



Episode 1,213: Conservatives' 'Tough on Crime' Act Goes Wrong Again

Guest: Kevin Ring

WOODS: I don't know the history of mandatory minimums, I don't think, but my instinct tells me that they probably came about as a result of some kind of "Tough on Crime" campaign, in which people who pride themselves on talking about how tough on crime they are were trying to overrule what they believed were the excessively lenient sentences being handed out by liberal judges. I could imagine it being portrayed that way. Am I close to the target?

RING: Yeah, certainly in the modern era in our country, we've had mandatory minimums since the country's beginning, and the usually followed what was considered the crime du jour. So we first had them for piracy and sort of early crimes like that. We got our first gun mandatory minimum after the shooting of Robert Kennedy, the assassination of Robert Kennedy. And we had flirted with drug mandatory minimums in the '50s and '60s, and then it was actually Richard Nixon who signed legislation eliminating mandatory minimums for drugs in the 1970s. But then with the death of Len Bias in 1986, a very popular, outstanding basketball player at the University of Maryland, of an overdose after being drafted by the Boston Celtics, moral panic set in. And this was a time where the country was experiencing high crime rates, and drugs were the big issue and Republicans and Democrats were trying to compete with one another to be the toughest on drugs.

And they passed what are now in place the tough drug laws that we have in place today, mandatory minimum sentences, which, as you said, were implemented for a couple of reasons. One was to counteract what they saw was the soft-headedness of some judges. But also to create some uniformity, to say that no matter where you're punished or arrested in this country, you should receive roughly the same sentence, a noble goal, no doubt, one that hasn't come true with mandatories. But so those were the purposes. One was to straightjacket judges who they thought couldn't be trusted, and two, to provide some uniformity, but certainly with the mindset of: we've got to get tougher, we've got to be harsher on these criminals who are ravishing our streets.

WOODS: All right, so I had a feeling my instincts were more or less correct on it. What about the response that almost certainly you get, which is, on the one hand, people let's say on the political left will boast — when Donald Trump was talking about crime waves, they'll say: but violent crime is at such low levels. Couldn't people come back and say: yeah, the reason it's at low levels is that we've swept so many people into the prison system that, yeah, the remainder are pretty peaceful, but it's precisely because of the mandatory minimums that we've been able to get these people off the streets for so long? How do you answer that?

RING: I think it's a totally reasonable argument, and I think it's a mistake for people on my side of this issue to not address that head on, because it's intuitive that we have high crime in the '70s and '80s, we pass tough mandatory minimum sentencing laws along with other things, and then crime starts dropping in the '90s, and up until a couple years ago, it had been in free fall. And so isn't that clear, that that is working? And again, it's also intuition that the bad guys are in prison, they can't be committing crimes, so this is working. But that ignores a lot of other data points. That focuses on two: crime was high; we passed mandatory minimums; crime is lower now; they must have worked.

What really has happened, though, is you'll see jurisdictions all across the country who in the '90s started saying we can't afford these penalties because we're locking up low-level drug offenders for decades, and although we think they should be held accountable, these punishments seem excessive. They don't seem to satisfy any kind of cost-benefit analysis. We're building tons of prisons. An important stat that I always tell people: between 1990 and 2005, in this country we built a prison or jail every ten days. That's an amazing amount of construction.

And so some of these states were going bankrupt, including "tough on crime" states like Texas. And they said maybe there's a better way. Maybe we can do some other things with at least some of these offenders, like diversion programs, treat addiction, do behavioral counseling, try in-community monitoring instead of keeping them in expensive prison beds. And so when they did those things over the course of the last two decades, you saw the crime rates in those states continue to fall. So you saw their incarceration rates fall, they saved some money, but more importantly, their crime rates fell.

And so that kind of data suggests that maybe it wasn't just the mandatory minimums, or maybe the mandatory minimums don't deserve the credit they've got, that as a culture, we decided we were being too soft on crime. But maybe that message got to judges, so maybe judges were a little tougher and maybe at the moment in time, that was appropriate. But then we took a sledgehammer to a tack and that we locked up entire communities, we became the world's largest jailer. I mean, our incarceration number is really an outlier. And I think people on both sides of the aisle are right to say: was it worth it? Did we get our money's worth? Is that the most efficient way? Not: does it work at all? Because we could eliminate traffic accidents if we put the speed limit at five and we banned left-hand turns. But people wouldn't countenance that. And so the same thing with criminal justice policy: is this cost-efficient? Not: do these policies work. Are they efficient? And I think that reaction and that data suggests they're not.

WOODS: Let's talk about your organization, Families Against Mandatory Minimums. What's the history of the organization? How long has it been around, and what was the catalyst that got it started?

RING: So Julie Stewart was a communications professional at the Cato Institute in 1991 when her brother was arrested for growing marijuana in Washington State, which would arguably not be a crime today. He was threatened with a five-year mandatory minimum, because that was part of the package that Congress passed in 1986. If he would cooperate against others, he would have been able to try to get out from under that sentence, but he didn't want to get friends in trouble and he was willing just to take responsibility for his own stupidity. So he didn't plead, and Julie thought, okay, well, it's marijuana, first-time offender, good family, the judge isn't going to hammer him. And what she didn't realize, a lot of families didn't

realize at the time was that mandatory minimums meant the judge had no discretion any longer. So the judge couldn't go below five years once the prosecutors decided to charge him with the crime that carried the mandatory minimum.

So she learned about this problem like a lot of families did firsthand and said this is outrageous, and she said: I'm going to start a group. And in the years that followed, she started hearing from families all across the country, many of whom had loved ones serving longer services because they were related to crack cocaine or maybe stronger drugs like heroin and the rest. And these were people who were either addicts or small-time dealers who made mistakes, needed to be held accountable, but did not need decades long in prison. And she formed this group and basically said: I'm going to put a human face on this problem. She thought it would take 5 or 7 years before the politicians saw what they were doing and change their mind, but here we are, 27 years later, still fighting this fight.

WOODS: Well, I think when you think it through, you can see what the main problem is: what's the constituency for changing the status quo? Certainly people who are, as you say, in situations where mandatory minimums are yielding clearly unjust outcomes are few and far between and don't have the sympathy of the voting public. The voting public wants "tough on crime," by and large. I mean, I know people say they don't, but in their heart of hearts, I think they do and I think there just isn't the sympathy. Isn't that the issue?

RING: Oh, it's a huge point. Prisoners and those who break the law are the great other, and it's very easy to say I have no sympathy for them and it's a very sort of American individualist idea to say, "You do the crime, you do the time." I mean, I hear that all the time. And my point is we're not the Innocence Project. I'm not arguing they didn't do the crime. I'm arguing what time is proportionate. You would not give life sentences to jaywalkers, so let's start drilling down now and figuring out what makes sense.

Because if you're really concerned about crime, you're not going to take a first-time offender and certainly not an addict and put him in prison for 10 or 15 years, knowing as we do that when they come out, they're going to be more likely to reoffend, not less, and that their family's going to suffer hardship, emotional, but also economic, and you might have taken a breadwinner out of the house. And so now you've hurt families, and now you have intergenerational poverty. So if your concern is strictly public safety and I'm worried about my family being hurt by these offenders, then you have to wake up to what's the appropriate sentence, not whether they should be punished.

But you're right. Our fight and our challenge for all these years has been what I think is an evolutionary one, which is we like to punish people who do things wrong. I mean, there's biological evidence that we get satisfaction from punishing people. And that's what makes this such a difficult fight, but also it's one that I think FAMM's uniquely suited to fight, because just arguing data and statistics is never going to overcome somebody's emotional response to a high-profile crime. Every time you see a Kate Steinle murdered or a Len Bias overdose, you deal with people who viscerally want to hammer somebody.

And what FAMM's trying to do is say the people that you're hammering are your neighbors and your cousins and your loved ones, and now that we have so many people in prison and in jail — when I go speak at colleges, I'll ask people: raise your hand if you know somebody, either a family member or close family friend, and usually half the class raises their hand. This issue is touching so many people that that's the kind of argument that is more likely to sway people,

is to say, classic, empathetic position, which is: this could be you. Not in some circumstances, not murder. People don't see that. But in some of these other instances, we're talking about crimes for offenses that other people have committed. Our last several presidents have done illegal drugs, and I don't think anyone would have thought they should have sat in prison for years. So personalizing this, humanizing this issue is I think the best way to approach it, but we have the challenge you suggest.

WOODS: My audience is overwhelmingly libertarian, so their view will be these people shouldn't be in prison at all. But certainly at the very least, we can agree that it just seems to make more sense that, regardless of how you feel about judges in general, it does seem better for them to be able to decide what's best on the basis of the available evidence and the particulars of the case, rather than be in some kind of straightjacket imposed on them by congressmen. That to me is just obvious.

RING: Yeah, it's absurd that you even have to argue that, that you would think that context doesn't matter at all, that the person who is supposed to impose a sentence shouldn't know whether this is your first or third offense, whether you were stealing something to feed your family or to add another million to your pockets, whether it was a product of addiction or simple greed. I mean, all the things that, if this were your child, you'd want to know before you punished them, the idea that you would blind judges to those factors, that context makes no sense.

And it also comes from people — I mean, I come from a politically conservative background, and I get the sort of black-and-white clarity of, like, no, we have rules and you follow rules. But most of the time, we realize that one-size-fits-all government rules don't work well. We don't like it when EPA or FDA or other agencies of government and people with power don't exercise flexibility and discretion to make sure that the laws and the sentences and policies are appropriate. So it's so strange in this area to see so much authority to prosecutors or more likely to politicians who created these laws. I mean, think about the guys who created the laws in 1986 and 1988, these mandatory minimums. They could not possibly foresee all the unique circumstances and situations in which those laws would apply. And so just out of humility, you might think save some discretion for judges so they can tailor the sentence to the crime, but you know, that's where we are.

WOODS: I have a slightly technical question. I know I've been reading recently about — and I don't know if this is purely anecdotal or if they've done a study on it, but an increase in plea bargains, that people are just doing that even when they're innocent for a lot of reasons. They just can't fathom the legal nightmare it would be to challenge it and so on and so forth, or they get intimidated into entering a plea. But in the case of mandatory minimums, doesn't that remove the possibility of a plea bargain from the table, because what could you bargain for? The punishment for your crime is this mandatory minimum.

RING: No, it's actually just the opposite. Mandatory minimums have increased the rate of plea bargains because —

WOODS: Oh, okay, yeah, how does that work?

RING: Yeah, because prosecutors come to you and they say, you know, *With this quantity of drugs or with that gun in your car that was in your constructive possession when you did this, I can hammer you with 10 or 20 years now, and the judge will have no discretion, so if you go*

to trial and get convicted, you're looking at 20 years. Take this deal for 5. And so we went from a world where, in the '80s, you had 30% of people going to trial, to today where under 3% at the federal level go to trial.

And it's known as the trial penalty, which is that you get hammered with a much longer punishment for going to trial, and this is another one that absolutely shocks me that more people don't understand, that the right to jury trial is one of the most fundamental individual rights enshrined in our Constitution. The idea that you would penalize that and so many people, I'm afraid, seem comfortable with the idea of, well, you should just take the deal. Well, sure, you may think that. This person may think they're innocent. They may think that under delusion, or they may just think I have nothing to lose and I want to exercise my constitutional right. Whatever the basis, the idea that somebody would get an 800 or 900% longer sentence because they go to trial is so noxious. I mean, we are watching the jury trial right evaporate before our eyes.

And the National Association of Criminal Defense Lawyers just issued a report on trial penalty. We're calling attention to it. But mandatory minimums and lengthy sentencing guidelines have hastened that evaporation, because they give defendants no choice at all. And I heard a law professor say this really well. If you went to a defendant and said: hey, say what we want and cooperate against your buddies or we'll break your arm," no one would have a problem seeing the moral dilemma there and the ethical problem of offering that choice. But any defendant would much rather have that choice than be told: do what we say and cooperate against these folks, or we're going to give you a 20-year federal prison sentence away from your family. And so when the threat becomes that coercive, you have to wonder what's left to the right. And so it's one that should bother libertarians, conservatives, liberals, everybody.

WOODS: You mentioned that it's important to humanize this whole matter and to give flesh-and-blood examples of how people really suffer under this. And on your website, FAMM.org, which, by the way, I think is a very effective, very well-laid-out website, you have a whole section of stories, and I wonder if you might share one or two of them that stand out to you in particular.

RING: Sure. This is a perfect example of what happens with mandatory minimum sentences. You take a really good-sounding idea and well-intentioned — so for instance, you'll say we're worried about drug dealers targeting kids with drugs, so we're going to create something called a drug-free school zone. So within 1,000 feet — yes, that's arbitrary, but we have to pick something. Within 1,000 feet of a school or a playground or a daycare center, if you sell drugs, your sentence is going to be doubled, and that's what they do in Tennessee.

And there was a guy there named Terrence Davis who was selling drugs. Shouldn't have done it. But a confidential informant set up a buy at his apartment, Terrence's apartment, which was in an apartment complex down the street from a school, but because of the wing of the building he was in, he was 995 feet from a school. It was at night on a Saturday night in his apartment, no kids around, school not in session. And he gets hammered with a longer sentence. That is absolutely not the kind of harm we're trying to prevent with that sentence. That cannot have been what lawmakers intended, and if they did, they just completely overshot.

And so drug-free school zones is a perfect example of a terribly-applied mandatory minimum. In so many jurisdictions, it applies during summertime. It applies on weekend nights when

school's not in session. It applies even when confidential informants and the police set up buys inside the school zone so that they can get the enhanced penalty. So you have law enforcement actually bringing the drugs into the school zone, which is what we're supposed to be avoiding by passing these laws.

And so Terrence Davis, his wife has been fighting for his freedom, seeking clemency from Governor Haslam in Tennessee. We've been trying to change the school zone law to shrink its size. And here's something that's so perverse. We tried to change the school zone from 1,000 to 500 feet. The prosecutors were the Tennessee legislature saying, if you make that change, that's okay. We'll just set up our buys 499 feet from schools. There's something wrong there. We're not seeking justice when we do that, because that's not the type of behavior that deserves an enhanced penalty, and it's starting to seem more like a game that's intended to give prosecutors leverage to coerce plea deals. That's not what the American justice system should be.

WOODS: Now, speaking of stories, we should take a moment to talk about your own story that goes back to the year 2010 involving your own conviction and sentencing. Why don't you give that background? And by the way, for anybody who thinks this is a "gotcha question" or I'm putting Kevin on the spot, I don't normally do this, but I did ask Kevin in advance if it's okay to discuss this, so I'm not trying to make him uncomfortable or anything. So why don't you tell us about that?

RING: Sure, I'm happy to talk about it. I'm not happy it happened, but it made me smarter and educated me, and I'm afraid, as with many other families, my family learned about the problems in the system by going through it firsthand. I was a "tough on crime" staffer in the '90s and early 2000s on Capitol Hill. I became a lobbyist, and I had the misfortune of being a lobbyist at the firm of Jack Abramoff, who was my boss. Our firm came under investigation for our lobbying practices for basically what is known as honest services fraud, which is a junior varsity form of bribery, meaning we took staffers and members of Congress to lunches and dinners, provided them tickets to sporting events and things like that, and in return they did things for our clients. I was asked to plead guilty to crimes that I did not think I committed. More importantly, I was asked to testify against former members of Congress, other members of Congress, and staffers who I was very close with and who I did not think committed crimes. [siren] Sorry about the siren outside.

WOODS: That's okay.

RING: And so I couldn't take the plea deal that was offered, because I thought I'd have to perjure myself and I wouldn't have been able to live with myself. But I had two young kids, and it was a very difficult situation. It was a tough choice. The government then raided my house one morning. They took all of our stuff. They then arrested me. I went to trial. The jury hung on all counts. The government tried me a year later. I was convicted on half the counts. I was then sentenced to 20 months in federal prison. I served those in Cumberland, Maryland at a federal prison camp.

And during that time, I served with people — there are no white-collar camps. I know people always say, "Oh, is it a Martha Stewart-type facility?" I don't know what that means today because of the drug war, essentially. I served my time with most people who were brown and black serving drug sentences or gun sentences. And these were people who I otherwise didn't interact with, but I had seen they made mistakes. And they weren't always the greatest

people, but a lot of them had just made dumb mistakes, not because they were evil geniuses, but because they hadn't thought about their actions and they were young and careless and reckless, which is not unusual is you know the brain science.

And they were serving long prison sentences, and I think in this country we've become sort of anesthetized to the idea of how long 5 years or 10 years is. And so for me being gone, I ended up doing 16 and a half in the prison and then a couple of months on an ankle bracelet, I hadn't been away from my daughters for more than two nights in a row. I mean, I'm just — I've always wanted to be a dad, and I've enjoyed it. And so being away that long was brutally painful. I mean, every day, looking at the clock and the calendar to see when I'm going to go home. And I had guys who were serving 10, 20 years.

And I think, as you said earlier, people don't have a lot of sympathy for that, and I think there's a lot of stigma that goes with it, but I want to use my experience to say I've been on both sides. I wrote some of the bad, tough laws when I was a staffer on Capitol Hill and I was young and I didn't know better, and now I've served time with people serving some of the sentences, even ones that I had a hand in writing. And what we're doing isn't smart. Even if you're not a compassionate person, it's just a dumb approach, because we can get our pound of flesh without keeping people in these prisons for decades, and we're not getting ourselves all that much safety for it.

And when people are in prison, they're not really getting a chance to improve themselves. If they had job skills, they atrophy. Many of them didn't have job skills, and we're not using that time where they're literally a captive audience to get them substance abuse treatment, mental health counseling, job training, things that would be really smart to do, so that when they come out, they're less likely to reoffend.

So I just saw a lot from that experience that I think has changed my view. I don't know that I have the zeal of a convert, but I just — life is about experiences. This is a tough experience that I accumulated, but it absolutely informs my work.

WOODS: I read an article over at AboveTheLaw.com, which is a very, very heavily trafficked legal blog that actually was founded by a college friend of mine, Dave Lat, about your case that makes a pretty good series of arguments that there was a miscarriage of justice involved all around. But be that as it may, in your view — well, in fact, what were the exact circumstances by which you then became involved with this organization, Families Against Mandatory Minimums?

RING: Oh, yeah, good question. So I had been cooperating with the government for two years, and when it became clear that we did not have a meeting of the minds, they said we're ready to turn on you at any moment. And so at that point, I had still been lobbying, and I told my firm: look, I think this is heading in a bad direction and I don't want to get the clients hurt or the firm hurt, so I'm going to resign. So I left my law firm and didn't have work, and I didn't have prospects. And you know, the old expression is true: if you want a friend in Washington, D.C., get a dog, because this was a really high-profile political scandal. And so I was somewhat toxic, and I looked for work and I saw an opening at FAMM.

And one thing that came through to me from my experience even cooperating with the government was — and I'm sure there's people in the White House who feel this way — once the prosecutor decides you're the bad guy, your only hope at that point is for a neutral judge

to have a say, and that person is going to be who you put your fate in, because our system of justice is adversarial. I had one view, we did, and the prosecutors had another view.

And they were like rabid dogs going after you, and I thought, well, it's bad enough — I think they're misconstruing facts and circumstances and intent and so they're coming after me. What if they had control over my sentence? Because I knew the offenses that they were accusing me of didn't carry mandatory minimums, and so even though they came to me and said, "Plead guilty or we're going to charge you with these things that carry 20, 30 years in prison," I thought, well, we'll see what a judge has to say about that after we go to trial. But if they had come to me and said, "These crimes carry 20-year mandatory sentences and judge isn't going to have any discretion and this is a gray area of the law," that would have been much harder calculus. So I was open to the idea that prosecutors had too much power. I heard about FAMM. I came in here, hat in hand, explained to Julie what was going on, and she said, well, I've got overpriced talent here who I can pay little and who wants no attention, and it was a perfect fit.

And I started working on cases and reading about people whose situation was much worse than mine: uneducated people, no resources, who were facing a government that was seeking 30-year sentences against them, and they had no leg to stand on. Here I was a law-school-educated person of some means and education to fight, and I was seeing people who had it much worse than I did, and that sort of helped get me out of my own head, but also gave me a reason to exist, to try to help other people who are facing these circumstances. And I learned a lot. I learned that what was happening to me in a white-collar context was happening to people in drug contexts, gun contexts. I don't have a lot of sympathy for people who use guns illegally, but I also realize our sentences are absolutely nuts in these areas.

And so I just learned a lot about an area I did not know. Maybe it's something I should have been more sympathetic to before then, but you know, you live and you learn. And FAMM was open to me because of my experience. They sat through my trials with me. They waited for me to go to prison. I sort of said I was on assignment while I was there, and then I came back after I finished my sentence.

WOODS: I have to say I think it's particularly great that you come from a more conservative background, because that defies the stereotype of people who would be involved in advocacy of this kind.

RING: I think it does, and I also think the people we have to win are the people I know, because I was one. When I'm trying to make arguments to convince people, I'm trying to appeal to a 25-year-old Kevin Ring, who only knew so much but thought he knew everything. People say, why didn't you get this before? Well, because I didn't grow up with people whose options were going and selling drugs. I didn't hang around people who had guns. I played little league baseball and football. And so you're a product of your experiences, and I didn't know this life, and that's not to excuse that behavior, but it also gets me out of thinking that I made some great moral choices. I was influenced by my peers like everyone else, and I'm learning about people who were influenced by their peers but in a much worse direction and maybe who didn't have family support.

But I also think it's important in talking to the people who are more conservative is to say: I share your value for law and order and for public safety. I have two young kids, and I don't want them to be at risk of harm any more than you do. This is not something where you can

sort of get to my right and say no, I'm really tough on crime. I mean, there's no limit to that. And so what I try to say is it's not cost effective. You don't believe this in any other area of government operation. You don't give the FDA this much power. You don't give IRS officials this much power, because you know it can be abused. All I'm telling you about prosecutors is, if you don't check their power and balance it with other branches of government, including the judicial branch, you're going to get corruption and misuse. So I want to argue to them in I think language they'll understand and with values that I still share.

WOODS: And you can particularly — I've had some success with this too, because I definitely come from a conservative background — appeal to what their own principles are in theory supposed to be. They're supposed to have some kind of skepticism of state power, but you can't just drop that skepticism when it comes to law and order and prosecutors and law enforcement or whatever. These are also government employees in a lot of cases, or they're operating within a government system, and so you can't just say, "But I know these are good guys, so we'll give them some leeway." Was that the message that the framers of the Constitution were trying to give you: if they're good guys, just give them some leeway? Is that the conservative principle?

RING: Yeah, it's so funny. I was just tweeting with somebody about this. If you read Justice Scalia — I put together a book of Justice Scalia's opinions. I did a volume in 2004 and then —

WOODS: Oh, with Regnery.

RING: Yes.

WOODS: Now I know where I've heard your name before. I have that book.

RING: Yeah, well, good. Others should too [laughing]. But if you look at Justice Scalia's record in the court, I mean, he defended criminal defendants' rights all the time, because those are in black and white. I mean, it's hard to think that we would have all of those provisions defending sort of the accused's rights today and certainly not in the Republican Party. Those would be considered soft on crime. And yet, in so many opinions, Justice Scalia said the highest value here is not helping law enforcement. Our job is to protect the rights of the accused and put the government through its proof. And so whether that's search and seizure — I mean, there's a great case in Maryland where they were using DNA swabs, whenever they had somebody who was incarcerated, to then check that against other crimes. And he said, look, pursuit of public safety is a noble objective, but it's no more noble than protecting people against suspicionless searches. That's not what our sort of Founding Fathers ran away from the crown for. I mean, this should all be basic, elementary stuff to constitutional conservatives, and yet, I read enough evolutionary psychology to know that, with crime, there's just a different impulse that we're fighting. People just, it becomes visceral and emotional and not sort of principled. It becomes: government, save us, protect us. And they're willing to cut corners when it comes to rights. And it's sad. I'm afraid you only appreciate it when it's your turn in the dock.

WOODS: Yeah, no kidding. Well, I'm looking at your donations page, and it says, "In the last 20 years, over 320,000 people have benefited from sentencing reform championed by FAMM. We could not have achieved those victories without the generosity of our supporters." So if you'd like to support what Kevin and FAMM are doing or you'd just like to learn more about it, they've got an excellent site, FAMM.org, that I urge you to check out. I'll link to it on the show

notes page for today. This is Episode 1,213, so TomWoods.com/1213. Well, Kevin, thanks for your time, and continued success. I'd like to see you have a lot more success, but just breaking through, trying to break through to people who are like the way I used to be and the way you used to be. You're the best guy to talk to them, and I hope it keeps working out for you. Thanks so much.

RING: Thanks for having me. I appreciate the discussion.