abusive husband or an out-of-control cop or soldier. It won't get to the state of justice in which the Supreme Court looks like the America of whose rights it is the ultimate guardian, and has some connection to, and yes, some empathy with, those who come before it challenging powerful interests, whether it's the state or rich corporations. The arc won't bend, at least not enough, unless we make it bend, and it is precisely now, when there is a powerful hand pulling with us much of the time, we need to roll up our sleeves, join together, and yank like hell.

Thank you.