

From the President

Overcriminalization: A National Problem in Need of Reform

By Robert J. Anello



“Out of sight; out of mind” is an unfortunate cliché when applied to our nation’s massive

prison population. All too often as lawyers we deal with criminalization and sentencing as theory or an argument affecting an individual defendant, but without any real understanding of the conditions of confinement, the impact of those conditions on individuals, or of the economic and collateral cost of mass incarceration on our country. In 2009, the Federal Bar Council established a committee – the Special Committee on Sentencing Reform and Alternatives to Incarceration – to examine such issues. Made up of judges, correction experts, and lawyers with experience in diverse aspects of the criminal justice system, the committee has had the opportunity to hear from those who run prison facilities and those who have been housed in them. Rather than theory, they have provided informed and per-

sonal insight into the effects of our culture of incarceration. Surprising to me has been the view expressed by individuals such as an official of the U.S. Bureau of Prisons, who, in an appearance before the committee, asserted his feelings that our growing prison population was too expensive and that sentences for many classes of violators – for example, non-violent criminals and individuals convicted of pornography possession – were too long and were unnecessary to achieve the goals of our penal system. Some of these views, from those inside the system, finally appear to be being heard more broadly.

On May 7, 2013, the House Judiciary Committee created a historic bipartisan Task Force on Over-Criminalization, a measure that was supported by staunch conservatives and liberal progressives equally. This represents the latest step in what is developing to be a consensus across ideological lines that over-criminalization and over-incarceration in the United States have resulted in too many criminal laws with too stiff criminal penalties leading to an extraordinary number of individuals in prison for too long.

Just a week earlier, on May 1, the Federal Bar Council honored Judge Barrington “Daniel” Parker, Jr., with the Learned Hand Award for Excellence in Jurisprudence during our Law Day celebration. Judge Parker noted during his address on Law Day that, “over the past 35 years, the federal criminal justice sys-

tem ... has, before our very eyes, evolved into the most punitive in the world.” Throughout his 19 years on the bench, Judge Parker has addressed issues of over-incarceration with thoughtful consideration. In *United States v. Dorvee*, for example, Judge Parker wrote for a unanimous panel of the Second Circuit, reversing a 20 year jail sentence for possession of child pornography. Rejecting the idea that a sentence within the sentencing guidelines should be considered presumptively reasonable, Judge Parker wrote that mechanically applying the guidelines without using discretion can “easily generate unreasonable results.”

Over-Criminalization

Looking at nationwide statistics, over-criminalization and mass incarceration can seem like runaway trains that cannot be stopped. Between 2000 and 2007, Congress created, on average, 56 new crimes per year. See Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law 6* (2010). Congress increasingly has directed the Sentencing Commission to revise the guidelines to raise penalties for numerous crimes, including tax fraud, securities fraud, and child pornography possession. Over 200 federal offenses now have mandatory minimum sentences, many of which were created in the last decade. The United States cur-

rently incarcerates 2.3 million people. Of that population, thousands are held in solitary confinement, under conditions that have been defined as torture by the United Nations' Special Rapporteur. See Juan Mendez, Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Aug. 5, 2011).

How can we look at these bleak numbers without resigning ourselves to the status quo, overwhelmed by futility? One area from which to draw inspiration is the burgeoning reform movement building in state legislatures and correctional systems to address these issues. The tremendous results these efforts have achieved in just a few years can be a roadmap. The *New York Times* recently reported that over the last five years, "29 states have managed to cut their imprisonment rates, 10 of them by double-digit percentages." In Mississippi, Christopher B. Epps, the Commissioner of Corrections, led a massive effort to reform the state's solitary confinement policies. According to his testimony before the Senate Judiciary Committee last June, Commissioner Epps worked with lawyers from the American Civil Liberties Union and other prisoners' rights organizations and with correctional experts to develop a new classification model for placing inmates in solitary confinement and to create step-down programs that allowed inmates to obtain release from solitary

confinement. The reforms also instituted group counseling, alcohol and drug treatment, life skills, and anger management programs for inmates in solitary confinement. As a result, the state reduced the population in segregation from over 1,300 in 2007 to slightly more than 300 in 2012, a decrease of 75 percent. Maine and Colorado have both undertaken similar efforts and reduced their solitary confinement populations by 50 and 36.9 percent respectively. These results show us that reform is possible now. They also show how important it can be for prosecutors, judges, and defense counsel alike to take into account the perspectives of new voices, such as prison administrators who can be invaluable resources for understanding the impact of mass incarceration.

Mass Incarceration

It can seem difficult for individual lawyers, prosecutors, and judges to act on these issues. In a criminal case, a court typically addresses the case before it – the individual defendant and his or her circumstances and the specific facts of the alleged offense. Sometimes it can seem like "the systemic nature of mass incarceration presents challenges beyond common legal claims." Anne Traum, *Mass Incarceration at Sentencing*, 64 *Hastings L.J.* 423, 440 (2013). As attorneys, however, we have a responsibility not only to our individual clients but to our

communities and our profession to address these issues not only on a case by case basis but systematically and institutionally. As Judge Parker said during his Law Day comments, a nation that currently incarcerates 2.3 million people "is not who we are. These are circumstances that none of us can justify and none of us can be complacent about." I encourage my fellow lawyers to take inspiration from Judge Parker's words and endeavor to improve the system to which we owe so much.

From the Editor

The Exonerated

By Bennette D. Kramer



Since the advent of DNA testing 24 years ago, defendants and their representatives have redoubled efforts to exonerate and free those who have been wrongly convicted. Recently, there have been several high-profile cases in the press, but my renewed in-