



A Better Way to Sanction Bad Behavior

Four years ago, in a dramatic speech at the ABA Annual Meeting in San Francisco, Supreme Court Justice Anthony Kennedy challenged the legal profession to concern itself with what happens to people in this country after they are convicted and sent to prison. Justice Kennedy raised fundamental questions about the fairness and efficacy of the American criminal justice system, which disproportionately imprisons minorities, and then returns them to their communities in worse shape than they left them. He pointed out that most states now spend more on their prisons than on their schools, and concluded that “our resources are misspent, our punishments too severe, our sentences too long.” He asked the ABA to help start a “new public discussion” about American sentencing and corrections policies and practices. I am pleased to use my first column as Section chair to report on the progress of that discussion.

In response to Justice Kennedy’s speech, then-ABA President Dennis Archer established in the fall of 2003 the Justice Kennedy Commission, whose report to the ABA House of Delegates—a year to the day after Justice Kennedy’s speech—was hailed as a blueprint for sentencing and corrections reform. The commission’s report is premised on an assumption that the bar has a responsibility to see that our criminal sanctioning system does

A sanctioning system should not exacerbate the crime problem.

not exacerbate the problem of crime, and that people who have satisfied their court-imposed sentences are given a fair chance to build better lives in the community. Its specific policy recommendations were developed out of a series of hearings across the country, during which it took testimony on subjects as diverse as mandatory minimum sentencing, racial disparity, prosecutorial discretion, executive clemency, and the legal and practical obstacles to offender reentry.

As chair of the Justice Kennedy Commission, I was proud to be able to deliver our report to Justice Kennedy as a substantial down payment on the obligation he had imposed on us the year before, and to let him know that the

report had the full backing of the Criminal Justice Section and many other parts of the ABA. I was keenly aware that this was the first time in our country’s history that a sitting Supreme Court justice had allowed his name to be formally used on an entity unrelated to the Court, and was gratified that the report was so well received.

The following year, in 2005, the ABA received a two-year grant from the Open Society Institute to continue the work begun by the Justice Kennedy Commission through the newly constituted Commission on Effective Criminal Sanctions (CECS). CECS, which I have had the privilege of cochairing with former Illinois Governor James R. Thompson, committed itself to developing among its membership of prosecutors, defenders, judges, and academics a broad consensus about what can and should be done to reduce reliance on incarceration and to reduce recidivism. With tremendous

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staff support from April Frazier and guidance from consulting director Margy Love, CECS organized a series of hearings nationwide where it heard from top criminal justice officials about how the legal system in different jurisdictions supports or discourages (a) diversion and treatment programs before or in conjunction with prosecution, and (b) reentry and reintegration of offenders after conviction. Commissioners were particularly impressed by alternative sanctioning programs developed by prosecutors' offices, and by collaborative efforts among justice stakeholders to address the social and economic problems that drive recidivism rates. The traditional advocacy model of criminal justice has been transformed in some places to a problem-solving approach that involves new roles for prosecutors, defenders, and judges.

CECS made a point of talking with those most directly affected by the criminal justice policies and practices we were studying—people with criminal records. With the assistance of the Safer Foundation in Chicago, the Legal Action Center in New York, and community activist groups, we were able to arrange interactive meetings with groups of people who had been convicted. We heard first-hand from them about the obstacles they face in trying to reenter and reintegrate into the community. One of our most significant findings was that barriers to reentry and reintegration are more often attitudinal than strictly legal. Employers and landlords are worried—sometimes unreasonably so—about the risk they run by hiring or renting to people with a criminal record. We concluded as a result that it is important to develop ways to limit their liability and otherwise to reassure them.

Based upon the information gathered at the hearings and other research in the winter of 2006, CECS developed policy recommendations expanding and elaborating on the recommendations of the Justice Kennedy Commission in the following areas:

- community-based alternatives to incarceration
- improvements in parole and probation supervision
- employment and licensing of people with convictions
- access to and use of criminal history information
- representation relating to collateral consequences
- training in the exercise of discretion

These recommendations, which were strongly backed by the Criminal Justice Section, were approved without dissent by the ABA House of Delegates on February 12, 2007, and adopted as one of the federal “Legislative and Governmental Priorities” for the ABA during the current session of Congress. (The full black letter text and accompanying reports, as well as minutes of the commission’s hearings, can be found on its Web site at www.abanet.org/cecs.)

The CECS recommendations represent a consensus, no small feat given the diverse personal and institutional perspectives represented by its members. More remarkable still, most of the commission’s recommendations were endorsed by the National District Attorneys Association and all were endorsed by the National Legal Aid and Defender Association. With support from these national organizations representing both the prosecutor and defender communities,

CECS anticipates that its recommendations will shortly become the basis for a reform agenda in jurisdictions across the country that are attempting to devise more effective ways of sanctioning criminal behavior.

In the spring of 2007, CECS organized a conference in Chicago on employment of individuals with criminal records. Participants included people with convictions who have experienced the difficulties

the job market presents, and employers with progressive hiring policies. Panelists also discussed the legal and policy issues presented by limiting access to criminal records. Mayors Richard Daley of Chicago and William Herenton of Memphis told about the affirmative hiring policies they inaugurated in their respective city governments. At the conclusion of the conference, CECS approved a broad policy recommendation encouraging jurisdictions to limit access (except to law enforcement agencies) to nonconviction records, and to some conviction records after a certain crime-free period, when the risk that a person will recidivate is greatly reduced. We concluded that employers and landlords are predisposed to reject people with convictions without regard to the actual risk they may pose notwithstanding civil rights or nondiscrimination laws purporting to protect individuals with criminal histories. Our goal is to give people a true second chance at employment, housing, and a place in their communities. We know that steady employment and

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stable housing are the two most reliable predictors of desistance from crime, and our policy recommendation is designed to make some criminal history information unavailable when its relevance to employment and housing is extremely weak without interfering inappropriately with the public's "need to know."

In the year to come, CECS, working closely together with the Criminal Justice Section, expects to take its policy recommendations on the road. We plan to spend most of our time developing postconviction relief mechanisms in Michigan and Massachusetts, and also to work with several prosecutors' offices to develop a white paper on deferred adjudication programs. We expect that CECS funding will permit the commission to continue for at most two more years, but are confident that as CECS moves to conclude its work the Criminal Justice Section's committees will continue to work to produce a national consensus on using criminal sanctions wisely to reduce crimes, the number of victims, and the number of individuals with criminal records who cannot find a lawful way

to live and contribute to their communities.

In the four years since Justice Kennedy challenged us, we have experienced a rarely seen period in which prosecutors, defenders, judges, and academics seem willing to work together to seek to do justice by means other than simply incarcerating more people every year. CECS and the Criminal Justice Section are reaching out to corrections officials and probation and parole officers to educate them as to the successes jurisdictions have had in adopting problem-solving techniques to control crime while decreasing recidivism rates. One of my most thrilling moments in the ABA was to stand before the House of Delegates and offer resolutions cosponsored by CECS, the Criminal Justice Section, NDAA, NACDL, and NLADA. It is long past time for all of us who care about promoting public safety and making our criminal justice system a model of justice and fairness to reach out to one another to advance the public interest. The opportunity to move forward together is here and now, and I hope and trust we shall not waste it. ■