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LAW IN ACTION

**TRANSCRIPT OF A RECORDED INTERVIEW
WITH THE LORD CHANCELLOR & JUSTICE
SECRETARY,
THE RT. HON. KENNETH CLARKE, Q.C., M.P.**

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ROZENBERG: (*applause*) Welcome to Gray's Inn, one of the four Inns of Court that trains law students and qualifies them to practice as barristers. My guest on this week's *Law in Action* was called to the Bar in this very hall nearly fifty years ago, and he's now reached the summit of law and politics. The Right Honourable Kenneth Clarke QC MP is Lord Chancellor and Secretary of State for Justice. Joining us in this historic hall are more than a hundred members of Gray's Inn - mostly barristers, but also a number of judges - as well as invited guests from other areas of our legal system. They're going to help me ask the Lord Chancellor what sort of system we can expect to have in the new age of austerity ushered in by last week's Spending Review. Well, I want to start with sentencing, Lord Chancellor. Last week you promised "radical proposals for more effective sentencing policies". Does that mean that you're prepared to spend money on community sentences in order to save money on prisons?

CLARKE: No, it doesn't because obviously the background is the severe spending cuts, for which I make no apology. We are going to produce a sentencing Green Paper designed, as you say, to make sentencing more effective, to concentrate on what sentencing should do to try to find some better ways of dealing with the people who are really drug addicts or really mentally ill or foreign prisoners who've washed up on the shores and seem to stay here indefinitely, and plenty of other problems which I think need to be tackled.

ROZENBERG: But radical proposals? What might these be?

CLARKE: Well, I'm not going to anticipate a Green Paper...

ROZENBERG: (*over*) Go on!

CLARKE: (*laughs*) ...one or two of them. I mean, community sentences are appropriate for the sort of person who is going in and out for short prison sentences. Some of them, there's no alternative. I've never been in favour of getting rid of all short-term sentences, but for some of them you've got to try and find some more effective alternative punishments which might be more successful in stopping them re-offending. Now you say is there more money for community sentences? The answer's no. Are we going to community sentences because they save money? Answer, no. Because effective community sentences are no cheaper than short-terms, a few weeks in prison, but sometimes if we can only get in place sentences, community sentences that are punitive and effective and can demonstrate they reduce re-offending, it might be a better way of spending the money. And what I'm going to concentrate on is what works, payment by results - actually paying for those programmes of rehabilitation which can demonstrate that they reduce the rate of re-offending. Indeed, we will pay people according to the extent to which they reduce the level of re-offending amongst the target population.

ROZENBERG: Well, if you're paying by results, you will still have to find some money to pay for those services on the assumption that they do manage to reduce re-offending.

CLARKE: Of course. Yes, what we're talking about is - even in the case of the charitable trusts who are investing in social impact bonds, I hope other

investors will be attracted to a novel form of ethical investment - we're going to pay them a return on their capital.

ROZENBERG: What are these social impact bonds? How do they work?

CLARKE: Well, they are bonds raised from any well-intentioned investor. The one that we've got that's launched at Peterborough is largely charitable trusts have invested in it. And it's a bond which offers a return and can finance that return to the extent that we pay for their delivery of a service which demonstrably reduces the rate of re-offending of the people who've been released from prison.

ROZENBERG: But you will have to pay them in the end and surely you're going to have to pay for community sentences if you're going to persuade the judges to pass them because, I mean, these are...

CLARKE: *(over)* Yuh, I agree.

ROZENBERG: ... these are all available at the moment and judges are reluctant to pass them because they don't really work, they're not rigorous enough, they're not tough enough. Nearly half the people sentenced to a community sentence order will never complete it.

CLARKE: I agree up to a point, although some community sentences have a better effect on re-offending than short-term prison. But yes, I've not identified community sentences as a way of saving money. Now we've actually reached the stage of announcing what we're going to save, the next stage is to produce policies in intelligent, joined-up writing on sentencing policy.

ROZENBERG: At the same time, you're saying I do want to provide the judiciary with alternative sentencing options, so that short sentences are used only when necessary. That's a pretty clear hint to the judiciary of what you want them to do.

CLARKE: *(over)* Well, I think we have too many short-term sentences because there isn't anything, any alternative. I think there are... er it's a fair gesture of despair to sentence someone to three months who's going to serve six weeks inside, he's going to be bunged out, and it's a pound to a penny he's going to commit more offences quite quickly. Indeed, two-thirds of them start committing more crimes within the first twelve months of being released. But, for example, community payback - which is on the ground - is worth looking at and worth strengthening, I think. But you do have to persuade people that community payback is actually paying organised in a way which encourages the work ethic, which is doing worthwhile work, is possibly giving people some worthwhile training which might improve their chances of getting into a job and settling down to normal society.

ROZENBERG: Is it true that you got a commitment from the Treasury that your department's cuts are conditional on these re-offending policies working? It's reported that if the cuts don't work, the Treasury will have to underwrite that and you won't be forced to close prisons.

CLARKE: (over) Yeah, that's again another of these loose parodies of the situation. Now what we have got is a settlement with the Treasury. It is true in our area that the settlement is based on *estimates* of what will be produced by legal aid reform, what will be produced by reform of sentencing because I can't command sentencing levels and I don't know what surges in demand or falling away of demand we're going to get in legal aid. But in the end, one way or another, we have signed up to what we have to deliver. And, of course, the biggest savings of all are in the administration of the department. I think you could reduce the administrative costs of my department by a third and still respond to whatever demands are thrown upon us by the court system, the prison system or legal aid.

ROZENBERG: But it's still your objective to cut the number of prisoners. And, according to various calculations, that suggests ten thousand fewer offenders going to prison each year if you're going to – because some of them don't serve as much as...

CLARKE: (over) I don't know how that's ... Oh I see, yes some of them are short-term stays, they're short-term.

ROZENBERG: (over) Some of them only serve short-term, yes. So 10,000 fewer a year.

CLARKE: (over) Yuh, which is very modest. I'm sorry it's so little. I mean, it takes us back to where we were about two years ago. I mean, I have expressed views of astonishment at the size of the prison population, which has grown without anybody intending it to an astonishing level. I've set myself this exceedingly modest target of perhaps having a prison population that's three thousand lower at the end of the period - four years time - than it is now. It'll still be twenty thousand more than when Michael Howard was Home Secretary. People did not...

ROZENBERG: But he's not very happy with it.

CLARKE: Well, I'm sure he's... He's being rung up by people trying to persuade him that he's not very happy. He agreed with everything. He told me he agreed with everything I said at the party conference, which is no doubt why his views weren't reported! Michael and I don't altogether agree about whether there's a direct correlation between the number of people in prison and the level of crime. I mean, there's no getting away from the fact we don't agree on that. But I'm not aware of any difference of approach. I've always said, and believed, that serious criminals should be imprisoned. I've always said protection of the public is our first duty. I haven't the faintest intention of letting people out early if I can avoid it. And I do think the thing that needs to be improved is the very bad record we have on the level of re-offending by people when they come out of prison, which is just ridiculous.

ROZENBERG: What makes you think that you're going to be any better at dealing with this problem of re-offending, recidivism, than your predecessors?

CLARKE: Well, I think my predecessors set about it in a totally different way. I mean, there's no doubt that I come at it from a different approach to people like John Reid and Jack Straw. In the Western world, crime generally has been dropping in countries which did all kinds of different things and it's very difficult to say there was any consistent cause and effect. I really do think my approach is not populist. It is quite liberal with a small 'l' because I think criminal justice, indeed all justice should be based on, you know, civilising liberal principles where possible. That's not incompatible at all with protecting the public against crime. I'm not certain I can achieve any of these things. I just have a pretty clear idea of the policies I wish to pursue. I don't think I've signed up to anything that saves money, which is not seeking at the same time to achieve an aim I don't believe in.

ROZENBERG: Okay, I want to bring in members of the audience here.

PURCELL: John Purcell. Lord Chancellor, just developing the theme you just spoke about. You mentioned that crime was generally going down in the Western world. I was just wondering if you're aware of the thesis put forward in Malcolm Gladwell's book, *The Tipping Point*? That this, certainly in the United States, was in large part down to the fact that so many of the people likely to commit crime - *i.e.* socially disadvantaged 16 to 30 year old males were serving significant custodial sentences; or - and I know you're not going to like this phrase - to put it crudely and in an old-fashioned way that prison actually works?

CLARKE: The trouble with political debate on most subjects is it reduces things to stark black and white. There is one simple cause for one simple effect. The causes of criminality or otherwise are more complicated than that, I think, and there's no single thing. What you should start from is what sentence punishes most effectively, what sentence protects whilst people are in, what then goes on to reduce the risks of them re-offending when they're released? I don't think governments control whether crime goes up or down particularly. All kinds of other outside influences come to bear on that. But I think the duty of government is to have the most effective and rational system in place for dealing with crime at every level in a way that does most to protect the public from the criminals involved.

ROZENBERG: Gentleman at the back.

MENDELLE: Paul Mendelle, immediate past Chairman of the Criminal Bar Association. Various estimates have been given in reports in this country that the harms from drugs, drugs-related harms in this country are variously estimated at between eleven to sixteen billion pounds per annum. Will this government set up a commission, as was set up in Portugal, to examine decriminalisation of personal possession of drugs?

CLARKE: Well, I agree that drugs is at the heart of the majority of our crime probably in this country. We estimate that about fifty-five per cent of the people admitted to prison have a drug problem. And such is the overcrowded nature and state of our prisons that probably people go in free of drugs and come out with a drug problem they've acquired in prison. So the situation is indeed very bad and that's another thing I want to tackle - try and get drug-free wings, try to do something

about drug rehabilitation. The Portuguese experience, yes, I've heard of that argument before. It's always seemed to me that if you actually legalise even just the possession of dangerous drugs, you are facilitating their sale. You're taking away a major discouragement to purchase. Just as I don't believe you get less crime if you put more people in prison, I don't think you get less crime just by decriminalising drugs.

ROZENBERG: But you don't rule out a change in the law?

CLARKE: I don't expect to see a change of the law. I don't think the present government's going to contemplate a change in the law. I'm not an advocate of a change in the law myself.

ROZENBERG: Another question?

YEOMAN: Howard Yeoman - barrister, retired police officer. You propose to reduce the prison population by diverting the less serious offenders to the Probation Service rather than building more prisons. The Probation Service cannot cope at the moment and will be further beleaguered with proposed financial cuts. What will be your yardstick for sending offenders to prison?

CLARKE: I personally have never said we're going to save money by diverting more people from prison to the Probation Service. We need with all crimes to actually punish people effectively and to find the way which does most good for the public, which isn't just punishing them but is also likely to reduce their liability to re-offend. The Probation Service, I realise, is heavily involved. I hope the Probation Service will be brought into this concept of payment by results, and I hope to see probation trusts getting involved in a system of trying to find more effective rehabilitative sentences.

ROZENBERG: How are these trusts going to work?

CLARKE: The probation trusts we have now, they run the Probation Service; but they could be providers under the system of payment by results if we can develop it. We've got to start by trialling it and we've got to start, I've got to start by producing a Green Paper working these ideas up further. But it is... it simply never has been my proposition that you can get rid of all short sentences. What matters is what works, so it has to have a punitive element but it also has to have more success than we have at the moment in stopping people offending. What is the point of just putting people through prison when two-thirds of them will commit more offences within less than twelve months of being released?

ROZENBERG: This would be an additional role, a new role for the Probation Service? What would it mean for them?

CLARKE: Yes, I think so. Some are involved. I mean, rehabilitation isn't a totally new idea to the system. The country is full of good ideas. It's full of very worthy voluntary bodies, it's full of good probation trusts, some local authorities working. The police, the Probation Service, the other services locally work together much more than they ever used to. And there are lots of good ideas.

You need to find some way of organising it in a way where the finances go to the most successful examples of reducing re-offending. And from where we start, it's a long way to go. I've got one pilot going at the moment at Peterborough. I hope to have some more in the New Year. But that is the way of progressing. But I do ask you not to believe this is just some simplistic let's stop sending people to prison to save money because somehow it's necessarily cheaper, whatever the outcome, to put them into the community because it plainly isn't.

ROZENBERG: Another way you intend to save money is you say you'll consult on saving £350 million by channelling legal aid into the cases that most require it. Which cases *least* require it?

CLARKE: We're going to have to look at means-testing. We're going to have to look at what kind of subjects legal aid should cover. The one starting principle is it's obviously necessary in a civilised society that you do provide legal support for people who would otherwise suffer injustice on a serious matter if there wasn't somebody articulate enough to represent them and someone to help them argue the law.

ROZENBERG: Does that cover...

CLARKE: I think the present system goes well beyond that. It is by *far* the most generous system in the world. And even if I achieve - which I think I will - the savings which you describe; after all that - and there'll be a great deal of debate about it - we will *still* have by *far* the most generous system in the world, far more expensive per head to the taxpayer than anything that exists in the Old Commonwealth or where they have a similar system to ours on continental Europe, where they don't. But it's grown like Topsy, and at a time like this it obviously has to be reviewed. But we're looking at eligibility, at scope, at the level of payment, at any perverse incentives built into it, which tend to make trials longer or proceedings more complicated than they need otherwise be. All that we'll have to consider.

ROZENBERG: You say that you won't be taking away legal aid for cases where justice requires it. Well, does justice require legal aid in matrimonial cases, in housing cases, in personal injury cases?

CLARKE: Well, I won't be drawn on the details. But I think we do have a very litigious society and it's not necessarily part of our system that the taxpayer should enable people to choose a legal route to pursuing a dispute without having to pay for it themselves.

ROZENBERG: So you're encouraging people towards something like mediation, for example?

CLARKE: I think mediation's a very good idea. I'm not naïve about mediation, but there are very strong advocates of mediation. The confrontation of adversarial litigation isn't always the best way of dealing with the disputes that follow a matrimonial break-up or arguments over children. I think sometimes it can be positively destructive as former partners, former spouses decide to take revenge on each other with thousands of pounds worth of litigation and repeated hearings about

access to the children or whatever. Now some of those may have to be resolved that way, but I think it's not only the expense; actually the method is questionable in some cases.

ROZENBERG: So no legal aid for matrimonial work? No...

CLARKE: (*over*) I didn't say that!

ROZENBERG: No court work? You want to take matrimonial disputes out of the courts and put them into mediators?

CLARKE: I want to leave myself free to produce a consultation paper, Joshua! I said what I said! But I gave that as an example where my personal view is I have encountered cases where talking to one or other of the parties, it is quite obvious that repeated litigation has made the problem worse and has not made it better. Sometimes what they're litigating is something which can't be *resolved* by a judicial process. Some other method is required.

ROZENBERG: And you also announced in July you'd be consulting in the autumn on replacing conditional fees with contingency fees, which very broadly...

CLARKE: (*over*) That's a no-win, no-fee situation.

ROZENBERG: The idea is that if an accident victim got a certain amount in damages because that's what the court said that victim needed to live on, a chunk of that damages would be taken to pay his lawyers rather than the money coming from the defendant as at the moment.

CLARKE: Well, the idea has been mooted by Lord Justice Jackson who was asked to review it. And I've had a look at the Jackson Report. I'm impressed by the Jackson Report. Although you can defend the system, it has led to a huge increase in cost and you shouldn't have a situation where regardless of however frivolous the claim is, the sensible thing for the defendant to do is to settle, get out before the legal costs start running up. And a very experienced judge, Sir Rupert Jackson, has come up with some very good recommendations which I find and the government finds very attractive. But they will involve perhaps a bit moving towards the American system whereby some of the costs are recovered out of the damages which are awarded.

ROZENBERG: Okay, some more questions from the audience.

CURTIN DARLING: I'm Ed Curtin Darling, a trustee of Legal Action Group, which is a charity focused on access to justice for vulnerable people. Would you agree that keeping a roof over your head is a basic necessity of life and it is essential that individuals have access to legal aid advice and representation in housing cases?

CLARKE: Well, I'm not going to be drawn case by case. The principle I'm going to apply is what is absolutely essential, you know, what is vital to the liberty, well-being, the central quality of life of someone and how far do they need legal support in disputes over that? Now in most areas there are cases and cases. I

mean, it depends how serious the housing case is, the strength of your case would I think depend. But we're looking at that. And then when we've looked at it, we will produce our proposals and then we will consult on those proposals. We're not likely going to start going into the legal aid system, but it must be reined back. At the moment, the taxpayer is paying for a quantity of legal advice and litigation on a scale which the taxpayers of other perfectly advanced civilised countries do not expect to have to pay.

ROZENBERG: Lord Chancellor, you said that the Criminal Injuries Compensation Scheme will have to be re-examined. That must mean less money for victims?

CLARKE: Well, wait and see! I needn't go beyond that. It's just for as long as I can remember, the Criminal Injuries Compensation Scheme has always awarded more money than any government's ever provided to be paid out of it. You're going to have to have some system. I'm not going to sweep away the idea of compensation to the victims of crime, but I think you do have to have a logical, affordable system, and we can't go on as we are just accumulating a huge pile of late paid payments, which is where we are.

ROZENBERG: So it's pay fast, but pay less?

CLARKE: Maybe.

ROZENBERG: I mean, what we're getting to is a stage where victims are less likely to get compensation and assailants are less likely to go to prison.

CLARKE: *(laughs)* To an absolutely marginal extent! We've never had so many people in prison! There are foreign prisoners who've finish their sentence; there are indeterminate prisoners who've finished their tariff; there are...

ROZENBERG: And you're going to let them all out?

CLARKE: There are drug addicts. No, I'm not going to let anybody out! I'm just saying the idea that what we have is a perfect system, that the safety of the country depends on keeping these overcrowded warehouses full of a variety of people is wrong, and what we need is an intelligent sentencing system. We need to have people imprisoned, of course, to punish the serious criminal, and to keep them there to protect the public. But there are better ways of doing things and it's a pity it required a financial crisis to get people to ask what kind of justice system, what kind of criminal law and sentencing system should really work in the twenty-first century in an advanced country like our own?

ROZENBERG: But how do you think this is going to go down with the public? They see people in prison as protecting the public from prisoners. You're pos...

CLARKE: *(over)* It's wrong.

ROZENBERG: You're positioning yourself to the left of the Labour

Party. You're going to be very vulnerable in Parliament. This is not what you were elected for.

CLARKE: Well, the Blairites went on, banging on about law and order, which if you read their various memoirs they did because they were very, very worried that Conservatives would get to the right of them on law and order. And I don't think Tony Blair really knew very much about criminal justice policy at all, but he struck a stance and it was stuck to by several of his successors. The public believe that prison protects them. So do I. But the public know perfectly well though prison protects them, that, you know, it doesn't stop people re-offending always; and if something could be done that was effective, that reduced the level of crime committed by people almost as soon as they're released from prison, that is another form of public protection.

ROZENBERG: Lord Chancellor, when is the government going to announce an end to the blanket ban on prisoners voting?

CLARKE: *(laughs)* The government is carefully considering that issue in the light of recent litigation!

ROZENBERG: But there's nothing much to consider. You have got to lift the blanket ban because the Strasbourg Court has said so.

CLARKE: Well, we're carefully considering the judgment of the Strasbourg Court and no doubt we will come back with proposals in due course.

ROZENBERG: So there will be proposals to lift the blanket ban even though you won't tell me what the proposals are?

CLARKE: It depends on the outcome of our consideration, yes!
(laughs)

ROZENBERG: You really have no option though.

CLARKE: My good friend and colleague, the Deputy Prime Minister, Nick Clegg, is in the lead on this subject, and I occasionally discuss it with him and I'm delighted to wait till he comes forward with the government's considered conclusion.

ROZENBERG: But you must have told him he's got to do something; he can't do nothing - as the previous government did?

CLARKE: I'm sure Nick is taking a very considered and responsible view of the whole question.

ROZENBERG: Final question, Lord Chancellor, and it's really where we began. It's really what sort of legal system we can expect in this new age of austerity. Let me suggest an answer to you. It may not be as good a legal system as we've had in the past, but it's the best we can afford. Is that fair?

CLARKE: No, I don't agree with that at all. Obviously, I'm a great admirer of the legal tradition in this country. I think we've always had an excellent legal system by the standards of the time throughout the generations, usually one of the strongest in the world. I think we still have. And I think, you know, times change and we need to have one that adjusts to everything in the twenty-first century - you know, it doesn't use more buildings than it needs, doesn't spent more taxpayers' money than is required, doesn't grow like Topsy, doesn't just incarcerate people but do nothing else to stop them re-offending when they go out, and all these other things. The big difference between the legal system now and the legal system when I was called in this Hall nearly fifty years ago is, I would guess - I don't have the figures - it probably costs the taxpayer twice as much in real terms as it did then. I don't think it's twice as *good*. And I do think that you have to keep the values, the imperative values of the rule of law, the independence of the judiciary, the trust that exists in the problem-solving and decision-making capacity of the courts. But every now and again having a look at what you can do by way of radical reform does no harm.

ROZENBERG: But even if it does that, it's surely not going to be able to do justice for as many people, in as many cases, in as many areas of the law as it does at the moment?

CLARKE: Some problems are not necessarily solved by adversarial litigation. There are things that if you just put a lot of money in, you will draw people into believing that the law is necessarily the best remedy for their problem. Many of the single issue groups in modern politics - probably because they have so many lawyers amongst their membership - constantly advocate legal remedies for the evil which they're campaigning against when legalism isn't always the right answer. So I just think the system will continue. It's essential to the backbone of a civilised society to have a properly functioning judicial system and justice system and rule of law. But I don't think it should become ever bigger, ever spreading, ever more costly in the way that I think it has in recent years. Every now and again you have to get back to fundamentals and say what is it that a well-ordered system of justice needs to deliver to a modern society, and I think this is as good a time as any to set about asking that question.

ROZENBERG: Lord Chancellor, thank you very much indeed.
(*Applause*)