Department of Justice

ADDRESS

OF

THE HONORABLE BENJAMIN R. CIVILETTI
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

THE JUSTINIAN SOCIETY OF LAWYERS

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GRAND BALLROOM
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It is a privilege and a distinct honor to be here with you as the recipient of the Justinian Award. In anticipation of this occasion, I decided to reexamine the celebrated Justinian Code for the insight it might provide into some of our present endeavors in the field of justice. (Not having had the time to peruse the Latin text, I opted, against my better judgment, for Scott's translation). I shall share some of my findings with you in a moment, but fairness dictates that I report some other findings as well. It seems that sixth century Byzantium was not quite as idyllic and orderly a place as our cliches about the Justinian Code would have us believe. As in many other cases, known to us all, the truth will out through that time-honored mechanism, the leak. In this case, the leak took the form of an entire book, written by the same Procopius who had written the official history of the emporer's reign. He called this unofficial book The Secret History. Although its veracity is actually quite doubtful, it provides some great entertainment as well as some prescient insights. Of Justinian, for example, he writes:

> ". . . if there were any ill-gotten gain in sight he was always ready to establish laws and to rescind them again. And his judicial decisions were made not in accordance with the laws he had himself enacted, but as he was led by the sight of a bigger and more splendid promise of monetary advantage.
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> "There was no security for those who had signed contracts, no law, no oath, no written guarantees, no legal penalty, no other safeguard whatever

> except to toss money into the lap of the Emperor. But not even this could ensure that (he) would continue in the same mind; he was quite prepared to sell his services to the other side as well. For since he invariably robbed both sides, it never crossed his mind that to treat with supreme indifference those who had put their trust in him and to act against their interests was in any way discreditable. In his eyes, so long as profit came his way, there was no discredit in his playing a double game."

The lesson lurking here, that even the best laws can be subverted by improper intentions on the part of the authorities charged with executing the laws, should not be lost on any society in any age. Incidentally, it goes without saying that The Secret History was published posthumously.

But to turn to the Justinian Code itself, I found there, in addition to some timeless principles of justice, several anomalies in the penal laws which a millennium and a half has not succeeded in overcoming. One of the more significant findings in this area pertains to the sentencing of criminals. Whereas, on the one hand, the Code exhorts judges to impose sentences which are neither too severe nor too lenient, there are, on the other hand, specific provisions with which we may be less comfortable. For example, a thief of the lowest stratum of society was to be sentenced to death; a thief of higher status was to be sentenced only to slavery; and a thief who acquired money or property through fraud was to be sentenced simply to pay double the value he had fraudulently obtained.

We find discomfiting parallels in the application of our criminal laws today. Certainly, in federal criminal cases our goal is a sentence which is neither more nor less severe than the case demands. Certainly, the responsibility for achieving this goal is entrusted to as competent and as honorable a body of judges as, in my view, any nation has ever assembled. Yet some of the old discrepancies in punishment that were correlated to the status of the offender still persist and they do so in three major forms.

First, a white collar offender today is less apt to have his crime detected, and his involvement established, than is his blue collar counterpart. This is largely due to the covert nature of such offenses. In addition, a white collar offender is less likely to be convicted, when charged, owing to the complexities of such cases and to the fact that he, or his corporation, will usually retain highly paid attorneys to ferret out and exploit all of the deficiencies in the applicable laws. Finally, a white collar offender, once convicted, is apt to receive a less severe sentence, relatively speaking, than his blue collar counterpart. This last disparity is more readily documented than explained.

In the federal system today, 53 per cent of those individuals convicted of felonies involving theft or larceny are sentenced to terms of imprisonment. However, of those individuals convicted of felonies involving not direct theft, but rather embezzlement or income tax fraud, only 31 per cent

and 42 per cent, respectively, are sentenced to terms of imprisonment. Moreover, the average term for an individual imprisoned for theft is 24.5 months, while the average term for an individual convicted of embezzlement is 13.5 months, and that for an individual convicted of tax fraud is 9.2 months.

It is true that there are statistical averages, representing a wide range of cases and individual histories. It is also often true that those convicted of embezzlement and of fraud may be more susceptible than those convicted of other forms of theft to civil actions based upon the same misconduct. Nevertheless, those who are devoted to a society of laws which prescribe equal treatment for equal offenses must find such statistical variation in sentencing practices troubling.

It is no more comforting to leave the statistical averages and to look at individual cases.

Some recent income tax evasion cases serve to illustrate the common disparity between the amount of money involved in the offense and the magnitude of the sanction. In one case, two corporate officers who caused a corporation to attempt evasion of $12 million in excise taxes were each sentenced to a $10,000 fine and six months of community service during two years' probation. In another case, a conviction for evading $69,000 in taxes brought a sentence of 1200 hours of community service and no fine.

Examples of similar sentencing patterns appear in recent antitrust cases. In one of these, involving hundreds of millions of dollars of commerce, the government recommended that the maximum fine of $1 million allowed by law be imposed on five of the defendant companies and that three of the corporate officers be sentenced to terms of imprisonment; the fines ultimately imposed ranged from $67,125 to $617,000, and none of the corporate officers were imprisoned.

In the realm of regulatory law, a recent case involved the dumping of toxic chemicals into the sewer system in Louisville, in what the district court judge described as "callous disregard" for public safety. The dumping was discovered only after the chemicals caused 34 workers at a sewage treatment plant to become seriously ill. It cost the city $3 million to restore the treatment plant and clear out the sewer lines, and it cost the people of the Ohio River Valley the ravages of 30 months' diversion of raw sewage directly into the Ohio River while the treatment plant was being repaired. The president of the company that dumped the chemicals was convicted, and was sentenced to a $50,000 fine and two years' imprisonment with eligibility for parole after eight months. It is noteworthy that in this case the sentence imposed was in fact the maximum sentence available under existing statutes.

Finally, I submit for your consideration a case of $200 million in nationwide fraud in which the most severe

fine was $40,000, or one part in 5,000 of the sum the defrauder stood to gain.

These examples, and scores like them, cause me grave concern. They tend to trouble all of us because they strongly suggest that in the domain of white-collar crime, which, even excluding antitrust and fraud violations, costs the American public staggering billions of dollars in losses every year, there is very little in the way of deterrence. Odds of 5,000 to one are very hard to resist. And there is yet another reason why such instances are troubling; here I would quote a more serious comment of our friend Procopius, summing up the alleged injustices of Byzantine society:

> ". . . those whom miscreants have injured the most cruelly are relieved of most of the misery resulting from a disordered society by the constant expectation that the laws and the government will punish the offenders. For when people are confident of the future they find their present troubles more tolerable and easier to bear; . . . they fall into utter despair through the hopelessness of expecting justice. Justinian betrayed his subjects . . . because he absolutely refused to uphold the victims of wrong . . ."

If we cannot see to it that this unconscionably large and costly category of crime is adequately dealt with, we will have despaired our citizens as well.

I noted earlier that our difficulty in responding to white-collar crime lay partly in its detection, partly in its prosecution, and partly in its punishment. Attempts have been made to respond to the problems of detection through a variety of means, a notable one being the creation of Inspector

Generals' Offices in numerous federal agencies. Problems surrounding effective prosecution have been addressed by working very closely with the Congress to convert our haphazard and, in many cases, obsolete penal laws into a modern, unified federal criminal code. Both detection and prosecution would ultimately be enhanced by the enactment of the proposed FBI Charter, which would give the Bureau the special investigative authority it requires, with appropriate safeguards, to deal with the unique problems posed by white-collar crime.

With respect to sentencing, the Justice Department has been in the forefront of the movement to introduce widespread innovations into the whole of the federal sentencing system in the context of the new federal criminal code. Such reforms would have been useful at the time of Justinian and Procopius; they are no less critical today.

Current federal laws pertaining to sentencing are of little assistance to federal judges. The first section in the sentencing chapter, for example, specifies that federal judges may not impose a sentence that would work "corruption of the blood." The second section specifies that a federal judge should not impose a sentence that would require the defendant to stand in the local pillory. In many respects, the ensuing sections are even less helpful.

These statutes do not articulate the purposes to be served by the sentencing system, thereby leaving unclear the

applicability and relative importance of deterrence, incapacitation, just punishment, and rehabilitation. Penalty levels vary inexplicably. The maximum fines that may be imposed are so unrealistically low as to be almost totally ineffective, and little authority is provided for effective collection procedures with respect to those fines that are assessed.

As for imprisonment, the imposition of sentences is a two-step process in which long terms imposed by the judge are often substantially reduced by the Parole Commission, even though the latter may base its determination solely upon the same factors which were available to the judge at the time of sentencing. This artificial bifurcation of the sentencing process is a major fault of our laws, for it leaves prisoners and the public confused and uncertain about the consistency and fairness of the system. The net result of these combined factors is a disparity in federal sentencing which, despite the best efforts of individual federal judges, seems to be an inevitable product of the current system itself. The extent of this disparity has been documented repeatedly in studies undertaken by the federal judiciary, the Bureau of Prisons, and numerous outside observers.

The broad sentencing changes supported by the Department of Justice, and incorporated in the proposed federal criminal code, are designed to achieve a rationality and consistency in sentencing that simply has not existed before. The new code will articulate for the first time the legitimate

purposes of sentencing, including that of deterring others from future criminal activity. It will specify certain actions which may be taken in addition to the traditional penalties; these include notification of fraud victims of a defendant's criminal conviction in order that they might initiate civil actions, and ordering restitution by the defendant to the victims of his crime. It will also specify innovative conditions of probation under which, for example, a white-collar defendant may be temporarily barred from engaging in the business or profession in the context of which he committed the crime in question. Fines would be dramatically increased, to a maximum of $250,000 for an individual convicted of a felony, and $1 million for an organization so convicted. The actual amounts would, of course, be limited by the legislation to the defendant's ability to pay. Finally, with respect to imprisonment, the proposed bill calls for lower maximum terms, while eliminating early release by the Parole Commission, so that the term imposed is the term actually served.

Important as these reforms are, they are far less important than the device that would be employed by the new code to assure that sentences are meted out in a fair and consistent manner. The bill envisions a Special Sentencing Commission in the Judicial Branch which, based upon careful research and public hearings, will develop guidelines for use by federal judges in imposing sentences in individual cases.

For each category of federal crime, there will be several guideline ranges, to allow for particular characteristics of the defendant and for any aggravating or mitigating circumstances. After finding the range applicable to the case before him, the judge would be expected to sentence within that range. Should he feel that unusual circumstances warrant a departure from the guidelines, he would be required to explain his reasons on the record and, for the first time in federal law, he could be overruled on review by a federal court of appeals. That review could be initiated by the defendant and, just as important, by the government - in recognition of the fact that fairness in sentencing is due both the defendant and the public.

In the interim, until the comprehensive criminal code can be enacted, the judiciary can and must carefully consider the devastating harm which white-collar crime causes at all levels of society. Because its effects are felt acutely by the poorest and most vulnerable members of society, and because they undermine the general confidence in the equity of our system of justice, I would urge federal judges to increase the costs of such crimes to those who commit them. The advantaged defendant who is found responsible for such violence to our national ideals has a claim to less, not greater, leniency from the federal courts. Only when prison sentences coupled with substantial fines become the rule for treating white-collar criminals will there be

effective deterrence and the concomitant assurance to the public that justice is administered fairly in the United States.

The laws of Justinian's time were numerous and complex, as indeed they are today. Justinian did not take them as he found them, but to a significant degree he simplified them, clarified them, and made them more rational, Procopius's entertaining carping aside. This is what we are trying to achieve today with the federal criminal laws. It is a necessary task and a worthy goal, and I know of no group to which such an effort should have greater appeal.

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