

## RETURN TO SENDER: LETTER TO CHIKIS

FRANK COSTELON<sup>∞</sup>

*In this epistolary essay, Frank Costelon recalls his childhood—an education in “the art of the smuggle”—and recounts his experiences within the criminal punishment system as an adult. He situates his work as jailhouse lawyer within a “family tree” of litigation, including legal victories won by his father and brother during their criminal prosecutions. He also describes the pain of being separated from his son for what “might as well have been a life sentence”—the duration of his son’s childhood.*

Chikis,<sup>1</sup> I am going to share something with you that I have not shared with anyone but my beloved son, Maximo, who is twelve now. Every year around this time on my day of nativity, which is today, I do not celebrate. Instead, I sit back and ponder in my solitude and isolation.

Chikis, I am not a skilled writer or orator (I only went to school to eat my lunch!). This is why I’ve said before that I am making this place into a university. You said you wanted to know about “the man I am today.” Well, here we go:

Through the sands of time, the hourglass revealed a young lad who had destroyed his life by choices he made at the age of twenty-seven. It is something of a cliché, that you can measure a person’s character by how they respond when the chips are down and their back is against the wall and everyone they know abandons ship. But it holds truth.

There was nothing in this lad’s life to suggest that he was willing and able to overcome the consequences and repercussions of the environment in which he was brought up or the family that raised him—two of the factors contributing to his fateful choices. But you would only reach that conclusion looking from the outside, as does one who makes stereotypical assumptions and generalizes—one who is not able to peer behind the facade of the circumstances, who does not seek to really get to know what lies deep and dormant within. Hidden talent can be recognized; it is all about perception.

One never knows what another will accomplish if they want it badly enough. The young lad had always known that he possessed qualities and attributes from the struggles he had surmounted, and the ways and means, the plots and schemes, he devised in his criminal endeavors. This hustle instilled in him a hidden gem, an uncut jewel not yet polished, tested by fire, and yet to be forged by pain, the greatest teacher. Now, only if this young lad could make a negative into a positive. James Allen wrote, “Circumstance does not make the man; it reveals him to himself[.]”<sup>2</sup>

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<sup>1</sup> The name of the letter recipient and Mr. Costelon’s son have been changed.

<sup>2</sup> JAMES ALLEN, AS A MAN THINKETH 19 (Longmeadow Press 1993).

Well, the trials and tribulations that this lad faced indeed revealed his potential. Chikis, this lad is me.

My grandmother often said, “Tell me who your best friends are, and I will tell you who you are.” My father explained to me that, “Your best friend is the money in your pocket.” I have come to understand that you become like the ones you spend the most time with and those you look up to as your role models.

Chikis, let me introduce you to who they were, as they are now deceased. Their legacy lives on in black and white, you can find them on LexisNexis in *United States v. Rigales*<sup>3</sup> and *United States v. Costelon*.<sup>4</sup> These two cases—both something of a victory—are part of my family tree. As you can see, my roots run deep in litigation; the apple doesn't fall far from the tree. I became as my role models were.

“As the branch is bent, so shall the tree grow.” My mother told me this. Although I did not choose the environment that I grew up in, nor the family that I was born into, I still made the choice to follow in my father's and brother's footsteps. Even though they gave me the caveat, “Do as I say, not as I do,” I was still around. So, I looked and I observed; thus, I absorbed.

I have come to learn that psychologists have a term for a person's deep-seated preference to be around people who look and think and sound like them: “homophily.” The term is psychological babble; it means that we are drawn toward each other because of our mirroring capacity, the part of our brain that wants to understand what we are dealing with, that feels comfortable because we kind of know what to expect.

As you may know, most people who have criminal tendencies acquire them as a result of unfavorable environments and improper associates during childhood. My training, as I can remember, started at the tender age of three. My teachers showed me the rudimentary principles of dope-fiend psychology, and my professor showed me the finer points of the art of the smuggle. Therefore, I grew up to fulfill the legacy bestowed upon me.

Even though it was ultimately my choosing, I was strongly influenced by the ones I spent the most time with: drug importers and growers. I learned legal lingo that I did not fully comprehend at the time. This is what I was exposed to as a child and so I mastered logistics. My old craft was knowing how to move the product internationally and cross-country. I am from the city where it passes, El Paso del Norte, which means the pass to the North—and let's just say it passes. There is a place on top of a mountain that is known as a scenic drive: it overlooks the valley and there are signs that explain what you see. One of the signs points to a spot on the river and tells a story about why that spot was called a smuggler's paradise.

The lifestyle was like an international game of chess. Even though I was raised to play it, I made the wrong move and got checkmated. The inevitable happened. I got set-up and busted by the DEA. Yet, I look back and realize that I am alive—instead of dead on the streets of Juarez, Mexico.

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<sup>3</sup> 630 F.2d 364, 365 (5th Cir. 1980) (reversing Ernesto Rigales's convictions on the basis that “a warrantless search of a zippered case found in the automobile he was driving violated his fourth amendment rights”).

<sup>4</sup> No. 90-1337, 1991 U.S. App. LEXIS 10636, at \*6 (10th Cir. Apr. 17, 1991) (vacating district court order denying a motion to discharge a \$15,000 fine and remanding to the district court).

Stuck in the nation's oldest federal prison, a 100-year-old red-brick-and-iron-caged dungeon, United States Penitentiary, Leavenworth. Sentenced to what seemed to be a lifetime. Not my lifetime, but my beloved son's lifetime. In the most tender years of a child's life when a little boy needs his father's physical presence. It might as well have been a life sentence.

I started consuming myself with reading law books, mentored by the few of us who will not give up. I became a part of the 1% of federal prisoners known as jailhouse lawyers. I was one of the usual suspects in the only place where you find freedom in prison. As iron sharpens iron, I picked up the tools of this new trade. I read *Black's Law Dictionary*, to crack the hidden code, decipher the esoteric legal parlance. I started reading motions, briefs, and every law book I could buy or borrow. In short, I studied law the way I had hustled: 24/7/365.

Printing caselaw and making my own law library in my cell, I ate law and digested it, I slept law and dreamt it! Then, one day, I found what I had not been looking for. I found my older brother's and father's cases.<sup>5</sup> I used both of these cases as motivation. It took me back to a time as a child when I would be around them and listen to them talk law.

I filed my *coram nobis* motion and unfortunately it was summarily dismissed, but I was undeterred; I appealed and won an evidentiary hearing based upon a *prima facie* showing of ineffective assistance of counsel.<sup>6</sup> I legally escaped federal prison via a habeas corpus *ad prosequendum* for the hearing. Unfortunately, the district court once more dismissed the *coram nobis* petition to set aside judgment and conviction.<sup>7</sup> Nevertheless, I continued my quest for freedom and charted my course through another round of litigation in the New Mexico state courts, exhausting in order to get to the federal courts.<sup>8</sup> Thus I received hands-on training in post-conviction remedies.

At this point and time, my common-law wife lost all faith, love, and hope. Let's just say that hearts got broken, tears got shed, and I became a member of the club: the ones that time forgot! I grew up visiting my father in a club fed; this is what my son's mother did not want for our son. She would tell me, "Look at how you turned out to be!" The thing that brought us together, the hustle, was the thing that took us apart.

Yet, being the creative person I am and remembering how my father still showed me his love from a distance, I figured out how to be a part of my son's life from a distance. I started writing books for my son and to my son, silent one-way conversations, putting him up on game, giving him a free education. From every angle, I gave the caveated message my father and brother had given me to my son: "Do as I say, not as I do." I entitled these books the *Compendium*. I also made him a chess board in ceramics with an inscribed message: "Life is like a game of chess. Be the chess player, not the chess piece." I wanted to train his mind to move, to think moves ahead, just as I had shared in the parables in the books I wrote for him.

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<sup>5</sup> See *Costelon*, 1991 U.S. App. LEXIS 10636; *Rigales*, 630 F.2d at 364.

<sup>6</sup> *State v. Costelon*, No. 32,890, 2013 N.M. App. Unpub. LEXIS 344, at \*2 (Ct. App. Nov. 25, 2013).

<sup>7</sup> *Costelon v. New Mexico*, No. CV 16-01327 JCH/SCY, 2017 U.S. Dist. LEXIS 182637, at \*9 (D.N.M. Nov. 3, 2017).

<sup>8</sup> See *Costelon v. New Mexico*, 726 F. App'x 696 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 238 (2018).

I will share with you the preface of the Compendium so you can get an understanding of the person that I have learned to be and the legacy I aim to leave behind, hoping that it skips a generation.

Maximo, what you are going to read is not a work of fiction. These facts and events are real. They are based on my personal experience and expressions, but I am not alone. Your father is just one of the few who have decided to write about this heart-breaking experience—which millions of prisoners have gone through in some way, shape, or form, and have suffered time and time again. . . . [T]his message is for you. In the words of Henry Ford, “Whether you think you can or cannot, you are right!” So with no further ado, this story is a story within a story of desire and determination. A story about a father’s loving message from a prison cell, and with this message there is a triumphant call to all who believe that no prison wall or cell bars can cut off communication! They may only muffle the sound of our voice or delay us from building bonds and relationships.

However, they will not stop us if we are persistent and train our minds to escape this realm by thinking outside of the box. Let this message reach you and our families who need some love and affection with some nurturing and wisdom from a loving biological father or mother figure. This journey of pain and struggle have been the greatest teacher, the moving force, the inspiration creating this action that you are reading and feeling in your heart and tearful eyes. This book is a way to form a special connection through the magic of words. Words are power, they are what dynasties are built on. These words that form this message cannot be destroyed or erased! They have been archived in the Library of Congress to make sure that you, my son Maximo, know the devotion, and the legacy of the mysteries of his father, a father who would not be deterred nor his love detained. This is the record of my presence by way of supplementing my love from a distance. These are my reasons for undertaking this never-ending epic of fatherhood. From my heart and soul, I have been blessed with the creativity to negate my absence and still be somewhat part of my beloved son’s life while informing him as to why I am not physically present. At the same time I will leave a lasting impression of my love and presence by giving my son this caveat...Maximo, please do not follow in your father’s footsteps!

. . . The title of this book [“Compendium”] dawned on me one day while on my quest to decipher the legalism parlance. I was deep in methodical thought, planning my escape...looking for the key to pick this judicial lock, when I stumbled on [the] word in *Black’s Law Dictionary*. This word grabbed my attention and I was distracted from my journey that was fueled by the pain that

led me and motivated me in the first place to strive for a way to be part of my son's life. This word jumped out at me, slapping me on my head, and I started to ponder. Isolated thoughts have nowhere to go, until they are trained to escape into the surrounding boundaries of freedom. This thought was young and it grew into an idea, and from that idea it became a plan, thus, from that plan it will manifest and grow into a man (you, my beloved son Maximo).

There you have it, Chikis. I hope you have a sense of the man I have chosen to become and the influence I hope to cultivate in my son to become nothing like me. His mother is making sure of that; I have had no communication with Maximo for about two years now. All I have is scribbled notebooks of this nature and a box full of letters stored at a family member's home for Maximo when the time comes.

P.S. After all of these years of pro se litigation, my attempts to vacate the prior conviction that enhanced my current federal conviction were not futile, but rather gave me insight into the intervening changes in law, and how one must keep abreast. I stayed at the forefront of the cannabis reform laws in the state of New Mexico—particularly, the Cannabis Regulation Act.<sup>9</sup> This granted me a third bite at the apple. I petitioned the state court to expunge and seal my prior cannabis conviction. It was granted and ordered that those “proceedings shall be treated as if they never occurred.”<sup>10</sup> Now comes the hard part in federal court, because of the rule of finality and Ninth Circuit precedent.<sup>11</sup> Let's see what else I can learn.

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<sup>9</sup> New Mexico Cannabis Regulation Act (2021), <https://www.nmlegis.gov/Sessions/21%20Special/bills/house/HB0002.pdf> [<https://perma.cc/7FZN-MA9F>].

<sup>10</sup> *In re* Frank Costelon, No. D-307-EX-2021-47 (N.M. Dist. Ct. Nov. 18, 2021).

<sup>11</sup> *See* *United States v. Diaz*, 838 F.3d 968, 973 (9th Cir. 2016) (describing how, in the Ninth Circuit, “later dismissal or expungement of a predicate state conviction ha[s] no bearing on” a federal sentencing enhancement).