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SENTENCING REFORM, THE FEDERAL CRIMINAL JUSTICE SYSTEM, AND JUDICIAL AND PROSECUTORIAL DISCRETION†

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INTRODUCTION

The United States is experiencing a thirty-year low in crime. After years of rising and unprecedented levels of violent and non-violent crime, sweeping and historic change took place in our nation's sentencing and corrections policy beginning in the 1970s. The sentencing system in place before these changes was marked by three key elements. First, the primary goal underlying sentencing and corrections was that a defendant's sentence should foster the defendant's own rehabilitation. Second, determining the correct sentence to fulfill this rehabilitative purpose was left almost entirely to the discretion of an individual sentencing judge. And third, the sentence meted out by that judge and announced to the public was subject to being undermined at some later point by an administrative parole authority, if and when that authority determined the defendant was rehabilitated. All three of these elements have now been rejected at the federal level and by many states, and we are now reaping the benefits of that change.

The current thirty-year low in violent crime is not an accident. Reducing crime means reducing the number of criminals on the streets. Reducing the number of criminals on the streets

† William B. Mateja was the second 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); G. Robert Blakey, Mandatory Minimums: Fine in Principle, Inexcusable When Mindless, 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, 329 (2004).

* Statement of William B. Mateja, Senior Counsel to the Deputy Attorney General, U.S. Department of Justice, University of Notre Dame, Notre Dame, Indiana, April 1, 2004.

in turn requires consistent, tough penalties that incapacitate the dangerous and deter those considering the commission of a crime. The nation's sentencing and corrections policy now, more than at any time in the last century, has resulted in consistent and tough penalties and, as such, has not only helped to reduce crime but has also made our nation's criminal justice system far less arbitrary and much more fair.

The Bureau of Justice Statistics (BJS) reported that the rate of every major violent and property crime measured by BJS declined from 1993 through 2002. Rape and sexual assault were down 56%; robbery down 63%; aggravated assault down 64%; simple assault down 47%; household burglary down 52%; motor vehicle theft down 53%; and property theft down 49%. The decline in violent victimization has been experienced by persons in every demographic category considered—gender, race, national origin, and household income. If 1993 rates of crime had occurred in each year since that time, in the last decade, 68,000 more Americans would have murdered, 1.4 million more Americans would have been raped or sexually assaulted, 3.8 million more Americans would have been robbed, and 22 million more Americans would have been physically assaulted. Nearly 27½ million violent crimes were not committed in the last decade because of the reduction in crime. The Department of Justice welcomes the chance to speak for all those who would have been victimized, but for these sweeping changes in our nation's sentencing and corrections policy.

Although most prisoners are held in state prison facilities, when we examine combined Federal and state prison populations nationwide, we find that about eight in ten prisoners have a prior conviction history and about two in three prisoners have a current or past history of convictions for a violent offense. Combining these two sentencing criteria—repeat offending and violence—accounts for 93% of the prison population nationwide. In other words, the present system is working. It is incapacitating those offenders who need to be incapacitated.

Tonight I'd like to examine the changes in the nation's sentencing policy over the last two decades, showing why sentencing reform at the federal level is a model to be replicated. I want to address how the key elements of federal sentencing reform—mandatory minimum sentences, truth-in-sentencing, limited judicial discretion, and overall consistency-in-sentencing—are critical to crime reduction and to fundamental fairness. I also want to take a special look at mandatory minimum sentencing statutes to rebut the myths that they are somehow ineffective and unjust.

In sum, the Department of Justice believes tough penalties demonstrate that there are real consequences for predatory and lawless behavior. We are now in an era where revolving-door injustice is largely over and real consequences for crime are the order of the day. We are committed to treating every crime seriously, every criminal justly, and every victim compassionately, and we believe the nation's sentencing and corrections policy should embody these values.

I. SENTENCING REFORM, THE FEDERAL CRIMINAL JUSTICE SYSTEM, AND JUDICIAL AND PROSECUTORIAL DISCRETION

A. *The Advent of Sentencing Reform*

For many years, beginning in the 1960s, this country has been struggling with the profound problem of crime. The available statistics show that while crime rates fluctuate over time, a historic increase in crime began in the 1960s. Since that time, federal, state, and local governments, in order to fulfill their first responsibility to protect the well-being of their citizens, have been working hard to develop and implement various strategies to combat crime. For most of this country's history, effective crime policy meant strong and ample criminal laws, powerful investigative agencies, and vigorous prosecutions. In the late 1970s and early 1980s, however, policymakers began to realize that this strategy was not enough; that there was a gaping hole in the nation's criminal justice system, namely sentencing policy, that was standing in the way of effective anti-crime policy. Many legislators saw the need to close this gap; to put in place a more effective sentencing policy so that all parts of the criminal justice system—legislation, investigation, prosecution, sentencing, and corrections—would work together in order to achieve, through a more effective national strategy of crime control, a safer and more secure society for all citizens.

The system of sentencing in place before the sentencing reform of the 1980s and 90s was almost entirely discretionary. Choosing a sentence for those convicted of most felony offenses was left to the unfettered discretion of judges and essentially was ungoverned by law. Beyond a statutory direction limiting the maximum sentence, judges had the discretion to decide what factors in a case were relevant to sentencing and how such factors should be weighed.

Moreover, the undergirding principle of that sentencing system was rehabilitation. While it was acknowledged that there were four purposes of sentencing—rehabilitation, deterrence, incapacitation, and just punishment—the agreed-upon primary

purpose of sentencing for many decades was rehabilitation. The hope was that an offender would go to a penitentiary to do penance, and to contemplate his crime and to take advantage of available services for a period of time, sometimes determined in advance and sometimes not. The hope was that when the offender was rehabilitated—ready to reenter the community—the offender would be paroled back into the community.

By the 1970s, however, serious questions were being raised about whether rehabilitation was working and whether a wholly discretionary sentencing system was fair. Research conducted in the mid-1960s through the early 1970s showed no link between rehabilitation program involvement and any decrease in recidivism, a conclusion that eviscerated the premise that parole boards could effectively assess the rehabilitative potential of inmates. This research led to most states significantly reducing discretionary sentencing and the role of parole boards.

At the federal level, in 1984, Congress found the discretionary sentencing system too often resulted in unacceptable outcomes. Studies showed that judges used their largely unlimited discretion in sentencing decisions to reach inconsistent results. The legislative history leading up to the passage of federal sentencing reform documents clearly show that similar offenders were being treated in dramatically different ways depending on the presiding judge. Such disparity was not surprising given varying judicial backgrounds and philosophies and the strong disagreement among judges on the purposes of sentencing. The problem was exacerbated by the existence of the parole system, under which some incarcerated offenders served all of their sentences and others as little as one-third. With sentencing authority divided between the judge and the parole authority, some judges attempted to craft sentences to anticipate the decisions of the parole commission, while others did not. And, of course, a substantial percentage of offenders were never subject to parole because they were not sentenced to prison at all. The net result of the entire process was that, with disturbing regularity, similar offenders who committed similar offenses received and served substantially *different* sentences. And on many occasions, the sentences simply were not sufficiently punitive to serve the purposes of just punishment of the offender and deterrence of others.

Congress, recognizing that the inconsistency and uncertainty in federal sentencing practices were incompatible with effective crime control, declared that "the existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an

effective deterrent against crime." Congress further concluded that the evidence that rehabilitation was working was sketchy, at best.

A body of research was also emerging that suggested that a very small number of criminals was responsible for a huge proportion of crimes committed. The pioneering work of Marvin Wolfgang and others began to document this phenomenon, which led many in Congress and across the country to consider new crime fighting strategies; strategies aimed at incapacitating that small number of criminals for long periods of time to promote greater public safety.

B. *Sentencing Reform in the Federal Criminal Justice System*

In 1984, in an attempt to address the shortcomings in the criminal justice system created by the then-existing sentencing policy, Congress passed the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984. The Act created the United States Sentencing Commission and mandated that the Commission design sentencing guidelines to bring consistency and certainty to federal sentencing law. It rejected rehabilitation as a purpose of sentencing. The Sentencing Reform Act was intended, in the words of the Senate Report, to bring about "sweeping" reform. Both the statute creating the Commission and its legislative history made clear that the guidelines Congress envisioned were to be detailed and comprehensive.

At around this same time, Congress also created mandatory minimum sentencing statutes to work in conjunction with federal sentencing guidelines. These statutes were reserved for repeat offenders or for particularly heinous or dangerous crimes—first degree murder would carry a mandatory life sentence; high level narcotics trafficking would carry a mandatory ten-year sentence; and using a gun in the commission of a violent crime would carry a mandatory five-year sentence.

The result of these congressional enactments is that today's federal sentencing system— involving both congressionally mandated mandatory minimum statutes and sentencing guidelines promulgated by a sentencing commission—is very different from the inconsistent and uncertain system in place before the Sentencing Reform Act. It is a model system, structured and tough. Under the existing statutes and guidelines, sentencing courts are directed to evaluate specific enumerated factors grounded in experience and reason and to engage in appropriate fact-finding to determine whether these factors are present in each case. If they are, the statutes and guidelines provide the court with direc-

tions as to how these factors ordinarily should contribute to the sentence. As Justice Stephen Breyer, one of the architects of federal sentencing reform, has said, this structure provides fairness, predictability, and appropriate uniformity. In addition, the structure allows for the targeting of longer sentences to especially dangerous or recidivist criminals.

The structure, though, is only part of the story. Federal statutes and guidelines substantively are tough, providing in most cases appropriately punitive sentences for violent, predatory, and other dangerous offenders, sentences substantially longer than those meted out before sentencing reform. Studies have shown, for example, that since sentencing reform at the federal level, sentences for drug and violent offenders have increased substantially. In addition, penalties have increased for white collar offenses and civil rights crimes.

Importantly, this new sentencing system also brings the critical element of honesty to the sentencing process by abolishing early release through parole. Now, the sentence meted out by the court is what the defendant must serve with only a very small percentage of the sentence available for "good time" credit. We believe this system of sentencing is a vast improvement over the system that existed prior to the Sentencing Reform Act.

C. *Judicial and Prosecutorial Discretion*

Within this structured federal system, however, there remains significant and appropriate judicial discretion. For example, judges are relied upon to determine whether a defendant has played an aggravating or mitigating role in a crime, the extent to which accomplice liability will attach, and whether, in certain circumstances, to depart, or in other words, move away from the narrow parameters of uniformity, either up or down, in unusual cases. In the latter circumstance, the reason for the departure must be stated clearly and the sentence and departure are subject to appellate review. To conform with the Sentencing Reform Act, departures are to be rare so that defendants with similar criminal histories who commit similar acts are treated the same way in all but the most extraordinary cases.

Moreover, once a sentencing range is determined under the sentencing guidelines, the sentencing judge is given a significant range within which to select a final sentence. In most circumstances, the top of the range provides for imprisonment that is 25% higher than the bottom of the range. The current sentencing law thus ensures a general rule of firm, fair, uniform sentences, while permitting case-specific adjustments by the sen-

tencing judge to account for the nuances of the individual offense and to account for the truly exceptional case. We think this system provides the right balance between appropriate uniformity in sentencing and sufficient judicial discretion to account for case-specific factors and the unusual case.

Just as we believe the sentence for a particular crime should not hinge on the sentencing judge, we also think it should not hinge on the individual prosecutor involved in his case. It is for this reason that the Attorney General recently issued new guidance to federal prosecutors. Like federal judges, federal prosecutors nationwide have an obligation to be fair, consistent, and tough. Federal prosecutors now have guidance to ensure that they charge and pursue the most serious, readily provable offenses supported by the facts in each case. Except in limited, narrow circumstances, victims, as well as their criminal perpetrators, will see the ideal of equal justice under the law made a reality. The new guidelines also require federal prosecutors to pursue hard-hitting sentencing enhancements against hard-core criminals. Repeat offenders, child predators, criminal bosses, drug kingpins, and violent gun criminals will face the toughest charges and spend the most time behind bars.

II. MANDATORY MINIMUM PENALTIES

A. *Generally*

Because there has been significant criticism of mandatory minimum statutes—especially at the federal level—we believe it appropriate to address this issue separately here. As stated above, at the federal level, mandatory minimum statutes are generally reserved for the most serious offenses and offenders. The majority of crimes prosecuted in the federal system are not subject to mandatory minimum sentencing statutes; rather, mandatory minimums typically involve the use of a gun in the commission of a crime or the trafficking of significant amounts of illegal drugs. We strongly believe the existing mandatory minimum statutes are both appropriate and good policy. At the same time, we believe the current mandatory minimum laws strike the right balance by allowing nonviolent offenders to escape the statutorily mandated sentences in appropriate circumstances. We take this position for several reasons.

First, in a way sentencing guidelines can't and don't, mandatory minimum statutes provide a level of uniformity and predictability determined by Congress to deter certain types of criminal behavior by clearly forewarning the potential offender and the public at large of the potential consequences of the

offense. Second, mandatory minimum sentences incapacitate dangerous offenders for long periods of time, thereby increasing public safety. And third, mandatory minimum sentences provide an indispensable tool for prosecutors, because they allow, through the use of cooperation agreements, relief for specific defendants who assist in the prosecution of another individual, further enhancing public safety.

B. *Drug Cases*

In drug cases, mandatory minimum statutes are especially significant. Unlike a bank robbery, for which a witness could be a bank teller or an ordinary citizen, typically in drug cases, especially serious narcotics cases, the only witnesses are other drug traffickers. Drug dealers take pains to do their work away from the prying eyes of law enforcement, and the more sophisticated the drug dealer, the more cautious he is about dealing with those who might be assisting law enforcement. The offer of relief from a mandatory minimum sentence in exchange for truthful testimony and other forms of substantial assistance allows the government to move up the chain of supply, offering the sentence against the lesser dealers to effectively prosecute the more serious drug traffickers—the organizers and the source of supply.

Cooperation agreements also allow for the gathering of the best evidence concerning a trafficking organization—evidence from the inside of the organization. It allows the Government to strip away the secrecy in which narcotics traffickers conduct their business and to obtain the truth. Such cooperation is essential, and our prosecutors use it every day. It is no exaggeration to say that it would be impossible to prosecute drug organizations effectively without cooperation agreements largely made possible by the threat of mandatory minimum sentences.

Nevertheless, while we view mandatory minimums as effective law enforcement tools, we also recognize the need to apply the provisions appropriately and to provide for appropriate exceptions. In 1994, Congress added the so-called "safety valve provision" to federal law to provide for just such exceptions. The safety valve allows the courts to impose a sentence without regard to any mandatory minimum sentence in certain cases. Specifically, the safety valve permits an offender who did not use a firearm or violence, who is not a leader, manager, organizer, and who does not have a serious criminal history, to be sentenced below the otherwise applicable mandatory minimum. The defendant, in exchange, must truthfully disclose to the prosecu-

tor all of the facts he knows about the case. The safety valve provision is applied thousands of times each year.

C. *Gun Cases*

Two years ago, President Bush made a commitment, through Project Safe Neighborhoods, to reduce gun crime by getting gun criminals off the streets. In FY 2002 compared to FY 2000, federal gun prosecutions increased by approximately 36%. In FY 2002 compared to FY 2001, the number of persons charged with federal gun offenses rose by over 20%, the largest single-year increase ever recorded. And as prosecutions have risen, the incidence of gun crimes has gone down substantially. There were approximately 130,000 fewer victims of gun crime in 2001–02 than there were in 1999–2000, marking the first two-year period with fewer than a million gun crime victims since 1993. Gun crime has been reduced so dramatically that last year just 7% of violent crimes were committed with a firearm—the lowest number of violent crimes committed with a firearm ever recorded.

Project Safe Neighborhoods—with its emphasis on partnerships between all levels of law enforcement—has contributed significantly to this success. As part of Project Safe Neighborhoods, federal and state prosecutors meet to determine the most appropriate jurisdiction for the prosecution of gun offenses. Particularly for violent crimes involving firearms, the federal system has numerous advantages—mandatory minimum statutes, federal sentencing guidelines, and no parole. The stringent federal gun laws have allowed federal prosecutors to work with their state and local counterparts to attack the problem of violent crime and take violent offenders off the street.

CONCLUSION

Sentencing and corrections policy reflects moral judgments about the heinousness of crime and those who commit it. Much of the criticism about current sentencing and correction policy, we believe, has stemmed simply from the fact that sentences under mandatory minimum statutes and sentencing guidelines are more consistent and longer than sentences under the fully discretionary pre-guidelines system of sentencing. Those who criticize the current trend in sentencing policy cling to an outdated and largely refuted notion that maximum sentencing discretion will achieve greater justice and at the same time yield lower crime rates.

The American people, through their elected representatives, through initiatives, and other means, are speaking clearly on sen-

tencing and corrections policy and rejecting maximum sentencing discretion. They are doing so to further two important principles. The first is that similar crimes should be punished similarly. The second is that it is better to protect the innocent by imposing long imprisonment terms on the guilty than to risk public safety by gambling too soon on a "rehabilitated" offender. Mandatory minimum statutes, three-strikes laws, and sentencing guidelines are the manifestations of these principles, as is a prison and jail population that has risen above two million people. Most importantly, the falling crime rates are the most obvious manifestation of these principles. People are safer today because of them. And violent crime is down for all racial and ethnic groups measured and for all ages across all income levels in every region of the country. It would be folly and would risk the lives of countless Americans to ignore the experience of the last thirty years.

I want to thank the University of Notre Dame, its Law School, and the *Notre Dame Journal of Law, Ethics & Public Policy* for the opportunity to join in this symposium and to address this critically important issue.