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Testimony Before The American Bar Association Justice Kennedy Commission

A decade ago ago, Texas addressed the problems of prison overcrowding, inflated sentences, early release and a rising crime rate. We strongly rejected the approach of sentencing guidelines that had already been adopted by the federal courts and several states. Instead, we reformed our punishment system by making significant changes to probation, determinate sentencing and parole.

Texans took the first step to reform by voting for a one billion dollar bond issue that paid for the construction of approximately 100,000 new prison beds, including several thousand treatment beds. Of those new beds, approximately 20,000 were in the form of a new form of confinement facility: state jails. These were less-expensive confinement facilities for the short-term incarceration of low-level drug and property offenders. By diverting these inmates from the more expensive prison beds, we guaranteed that long sentences for violent offenders would be carried out.

I note that the construction project was so large because politicians waited too long to maintain prison space. The reluctance to raise taxes and spend money on confinement was no savings, as it resulted in higher crimes rates and federal litigation on overcrowding. I hope Texans remember that lesson.

The Texas Punishment Standards Commission took the second step to reform by rewriting the Penal Code and the probations laws in the Code of Criminal Procedure. As to the Penal Code, special care was taken to assign the most serious punishments to crimes committed against people. The Commission recognized that the limited resource of prison space must be reserved for confining violent offenders. By ranking crimes against people above crimes against property, a more rational system of sentencing was imposed. As to the probation laws, new emphasis was placed on community corrections. The Commission renamed probation as community supervision and expanded the options for local treatment and rehabilitations programs.

The Texas Legislature took the third step to reform by doubling the minimum time that violent offenders must serve before they are eligible for parole (from 25% to 50%) and by creating a new punishment range (the state jail felony) for confining low-level,

nonviolent property and drug offenders. State jail felony offenders serve relatively short (180 days to 2 years) but certain (no parole or good conduct credit) sentences. Drug offenses that previously could result in sentences of life in prison were reduced to a maximum of 2 years in a state jail. Punishments for several property offenses (for example, burglary of a habitation, building and a motor vehicle) were reduced several levels and, in one case (burglary of a motor vehicle) to a misdemeanor. All of these changes worked in combination to preserve valuable long-term prison beds for violent criminals while creating realistic opportunities to rehabilitate and punish property and drug offenders.

This process of reform was accompanied by the slogan that Texans must be tough and smart on crime. The tough side of the slogan was easy to see: more prison beds and longer confinement for violent criminals. The smart side was harder to visualize: a balanced approach to confinement by shorter sentences for property and drug offenders and increased opportunities for local rehabilitation programs.

The smart side required an ongoing commitment to fund and support rehabilitation programs. Unfortunately, the legislative process is rather undisciplined and includes little, if any, institutional memory. Politicians seek bills that make one of these simple statements: "I am tough on crime" or "I have saved you money." Even better if you can say both.

Over the last ten years, this mindset has led to numerous amendments to the original reforms, including increased punishments for all sorts of crime (against people and property), mandatory minimum sentences (particularly for drug offenses) and specialized sentencing requirements (automatic probation, mandatory treatment, and detailed enhancements). Over time, these changes have begun restoring the top-heavy Penal Code that was a part of the original problem in Texas.

Nonetheless, I believe that the reform has been successful. Prison overcrowding was eliminated. Parole rates have been stable at 25% for several years. Violent criminals are serving longer sentences and the crime rate has fallen.

Economic times, however, which were good when the prison construction took place, have now changed. A squeeze on the state budget during last legislative session left rehabilitation programs stagnant and, in some cases, eliminated. The promise of expanded treatment programs has been broken. There is now some talk of solving this problem by simply shortening the time criminals serve on probation. While this will undoubtedly save money in the short term, it will once again lead to increased crime rates and heavy expenses for victims of crime.

It remains to be seen whether Texans will finish the reform of a decade ago by making meaningful progress in promoting rehabilitation programs. History generally shows small advances over a short time followed by a slow decline over a long time. If that is so, we will be looking for another chance at reform in about a decade.

And now just a few comments from a state prosecutor contrasting the Texas sentencing experience with the federal experience.

Much of the current debate over sentencing is a debate over the wisdom of exercising discretion. Texans support broad sentencing discretion. One reason the broad discretion continues to exist is our unique preference for jury sentencing. Texans trust a jury to hear all the relevant evidence and make a decision on the appropriate punishment within a rather broad punishment range. Although a defendant may elect that a judge exercise the sentencing decision, the existence of the option for a jury decision maintains a healthy debate on the community's opinions regarding proper punishment.

Federal sentencing laws, on the other hand, reflect a very different experience. The punishment decision is placed exclusively in the hands of a judge – and only within very narrow guidelines that were written by professionals, not average citizens. Discretion is viewed as dangerous. People are viewed as objects that fit within grids. There is little, if any, room for individual sentencing decisions.

While this approach undoubtedly leads to identical sentences for those offenses with identical factors, it does not necessarily result in fair or appropriate results. Punishment is not a science, and judges are not robots. People have numerous individual backgrounds and characteristics that should be weighed and assigned a value without inflexible reference to a chart, table or calculator. Much of the backlash we hear against sentencing guidelines, being expressed by judges and the public, is an expression of the tension created by artificially suppressing the unquantifiable human element of sentencing.

Guidelines also make it even easier for politicians to grandstand and promote the crime of the day. Minimum sentences for pet offenses highlight the already rigid approach of guidelines and place the sentencing judge in a position of ministerial bureaucrat rather than wise professional. And while the temporary public emergency that might justify a minimum sentence quickly passes with time, such laws rarely get repealed or adjusted downward. The result is a gradual hardening of the sentencing process, making the entire effect counter-productive.

With sentencing guidelines, the entire process of adjudicating relative blame is moved from the courtroom to the spreadsheet. What once was a healthy public debate over right and wrong is silenced by a grid. Certainly, the Texas experience of broad discretion has its problems. No doubt there are areas in which it can be improved. But as an elected prosecutor who represents a community, I trust that community to have a voice in the expression of their moral opinions on the proper punishment to be imposed in criminal cases. And I will fight hard to keep their right to express that opinion in Texas courts.

