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MANDATORY MINIMUMS: FINE IN PRINCIPLE, INEXCUSABLE WHEN MINDLESS†

G. ROBERT BLAKEY*

Judge Martin, Mr. Mateja, Ladies and Gentlemen:

Does the time fit the crime?

I feel like I'm President Clinton trying to get out of trouble by asking what "is" is.

What I now must ask is: What does "fit" mean?

And that all depends on what the purpose of a criminal sanction is.

Or maybe I should say purposes.

We can at least begin to talk about that question in terms of the generally accepted purposes of the criminal law.

I. RETRIBUTION

Will the time fit the crime if the purpose of a criminal sanction is retribution?

One of the great difficulties the Federal Sentencing Commission faced when it tried to set policy for sentences was to determine the proper level of retribution, or, as it is sometimes called, just deserts. And the Commission found that people's judgment about the appropriate sentence level varied with age and gender. For example, if you take the highest level of crime, and call that homicide, or murder, and you give it a number, and rank the other various crimes below it, the Commission found

† G. Robert Blakey was the third speaker at the Symposium on Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime?, hosted by the *Notre Dame Journal of Law, Ethics & Public Policy* on April 1, 2004. See also John S. Martin, Jr., Why Mandatory Minimums Make No Sense, Speech at the Notre Dame Journal of Law, Ethics & Public Policy Symposium on Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime? (April 1, 2004), in 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 311 (2004); William B. Mateja, Sentencing Reform, The Federal Criminal Justice System, and Judicial and Prosecutorial Discretion, Speech at the Notre Dame Journal of Law, Ethics & Public Policy Symposium on Mandatory Minimums and the Curtailment of Judicial Discretion: Does the Time Fit the Crime? (April 1, 2004), in 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 319 (2004).

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something you might not have anticipated, though you might not be surprised when I tell it to you, that is, young women ranked rape higher than murder. In fact, the difference between men and women did not even-off until they got to about my age, and that is way up there. So, if you want to make the punishment fit the crime with a theory of retribution, you have to say retribution from whose perspective? The Sentencing Commission finally figured out, in short, that you can't use a number for retribution that satisfies everybody.

So, retribution won't work.

II. DETERRENCE

Does the time fit the crime if the purpose of the criminal sanction is deterrence?

Well, this is not supposed to be all that difficult. I can give you a scientifically valid algorithm for it: Deterrence equals swift, sure, and severe punishment. Absolutely. That works. The difficulty is that nobody knows how to put integers into each category: swift, sure, and severe. And, I'm really surprised to hear my good friend Judge Martin and my good friend Bill Mateja from the Office of the Deputy Attorney General in the Department of Justice suggest we know much about deterrence. We don't. The literature on deterrence usually, if not universally, ends up saying that we need more data to determine if the theory of deterrence, in fact, works—certainly to measure whether any single penal policy, like minimum mandatory sentences, actually affect the general crime rate.

I'm also struck by the fact that we are talking tonight principally about the federal government. But then we shift, and without a credible segue, we talk about state governments. We are, as they say, mixing apples and oranges. First, we talk about federal sentencing. Then, we talk about state crime rates. They really are two animals with remarkably different colors.

Let me make it concrete for you. The federal government has maybe 35,000 people in its entire law enforcement system—meaning, cops in some sense—from F.B.I. agents to fish and wild life officers. That is about the number of police officers in the City of New York. Which is another way of saying that the whole federal law enforcement establishment couldn't keep peace in New York for a single day and night—much less the rest of the United States—and do anything about terrorism or anything else on its ample plate. If you're expecting the federal government to do anything but bring "show prosecutions," identifying a bad person and locking him up—identifying a Mafia boss and locking

him up—I think you’re just simply mistaken. The federal government doesn’t have the resources to do it, and nobody is prepared, in the foreseeable future, to finance the immense job of handling crime in the United States.

In fact, in light of the challenge of terrorism, the federal government is increasingly getting out of things that the states also do. And I, for one, am glad. The states can’t do international terrorism. Only the federal government can. A lot of what the federal government does, and is still doing, could just as easily be done at the state and local level. Let’s get the federal government out of that sort of business, and let it do what only it can do, at least what I hope and pray it will be able to do in this increasingly dangerous world of international terrorism.

So, when you talk about crime in the United States, you’re talking about crime at the state and local level, not about federal criminal law enforcement.

So, much of the sentencing analysis, focused on the federal government, which you’ve heard about tonight, is simply irrelevant to state and local experience, that is to say crime in America.

III. INCAPACITATION AND REHABILITATION

As retribution focuses on the conduct, not the person, rehabilitation and incapacitation focus on the person, not the conduct. But if you take your policy of incapacitation/rehabilitation seriously, most murderers should be released; they should receive no jail time at all! In fact, most homicides arise out of a triangle, a love triangle; a husband, a wife, and a paramour. You can add in alcohol and drugs, too, if you want to. In fact, most murders occur under circumstances in which deterrence makes little or no sense. How do you deter a crime of passion, when the blood of the killer runs hot, which is true, almost by definition, in most homicides? Murderers also don’t recidivate. (Anyway, I suppose that if somebody else marries a murderer, you could always say he or she assumed the risk!) Murderers are also model prisoners. If you are only talking about rehabilitation, they don’t belong in jail. So, if your express purpose in sentencing is incapacitation/rehabilitation, then the fact that we don’t sentence murderers—never have sentenced murderers—on that basis is just another way of saying we have always followed a policy of “under-the-table” retribution. Truth be known, we also don’t know how to rehabilitate, just like we don’t know how to deter. Having a laudable goal is not the same thing as having the know-how to achieve it in the world in which we, in fact, live. And knowing what we don’t know is one *necessary* form of wisdom.

But, at least, we know that incapacitation keeps offenders from offending while they are in jail, except on one another, but even here, we are not going to give all offenders, no matter what the crime, life sentences. Our intuitive notions of just deserts prohibit that, and rightly so. If we really wanted to incapacitate as a crime control policy, we would give most kids twenty years or more when they *first* offended. (We now always give them another chance because we hope (over reason) that we can rehabilitate them.) All of the studies show that criminals have a criminal career that roughly tracks the rise and fall of testosterone in their systems. When they get a little older, they just don't offend anymore! They just don't have the stuff for it anymore. Take me. Can you imagine me going into a bank, vaulting the counter, and running off with the money? I hardly run anywhere anymore! Lock people up, sure, but you are going to have to let them out sometime. Then, they will go right back to the only thing they know: crime.

Incapacitation/rehabilitation is a policy, too, that hardly works, at least, most of the time.

Knowing that, too, is wisdom.

So much for incapacitation/rehabilitation.

What the Sentencing Commission finally found that it had to do was *not* sentence under any of these philosophical systems. In fact, what it did was examine the existing sentencing practice—actual sentences imposed—and it found wide variations in sentences. So the Commission took the tops off and filled in the valleys; it just smoothed out present sentences, no too high sentences, no too low sentences. But that is another way of saying that we can't figure out whether we, as a society, want retribution, deterrence, or incapacitation/rehabilitation, or a little of each, or none of the above. The Commission came, rightly, in my judgment, to the conclusion that it might just as well "rationalize" current practice, whatever that is, and get on with whatever it is that we are doing, and leave the rest to the philosophers in academia.

IV. WHO DECIDES WHAT "FITS?"

Putting philosophy to one side, who decides in our society if the time fits the crime?

The truth of the matter is, if you look at it carefully, *every* participant in the criminal justice system has input on how much time fits the crime.

Let's start with the legislature. The legislature could, of course, articulate a purpose for crime control, if it wanted to,

that is, if the legislators could figure out where our social consensus rests. The fact is we do not have a social consensus about any aspect of the criminal justice system, federal, state, or local.

In the federal system, at least, without a definition of the basic elements of crime, specified sanctions, and a court with jurisdiction to try it, the federal system cannot process anti-social behavior as criminal.

So, in the first instance, the legislature, that is, Congress defines crimes and sets the sanctions.

The difficulty with that simple system is that when you define a crime you necessarily define it with a logical universal, for example, "Robbery." The truth of the matter is 9/11 was a "robbery." In the federal system, it would be called "hijacking," but basically the terrorists stole the airplanes, using force or violence. That is at least a "robbery." I suppose you could also call it "kidnapping," "arson," and "murder."

So, the tragedy of the Twin Towers could, at least in theory, be tried in the Manhattan County Supreme Court under the New York Penal Code.

Federally, it was also a RICO.

Laugh if you want to. I know people who say I've never seen a RICO I didn't like. Actually, I'm going to be in court on Monday representing the defendant in a civil RICO. I can tell you, that it is a RICO that I do not like.

So, 9/11 was a RICO. Al Qaeda is the "enterprise,"; "robbery," "kidnapping," "arson," and "murder" form a "pattern," particularly in light of previous incidents and Al Qaeda's stated purpose to commit acts of terrorism in the future. And, you could get up to a life sentence under RICO.

The problem, of course, is that we don't have any defendants in hand to prosecute. I suppose that we could always do with 9/11 what we did with General Manuel Noriega and his drug traffic operation. We sent the Marines into Panama to arrest him, and we brought him back to Miami for trial, and he is now serving a sentence under RICO. And I suspect, if we could find Osama bin Laden, and, putting national security issues aside, if we wanted to try him, we could try him for a RICO.

In any event, if 9/11 is a "robbery," and it is, so also is a kid with a stick taking a bike away from another kid in Central Park. That, too, is a "robbery."

So, your logical universal, "robbery," in fact, fits radically different situations, and as long as we speak the English language, it is always going to be that way. The problem is that we think and talk in logical universals, but we act in the face of particulars.

That is one of your biggest sentencing problems. We cannot set an exact sentence for every crime in advance without setting it inappropriately too high at the low end and too low at the high end. That is why, traditionally, we set a range of sentences, 0 to 20, and gave judges discretion in light of the facts of particular cases to fix the sentence somewhere in the authorized range.

You can, of course, as Congress has foolishly done, set a high mandatory minimum for an offense, but that mandatory minimum is going to come right up against the logical universal problem. You have one fact situation in mind when you create the high mandatory minimum, but the first person prosecuted under an offense having a high mandatory minimum sentence will fall at the lower range of the logical universal.

Judges are not machines that can be preprogrammed to do justice in individual cases. You need to give them the opportunity to exercise judgment, applying it to a particular situation. The Greeks called it "wisdom." The middle ages called it "prudence." We call it "judgment." It means the same thing. We think in universals, but we act in light of particulars. So, what our logical universal means in particular situations is a matter of "judgment." You cannot get away from that. Our minds just do not work any other way. It is foolish to think anything else. High mandatory minimum sentences are inevitably unjust in a significant number of instances to which they logically apply. You might just as well try to paint the wind. Period. End of story.

So, the legislature can set the sentences in defining crimes and setting punishments. Well, the prosecutor can set them, too. It doesn't make any difference what the legislature does. The prosecutor is the one who decides what to charge. You cannot compel him to charge a particular offense. I heard tonight that the DOJ has issued instructions to the Assistant United States Attorneys to charge the offense with the highest level of punishment before they start the plea bargain process, a process that undermines *any* sentencing policy anyway. Well, that, too, is an effort to paint the wind. Prosecutors just don't operate that way. They, too, at least in the field, have the good sense to try to do what is right, at least in the vast majority of cases. Directions out of Main Justice do not always control what happens in the field, particularly when they do not make sense in particular situations, which is what all AUSAs deal with every day anyway.

The federal parole board used to set the sentence before the Sentencing Commission got into the act. A judge would set one sentence, but the parole board would automatically cut that by one-third—and maybe more. The board could—and did—remedy sentences that were too high. Unfortunately, it could not

remedy sentences that were too low. At least at the federal level, the parole board is basically out of business. Indeterminate sentences are dead. Now, we have truth in sentencing; we call it determinate sentencing. What the judge imposes, with minor exception, is what the prisoner serves.

The president can, of course, set sentences through the exercise of the pardoning power. Normally, that is done through the pardon attorney's office in Main Justice. Granting pardons is one way of dealing with a sentence that made no sense in the first instance or makes no sense in light of present conditions. You find out someone is actually innocent. DNA. That sort of thing. You cannot get a new trial; it is too late for newly discovered evidence. The president can remedy that sort of miscarriage of justice. But the pardoning power itself sometimes does not make sense. As President Clinton taught us so well, or ill, you can set the sentence of just about anybody without going through the pardon attorney in Justice or getting the recommendations of anyone else with pardons on your last day in office.

Who else sets sentences?

Well, truth be known, juries set sentences. If you want to impose capital punishment, you have to get by a jury in this country. That means juries set sentences, capital and otherwise. They do it in other situations. Most of our crimes are stacked on top of one another. You have capital murder, murder, manslaughter, etc. When the jury comes back, having been given a lesser offense instruction, it can return any offense—read punishment—it wants to return. You cannot do anything about it. Jurors set the sentence when they choose between manslaughter and murder or aggravated murder.

Let's talk about it. The good judge will tell the jury to assess which offense to return in terms of its elements and the facts, but every jury worth its salt worries about what the sentence is going to be. Tell me why "he-said, she-said" rape charges are the most difficult on which to get jurors to return guilty verdicts? The jury is worrying about what happens to the defendant, particularly with the high level of sentence we now have for "rape," which, of course, has to cover on one end of the spectrum a rape where a stranger breaks into the women's house and rapes her at knife point and at the other end of the spectrum covers what is now called euphuistically "date rape."

Let's take Kobe Bryant's trial; I'll go out on a limb and say that he'll be found not guilty. Not entirely because he is a celebrity, though that is factor, but because the impact on him will be taken into consideration and factored in when the jury judges

her credibility. The issues are legally separate. She is credible or not whatever happens to Bryant. But jurors are not lawyers that can separate in their minds those sorts of decisions. They are people from the real world. In an ideal world, they would judge her credibility and then the judge would set the sentence, however the law permits him to do it. In fact, credibility determinations sometimes reflect sentencing considerations.

They do that, too, when smart juries know about high mandatory minimums. If a jury knows about them, and it thinks a mandatory minimum sentence, if applied, would be unjust, you will get a not guilty verdict—into the teeth of the facts and the law.

Aren't juries neat? Thank God for juries! They will do the right thing, even if the legislator, the prosecutor, and the judge do not. That is why the Founders put them in the Sixth Amendment. That is wisdom, too.

Finally, judges, of course, set sentences. They can set them within a range as a matter of discretion with no standards and no review. Pure discretion. That's what the federal system was before 1987. Frankly, that was inconsistent with every system in the world. When I was up on the Hill, we were thinking about appellate review of sentencing, an appellate review of sentencing, not only down, but up. We had the Library of Congress do a worldwide survey for us, and it found that we were the only country that did not have some kind of appellate review of sentences, both up and down. So that when our judges had unfettered discretion, they were unique in the world, and that is another way of saying that they were "lawless."

That is the blunt truth of the matter, though federal judges don't like it when professors tell them that.

So, Congress put a stop to that with the creation of the Sentencing Commission that created the infamous, at least among judges, sentencing guidelines. They are a compromise between "who" the defendant was, and what he "did." For the "who," you look to his criminal record. For the "did," you look to the crime he committed. You rob a bank, that's "robbery." You rob a bank of \$10,000, that's a different level of "robbery." You rob a bank, stealing \$10,000 and you use a gun, that's even worse. You balance those two off. You get a "heartland" point on a graph of "who" that goes across and "did" that goes up. You can see the graph in your mind. One side up, the other side across. That graph cuts off the tops and cuts off the bottoms of sentences. The judge then sentences within a much narrower range, the so-called "heartland," unless special factors are present, and he or

she feels that a departure up or down is warranted, but then the judge has to state his or her reasons, and the sentence may be appealed by either the defendant or the prosecutor. That is called measured justice.

You may also still have a mandatory minimum. For example, RICO used to be 0 to 20. If you had a RICO conspiracy, and a RICO substance offense, it would have been possible to get two twenty-year sentences that could be stacked, that is, imposed, consecutively. So, you really had the possibility of forty years.

Incidentally, the Royal Commission on Capital Punishment in England, a long, long, time ago, suggested that any sentence in excess of twenty years is the same thing as a death sentence; it just destroys a person as a human being. If any sentence is imposed and actually served for twenty years or higher, the person is functionally no longer a human being; he is and reduced to a shell of a human.

So, when you hear of a sentence of forty, fifty years, it is bizarre.

Simply, bizarre.

When you hear me say that, recall that no one has ever said I'm soft on crime!

So, is anything in principle wrong with mandatory minimums? No. They make sense. For example, RICO now is 2.5–3 years. That is a decent and wholly defensible mandatory minimum. In fact, given the requirements of the statute, involvement with a criminal group, multiple offenses, that actually sounds light, that is, *only* 2.5–3 years.

But that is not the world in which we live in today. Tonight, you have heard from Judge Martin and Mr. Mateja. In fact, the current federal sentencing scheme is polluted, through and through, with a mindless system of high mandatory minimum sentences that is perverse in its design and impart.

I was on the Hill when much of this stuff went through. And I have had contact with the people on the Hill and from the Department since. It is not the rational world you heard described by Mr. Mateja. Judge Martin's version is much closer to the truth. In fact, the reason the Sentencing Commission was established was that everybody on the Hill who thought about it realized that Congress, left to its druthers, would not produce a rationally defensible system of sentencing.

Could not do it.

And we all knew it!

It would end up a politically hot potato. Nobody wanted anything to do with it.

So, Congress gave the hot potato to the Sentencing Commission because they couldn't do it.

But one of the unanticipated consequences in giving it to the Sentencing Commission, which suddenly surfaced for Congressional staffs, was that everybody saw what was actually going on in sentencing. Congressional staffs then found out from their bosses that they could reach into the Sentencing Guidelines and tweak them, and tweak them for political purposes, not for rational sentencing purposes.

So, basically, what we have in at least two substantive areas is mindlessly high minimum mandatory sentences that are rationally indefensible—except in a political campaign when you deal only in sound bites.

One is guns. The issue has little to do with violence; it has everything to do with gun control. The National Rifle Association wants to take the position, "Don't control guns. Control the use of guns." So, to show that it is not soft on crime, the NRA supports high mandatory minimums for offenses committed with a gun, but no gun control. This is ideology, not crime control, or a rational sentencing policy.

Ideology not crime control.

The other area is drugs. Do not get me wrong. I'm for a drug control system. I'm not in favor of the decriminalization of drug use by any means. But the society we live in is close to hysterical about drugs. Our current drug sentencing policy, at least in part, goes back to a single instance. Len Bias, a college basketball star, overdosed on drugs. Suddenly, we had high mandatory minimums for crack cocaine. And if you have high mandatory minimums for crack cocaine, but not high mandatory minimums for powdered cocaine, suddenly that means that when a prisoner gets into jail, he suddenly finds out that crack, which is a lower class, black drug, gets a higher sentence than the sentence for powdered cocaine, which is a white, upper class drug; it rightly produces a feeling of discrimination, and it actually results in violence in the prisons.

The Department of Justice is afraid to develop a policy on the issue for fear of appearing soft on crime, as are most of the people on the Hill. Everybody knows that it is terribly wrong, but no one has the intestinal fortitude to stand up for what is right. We had a consensus once—and this is before this Administration got into power—between the Sentencing Commission and the Department of Justice; we were going to go up to the Hill, and we were going to even out sanctions for crack cocaine and powdered cocaine. At the last minute, the White House learned that if

Clinton supported it, the Republicans on the Hill would dump on him as "soft on crime." It was all over. The consensus fell apart, and nothing was done.

So, what we have is a bidding war. "Are you against drugs? You want five years? I'm going to be more against drugs than you are, and I'm going to go for ten." The high mandatory minimums just built up. It is the same thing with guns. I want to carry my gun. If you use a gun in a crime, I want you to go to jail "forever." That way I can keep my gun, and I am not soft on crime, because I support high mandatory minimum sentences for those who commit crimes with guns.

No gun control, though a majority of Americans support it, but lots of high mandatory minimum sentences for those who commit crimes with guns.

It is all just mindless.

Mindless.

Let me talk a minute or two about the notion that somehow our federal criminal justice policy has had a substantial impact on actual crime that is committed in this country. In fact, we don't really know, as social scientists, anything of importance about deterrence, certainly to the point where we can tweak sentences up or down and produce measurable results on individual crimes. In fact, do you want to know what the single most effective crime control policy has been in this country? It has been our policy of abortion on demand. Let me just speak up and witness to the truth. We kill approximately one million babies every single year. What's the impact of that? Well, it means we have a million less teenagers in fourteen or fifteen years after that. And, who commits the most crimes in this country? Teenagers. The single most effective policy for crime control, therefore, has been abortion on demand. Are you in favor of abortion on demand to control crime? That's anticipatory capital punishment of the innocent for any crime that they might commit if born. I don't think anybody supports that. But the unanticipated result of a social policy of abortion on demand is the reason, as much as anything else, and it is measurable, certainly more so than any particular penal policy, like high mandatory minimums at the federal level for guns or drugs, for our national declining crime rates.

I've discussed what I think is good, and I've indicated what I think is bad. Do we have any remedies for what I've described for you? Frankly, I don't think one exists. Crime definition is limited by the nature of language. Sentencing policy is ultimately a question of politics, politics of the worst sort: demagogy,

pure and simple. As long as language is what it is, and politicians are what they are, that is, they have a stake in crime control, we will have to live with something like the present federal system. It has been true at least since 1968 when Nixon decided to run for sheriff. The Republicans found out they could get in power riding the hobby horse of crime control, and our good friend Mr. Clinton decided that he would be just like President Nixon. He, too, would be in favor of capital punishment. You will recall back during his first campaign he went home to Arkansas to sign a death warrant. Suddenly, no difference existed between Democrats and Republicans on crime control. They both are against it. That was the beginning of the bidding war where each side fought each other on the same ground.

Do I see a remedy? Yes, but it is outside of the "overt" political system. I do not like activist federal judges, of the right wing or the left wing; it is all a matter of which knee jerks; it is six of one and a half dozen of the other. But the only solution I can see is that eventually the Supreme Court is going to have to have the intestinal fortitude to step in and do something about mindlessly high mandatory minimums. The irony today is the Court stepped in on capital punishment way back with its *Furman*¹ opinion in 1972, though it has back peddled somewhat since then, so you have an Eighth Amendment right to have the courts review the rationality of the application of capital punishment. The Court has also recently stepped in and imposed limitations under the Eighth Amendment for forfeitures, not the Cruel and Unusual Punishment Clause, but the Excessive Fines Clause. It did that in its *Bajakajian*² opinion in 1998. Forfeitures can't be mindless, just like capital punishment can't be mindless. The irony today is that you have judicial supervision of legislative enactments in the interests of life and property, but not liberty. I don't see how that can rationally continue. The Supreme Court, most recently, in its *Lockyer*³ opinion last year, dealing with the three strikes and you're out, had the chance to do something about a mindlessly high mandatory minimum sentencing policy. At least, it was honest enough to say that its jurisprudence on cruel and unusual punishment in the imposition of a liberty sanction "left something to be desired." Unfortunately, the Court did not step in and give us "something to be desired." I'm afraid—just afraid—that the Court is afraid of becoming the judiciary committee for fifty states, or that it will end up becoming a review

1. *Furman v. Georgia*, 408 U.S. 238 (1972).

2. *U.S. v. Bajakajian*, 524 U.S. 321 (1998).

3. *Lockyer v. Andrade*, 538 U.S. 63 (2003).

board or a parole board for fifty states. The Court just doesn't want the business. Currently, the Court is afraid to take a principled position against mindlessly high mandatory minimum sentences; it is because of a fear of the increase in its business. I think the Court knows, too, that it could not make any more sense of a general sentencing policy for the nation than the Sentencing Commission could for the federal government. But the Court did not have to go that far; it could have struck down the mindlessly high minimum mandatory sentence without giving *everybody* a review of *every* sentence. Surely, it is capable of drafting an opinion that could do that! Eventually, however, the Court is going to have to step in and say that mindlessly high mandatory minimums are unconstitutional.

I eagerly await the day.

Thank you.

