



AMERICAN BAR ASSOCIATION

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Testimony of

The Honorable Patricia M. Wald

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On behalf of the
American Bar Association

Before the
Inter-American Commission on Human Rights
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Good morning, your Excellencies. My name is Patricia Wald of Washington, D.C., and I am a former judge of the International Criminal Tribunal for the Former Yugoslavia and former Chief Judge of the United States Court of Appeals for the District of Columbia. I welcome the opportunity to testify before you on behalf of the American Bar Association concerning the impact of mandatory minimum sentencing in the criminal justice system of the United States of America.

I appear today at the request of the President of the American Bar Association, Michael S. Greco. The American Bar Association is the world's largest voluntary professional association, with a membership of over 400,000 lawyers (including a broad cross-section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide. The American Bar Association continuously works to improve the American system of justice and to advance the rule of law in the world.

In 2003, U.S. Supreme Court Justice Anthony Kennedy, in a speech at the ABA Annual Meeting, challenged the legal profession to begin a new public dialogue about American sentencing and corrections policies and practices. He raised fundamental questions about the fairness and efficacy of a justice system that disproportionately imprisons minorities, and then returns them to their communities in worse shape than they left it. In regard to mandatory minimum sentences, Justice Kennedy said, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." "In too many cases," he asserted, "mandatory minimum sentences are unwise or unjust."

In response to Justice Kennedy's concerns, the ABA established a commission to investigate the state of sentencing and corrections in the United States, and to make recommendations on how to correct the problems Justice Kennedy had identified. The Justice Kennedy Commission after studying these issues reported to the 2004 Annual Meeting a series of policy recommendations that have been hailed as providing a blueprint for sentencing and corrections reform. In particular, the Justice Kennedy Commission called upon states, territories and the federal government to repeal mandatory minimum sentence statutes.¹ The recommendations were overwhelmingly approved by the ABA House of Delegates.

The ABA's opposition to mandatory minimum sentencing is longstanding. Its 1994 Standards for Criminal Justice on Sentencing, in whose formulation I participated, state unequivocally that "A legislature should not prescribe a minimum term of total confinement for any offense." Standard 18-3.21(b). In addition, Standard 18-6.1 (a) directs that "[t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized." This standard goes on to say that "[t]he sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account." These standards balance respect for the role of the judge in

¹ Recommendation 121A, Annual 2004, <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> ("Justice Kennedy Commission Report"), at 9.

calibrating the severity of the punishment due in each case, with a need to avoid disparity and reduce levels of severity overall.

The ABA has also expressed concern about the racially discriminatory impact of mandatory minimum sentencing, particularly in connection with the differential penalties for trafficking in crack and powder cocaine. As early as 1995, the ABA called for the elimination of “current differences in sentencing based upon drug quantity for offenses involving crack versus powder cocaine.” The report accompanying this resolution noted that African Americans were disproportionately prosecuted and sentenced under the harsh federal crack cocaine laws, and thus were likely to serve substantially more time in prison for cocaine offenses than whites.²

Following receipt of the Justice Kennedy Commission report in 2004, the ABA again urged the repeal of mandatory minimum sentence statutes as well as other steps to eliminate unjustified racial and ethnic disparities.³ The ABA reasserted its opposition to mandatory minimum sentences in the policy it adopted in response to the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005). It urged Congress to take several steps to assure fair, effective and just federal sentencing practices, including expanded sentencing ranges and increased judicial discretion in departing from those ranges.⁴

² Recommendation 129, Annual 1995 (Individual Rights and Responsibilities Section; Special Committee on the Drug Crisis; cosponsored by the Standing Committee on the Unmet Legal Needs of Children).

³ Justice Kennedy Commission Report, *supra* note 1 at 47.

⁴ Recommendation 301, Midyear 2005 (Criminal Justice Section).

As a matter of policy, mandatory minimum sentences raise a myriad of troubling concerns. To satisfy the basic dictates of fairness, due process and the rule of law, criminal sentencing should be both uniform between similarly situated offenders and proportional to the crime that is the basis of conviction. Mandatory minimum sentences are inconsistent with these twin commands of justice.

First, mandatory minimum sentencing laws have resulted in excessively severe sentences. Mandatory minimum sentences set a mandatory floor for sentencing. As a result, all sentences for that crime, regardless of the circumstances of the crime or the offender, tend to be arrayed above the mandatory floor. They are a one-way ratchet upwards. The Justice Kennedy Commission found that, since the advent of mandatory minimum sentencing policies, the average length of incarceration in the United States has increased threefold.⁵ I recently participated in a case where a first offender who had been charged with two sales of a modest amount of marijuana while carrying a gun on his person was sentenced to 55 years in prison. The sentencing judge expressed intense frustration but said he could do nothing as the mandatory minimums required the sentence. The Justice Kennedy Commission found that mandatory minimum sentencing was one of an “array of policy changes which, in the aggregate, produced a steady, dramatic, and unprecedented increase in the population of the nation’s prisons and jails,” despite a decrease in the number of serious crimes committed in the past several years.⁶

⁵ Justice Kennedy Commission Report, *supra* note 1 at 16-17. The Report attributes this increase to a combination of policies, including mandatory minimum sentences, designed to get tough on crime. *See id.* at 16.

⁶ *Id.*

Second, mandatory minimum statutes lead to arbitrary sentences. When the relevant considerations in sentencing shifted from the traditional wide focus on both the crime itself and “offender characteristics,” to an exclusive focus on “offense characteristics,” a host of mitigating circumstances could no longer be considered in determining the sentence. As a result, a person with sympathetic mitigating factors based on background, family status, or community ties would receive the same punishment as a hardened criminal. Women offenders -- typically minor players in drug dealing and disproportionately the caretaker parents of minor children -- bear the brunt of mandatory minimums. Their numbers and the duration of their confinements have increased dramatically.

Third, mandatory minimum sentence statutes have produced the very sentencing disparities that determinate sentencing was intended to eliminate. Because punishment as a practical matter is now determined by charging decisions made by prosecutors, judges no longer have the ability to individualize sentences or impose the minimum sanction that is consistent with the gravity of the actual offense conduct. Disparity in sentencing also arises when laws provide radically different penalties for what are more reasonably regarded as substantially similar behaviors: a person who possesses crack with intent to distribute will receive a substantially higher sentence than someone convicted of possessing the same amount of cocaine powder. In the case of the crack/powder differential, the sentencing disparities break down along racial lines, in part because black urban populations tend to use crack while white suburbanites tend to use the powdered version, and in part because of law enforcement policies that target urban areas. A person

who possesses five grams of crack cocaine receives a sentence that is equivalent to that imposed for the possession of five hundred grams of powder cocaine. As the Kennedy Commission concluded, the “differential treatment of crack and powder cocaine has resulted in greatly increased sentences for African-Americans drug offenders.”⁷

Fourth, mandatory minimums undermine judicial discretion. The ABA believes that a fair and just sentencing system must allow for the sentencing judge to exercise discretion in appropriate cases.⁸ In our adversarial criminal justice system, judges are expected to take an impartial role in the resolution of cases, siding neither with the prosecution nor the defense. Thus it is the judge who is the appropriate person to decide on a particular sentence within designated ranges, and not the legislature or Sentencing Commission. Mandatory minimum sentencing regimes shift discretion from judges to prosecutors, who do not have the training, incentive, or even the appropriate information to properly consider a defendant’s mitigating circumstances at the initial charging stage of a case. To give prosecutors that kind of unchecked power dangerously disturbs the balance between the parties in an adversarial system, and deprives defendants of access to an impartial decisionmaker in the all-important area of sentencing.

In addition to the organized bar’s objections to mandatory minimum sentencing regimes, I note that the weight of opinion within the ranks of American judges is also opposed to mandatory minimum sentencing. Both the Judicial Conference and the

⁷ Justice Kennedy Commission Report, *supra* note 1 at 28.

⁸ See Standard 18-2.6 (a) of the ABA Standards for Criminal Justice on Sentencing (“The legislature should authorize sentencing courts to exercise substantial discretion to determine sentences in accordance with the gravity of offenses and the degree of culpability of particular offenders.”).

judges of the 12 federal circuit courts of appeals, on one of which I sat for 20 years, five as chief judge, have adopted resolutions that oppose mandatory minimum sentencing statutes. In a formal resolution, the Judicial Conference urged Congress to “reconsider the wisdom of mandatory minimum sentence statutes and to restructure such statutes so that the U.S. Sentencing Commission may uniformly establish guidelines for all criminal statutes to avoid unwarranted disparities from the scheme of the Sentencing Reform Act.”⁹

I conclude by briefly mentioning a few of the most disastrous social consequences of our overreliance on punitive sentencing policies, particularly mandatory minimum prison sentences. Society incurs a variety of collateral costs when a person is sent to prison or jail, including increased expenditures for the maintenance and health care of dependents of inmates, lost tax revenues from income that would have been earned or expenditures that would have been made by the person left free in the community. Not least of all, the families and communities from which prisoners come suffer a wide variety of tangible and intangible harms from the absence of the prisoner. These include as I have mentioned the emotional, economic, and developmental damage to the children of incarcerated offenders, and the disenfranchisement and consequent political alienation of a significant portion of the young men in minority communities.

⁹*Report of the Proceedings of the Judicial Conference of the United States*, March 13, 1990, published in United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at 90 (1991)

There is no question that crimes must be punished and that prison serves a legitimate retributive and incapacitative purpose, but only if it is proportionate to the circumstances of the crime and the offender as well as the gravity of the underlying offense. Unduly long and punitive sentences are counter-productive, and candidly many of our mandatory minimums approach the cruel and unusual level as compared to other countries as well as to our own past practices. On a personal note, let me say that on the Yugoslav War Crimes Tribunal I was saddened to see that the sentences imposed on war crimes perpetrators responsible for the deaths and suffering of hundreds of innocent civilians often did not come near those imposed in my own country for dealing in a few bags of illegal drugs. These are genuine human rights concerns that I believe merit your interest and attention.

Again, I thank you for the opportunity to testify on behalf of the American Bar Association.