

Message from the Chair

In preparation for writing my final message to you as Chair of the Criminal Justice Section, I reflect on all the meetings, public speeches, previous chair messages and articles in which I proclaimed:

"We are prosecutors. We are defense attorneys. We are judges." Perhaps I misconstrued the dynamic? I look back now with experience on this topic and I look toward the future with naiveté as I come to this conclusion: "We are human beings. We are citizens. We are lawyers." This paradigm shift challenges our members to remove the constraints of their "day jobs" initially outlined above and instead look at criminal justice through the lenses of the later. If accepted, this challenge could prove to unify us with the goal of achieving greater success on important legislative advancements.



zens in a profound way. Nearly 70% of tens of thousands of jailed New Yorkers are pre-trial detainees. The presumption of innocence is waning under a current system that forces people to either pay cash or remain incarcerated until the case is resolved. This is a system that hurts our poorest citizens and promotes mass incarceration. Citizens who cannot afford freedom lose families, jobs and housing. We should continue to look at this issue as citizens of New York State and finally pass the Bail Elimination Act. This advancement in criminal justice would end money bail, reduce the number of our citizens wasting away as pre-trial detainees, and elevate standards of due process.

Second, as citizens we must take a hard look at discovery reform. Most citizens would agree that New York State has one of the worst criminal justice discovery statutes in the United States. Currently, the government may withhold vast amounts of information from the citizen accused, such as witness statements, grand jury testimony, investigative notes and police reports until just before a trial begins. This fact comes as a surprise to most New

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As human beings we addressed implicit bias in criminal justice at our Annual Meeting CLE in January 2019. Certainly, this issue affects prosecutors, defense attorneys, law enforcement and judges. For example, police officers risk their lives every day at work. They are exposed to the worst of humanity. They are required to make split second decisions based on training and instinct. At the program, we examined how effective implicit bias training of police officers could be developed with the goal of creating safer communities with fewer arrests. There is no question that implicit bias is a human condition that cuts across our entire criminal justice system. It is not simply on the front lines of law enforcement. It exists too at the end of our journey toward justice during the jury trial. To that end, our leadership has come together to advance new jury charges on implicit bias to be used in criminal jury trials. The manner in which this Section looks at implicit bias is a prime example of how looking through the lenses of a "human being" can be a powerful and effective means of change.

As citizens we addressed bail reform and discovery reform. Resolution of these issues is not limited to the roles we play at work. First, bail reform impacts our citi-

Yorkers, including lawyers who practice civil litigation where the concept of anything but full disclosure is unfathomable. Imagine the surprise of the first-time offender fighting to maintain her freedom and exercising her right to trial only to learn that she is not entitled to know the proof the government believes demonstrates her guilt.

However, our citizens are not just those accused of crimes. We must consider the impact Discovery Reform has on crime victims. Victims can be particularly vulnerable to threats and intimidation from the unscrupulous offender. A new approach to discovery in New York can accommodate these concerns while providing the accused with all of the evidence they deserve to defend themselves against the power of our own government.

As lawyers we face a greater challenge on the creation of the new Prosecutorial Conduct Commission. We must not look at this as prosecutors, defense counsel or judges. This unique and unprecedented commission faced opposition from our Section's prosecutors on philosophical and constitutional grounds. In my view as a lawyer, these concerns are legitimate. As defense counsel, I am reminded of our daily struggles to prevent wrongful convictions. I do not accept the concept that our existing disciplinary

mechanism for lawyers in general is adequate to address claims of prosecutorial misconduct. Prosecutors are entrusted with the power of an army of law enforcement agencies and should be held to a higher standard. This power, coupled with inadequate discovery rules, is a petri dish cultivating an environment ripe for unlawful and wrongful convictions.

Reflecting on the issue, I envision a pendulum swinging from side to side—oscillating between one extreme and another. For decades we have allowed a criminal justice system in New York to be so unfair, so unjust and so one-sided that we have grown skeptical of our brethren. We profess a need for more public accountability for prosecutors who violate ethics rules and criminal procedure laws. In previous messages, I warned of the dangers of a “revolution” because necessary changes can often be made without the radical overthrow of the system in favor of a new one. I believe the Prosecutorial Conduct Commission is an instance of revolution. Some would say a worthy revolution. Others would say it is unwarranted. In the end, we members of the Criminal Justice Section need to shed the biases of our “day job” and look at this issue as lawyers, lawyers sworn to uphold the Constitutions of the United States and of New York State.

The Prosecutorial Conduct Commission is the nation’s first of its kind. As with many first initiatives, the legislation is imperfect and is replete with constitutional infirmities. As lawyers we must reject a statutory scheme that violates the rules of law that we are entrusted to protect. In my view as a lawyer, the legislation must overcome constitutional objections to be viable. I do not profess to be a constitutional law scholar, so those of us entrusted with making those decisions will be the final say on its legitimacy. We lawyers, however, see this issue as more than merely academic analysis of constitutional review and application. The pendulum has swung. Citizens have spoken. The age-old struggle for fairness has reached a breaking point and the concept of such a commission is the by-product. I suggest that before we purchase it with the currency of jurisprudence, we need to remove the masks we wear on the battlefields and approach the issue as we did many others, as human beings, as citizens and as lawyers.

It has been my honor to serve you as Chair of this Section for the past two years. My tenure wraps up June 1, 2019. We look forward to new leadership headed by Robert Masters, Esq. My hope is that we are guided in the direction that my naiveté has been allowed to imagine.

Tucker C. Stancliff

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