

**THE  
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NOMINATION**

*Breyer on Mandatory Minimums*

## These 'Very Rotten Bananas' Should Be Discarded

Judge Stephen Breyer a founding father of the federal sentencing guidelines has not shied from openly criticizing their oft-pampered stepchild, mandatory minimum sentencing statutes. Breyer is sure a stinging attack on mandatory minimums and the pernicious role he feels they have played in the criminal-justice system is on Aug. 7, 1993, panel discussion sponsored by the American Bar Association. What follows are excerpts from Breyer's remarks.

It's very difficult to discuss this issue because the public doesn't know the difference between the statutes and the guidelines and the other things. And before you know it, it's turned into an issue of are you for crime or are you against it. We're against it, OK. We're against it.

What I want to do is make four points from a tough anti-crime point of view. The first is simply this: It's important to keep in mind what statutory mandatory minimums are. That's why I want you to read this report of the United States Sentencing Commission, this is not a bunch of liberal minded passages.

This is their report on mandatory statutory minimums. And look at what they are. What they are are about 60 statutes, randomly passed by Congress from time to time when they felt, since 1790, the need to deal with a subject, a special subject.

For example, if you cause a vessel to aground by use of a false light, it's a mandatory prison sentence of 10 years. All right, that was in 1790, that one. I hope you aren't going to sell poison in China, another mandatory minimum. I certainly hope you're not going to engage in piracy.

### 'A Mess in the Statute Books'

I mean, you know, you can look through these and they basically responded to some kind of problem. Congress thought was important at the time, and the result is a mess in the statute books for which reason Congress set up the United States Sentencing Commission. The United States Sentencing Commission went through every crime on the books. And believe me, it's an unbelievable nightmare. The United States Criminal Code, which I don't have to explain to you.

And the commission wrote a whole bunch of penalties and they have mandatory statutory minimums for every crime. Not just one every one of these things is mandatory. The only difference is one is a little bit more sophisticated so they don't quite give the judge who is paid \$300-thanks to take in four kilograms of cocaine the same sentence as the big chest. In other words, they distinguish between the big chest and the small fry. And second they say, Judge, if you have a special case depart. So there's all in the points and that's what I want you to remember.

My second point is that there are some things that are true of law since the beginning of history. You cannot get a rule that has 100-percent application. And that's why law, since the beginning of history, has been a fight between rules called law and equity called fairness. Treat like cases alike, but make an exception for the special cases. Different cases differently, rouses.

And we can ask Congress, we can ask Plans a question: we can ask anybody you want—who else will ever get a system of law that you just have to have exceptions for. And when we get into the criminal area, where our perceptions of criminal



Judge Stephen Breyer openly criticizes mandatory minimum sentencing. In part because, he says, there always have to be exceptions.

law are supposed to comport with ordinary people's ideas of what's moral and decent, you will always need the exception. You will always need what we found at the commission.

Isn't robbery even with toy guns a terrible thing? Of course, it's a terrible thing. But what do you do with a real case when the person got a toy gun, got \$400 for a bank robbery. [And] it turns out he had an IQ of about seventy. His only friend in the world is his dog. The dog needed an operation. He went to the vet, he wouldn't do it on credit. He needed the money. He asked for a bank loan. They wouldn't give it to him. So he got his toy gun, robbed \$70 from the bank to give the dog the operation, turned himself in to the FBI when the dog died anyway.

OK, you give him life? I mean this is weird, you say. That's what equity is there for. That's what the discretion of the usual case is there for. That's why we don't want the statutory minimum because, because there will always be exceptions, always.

Now, what happens when you stop following the guidelines which say mandatory minimum for everything but if it's an unusual case, make an exception? What happens if we say no? We're denying that out of the window. We're going to say never an exception.

I'll tell you what happens, three things. The first thing that happens is just what you heard, which is pathetic cases come along that nobody would think that should be the sentence, and so you get a considerable degree of unfairness. The second thing that happens is, examples nobody will tell you about, but they're the opposite kind of example.

Because you cannot tell human beings to do things that they feel are totally unfair, and if you tell judges or lawyers or prosecutors who are human beings to do something they think is terrible, they won't do it. They'll figure a way out. And, my goodness, I mean there is out in the joints of the criminal law, always out in the joints.

Oh number one, the prosecutor decides not to prosecute. Oh number two, the jury won't convict. Oh number three, sentencing. So we stop say off in the sentencing part, well you'll just push it into the other two parts. The jury won't convict, and the prosecutor won't prosecute.

That's why I found what's really here of interest to me is in this commission report it says that when they looked through the sentencing reports of all the people who should have gotten minimums, they found the increased penalty was not sought or obtained 65 percent of the time. His weapon charge in these things with mandatory minimum, although a weapon was [found] 43 percent of the time.

So I say to the people who actually are interested in tough law enforcement, what you'll get is sometimes they'll follow it and then they'll get an unfair case, and more often the prosecutors won't follow it, and then you'll discover no penalty or the jury won't convict, and there will be no punishment at all. And if you think that's theoretical or isn't happening, what you do is read this report of the United States Sentencing Commission, and you will see that's exactly what's happening. And, finally, what you'll discover as a result of that mess—because that's what I would describe it as, a mess—you'll discover not only unfairness, not only unfair

to punish where there ought to be some punishment, but you'll also see everybody sweeping everything under the rug. Because you're not going to find prosecutors really saying publicly they don't prosecute or judges saying, well I sort of cut him a little here or there, whatever it is.

Rather what grows generally is you have a law that can't really be enforced and when you have that, you have disrespect for law. And you have the public feeling something is going wrong, but you're not quite sure what. And you have everyone acting a little bit hypocritically.

Well, I've just been to a conference in terminology where people were talking about what goes on in other countries. And for a long time, we've seen a lot of countries that had great legal systems on paper, but, in reality, the reality does not comport with the paper.

Now, you can get by with a little bit of that in any system. But when you build in your criminal-law system a set of rules that people inevitably, with their ordinary human perceptions of what is just, will feel compelled to distort or ignore, and you get the unfair results.

I suppose that's why I feel so strongly about it, and why I think these japs' much to be taken. As on the other side. So my last point is, well, what would you tell the congressmen to say who has to deal with a public that is worried about law and order? I'd say, first of all, we do have a system of law and order, we do have a kind of mandatory minimum minimum sentence for every crime, but it is one that has all in the joints and allows departures and makes distinctions between mules, small fry, and big cheeses. That's called the sentencing guidelines.

Second, I'd say there isn't much need, because there's no evidence, for set sentences. There are departures allowed under the guidelines. Only about 7 percent of the judges have departed, maybe 8, maybe 9. Compare that with the 40 to 60 percent of the prosecutors who are prosecuting under these mandatory minimums if you're interested in being tough on crime.

### 'Odd Patchwork'

And I'd say then go out and don't call these mandatory minimums, call them the odd patchwork of statutory minimums, talk about passing them out while you give power to the commission. Have the commission write reports on how it's going so you can supervise whether or not law's getting weak. Think about the prison capacity and what it's going to do when everyone applies them across the board 100 percent. Talk about rationality and the effectiveness of having a criminal-justice system that does punish people who deserve to be punished and has enough out in the joints so that it can work effectively.

And, finally, if you're stuck to say any thing else, remember Alfred Kahn. Do you remember Alfred Kahn? He was President Carter's inflation fighter. He wasn't supposed to use the word recession. Remember? You can't use the word recession—that was what the president said. He said, "OK, I mean I use the word recession. I'll call it a banana."

All right, let's not call them mandatory statutory minimums. We'll call them the odd patchwork of statutory minimums. And I think, from a point of view of people who are interested in an effective system, and also a rule of law that people will be able to enforce fairly and act fairly obvious to me that we ought to get rid of them. □