



AMERICAN BAR ASSOCIATION

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Testimony of
JAMES E. FELMAN
on behalf of the
AMERICAN BAR ASSOCIATION
before the
UNITED STATES SENTENCING COMMISSION
for the hearing on
MANDATORY MINIMUMS

Washington, D.C.
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Chair Sessions and distinguished members of the United States Sentencing Commission:

Good morning. My name is James Felman. Since 1988 I have been engaged in the private practice of federal criminal defense law with a small firm in Tampa, Fla. I am a former Co-Chair of your Practitioners' Advisory Group, and am appearing today on behalf of the American Bar Association for which I serve as Co-Chair of the Criminal Justice Section Committee on Sentencing.

The American Bar Association is the world's largest voluntary professional membership organization, with almost 400,000 lawyers (including a broad cross section of prosecuting attorneys and criminal defense counsel), judges and law students worldwide as members. The ABA continuously works to improve the American system of justice and to advance the rule of law in the world. I appear today at the request of ABA President Carolyn Lamm to present to the Sentencing Commission the ABA's position on mandatory minimums.

I. Introduction

The ABA strongly supports the Commission's long-standing opposition to the use of mandatory minimum sentences. We are all familiar with the recent statistic that, for the first time in our nation's history, more than one in 100 of us are imprisoned. The United States now imprisons its citizens at a rate roughly five to eight times higher than the countries of Western Europe and 12 times higher than Japan. Roughly one-quarter of all persons imprisoned in the entire world are behind bars here in the United States. The federal sentencing scheme has contributed to these statistics. In the 25 years since the advent of the mandatory minimum sentences for drug offenses and the adoption of the Sentencing Guidelines, the average federal sentence has roughly tripled in length. We know that incarceration does not always rehabilitate –

and sometimes has the opposite effect. The time has come to reverse the course of over-incarceration. The Commission's recent amendments submitted to Congress represent modest steps in this direction. Elimination of mandatory minimum sentences would be a dramatic further step.

Sentencing by mandatory minimums is the antithesis of rational sentencing policy. There are few, if any, who would dispute the proposition that criminal sentencing should take into account a wide array of considerations, including the nature and circumstances of the offense, the history and characteristics of the defendant, the defendant's role in the offense, whether the defendant has accepted responsibility for his or her criminal conduct, and the likelihood that a given sentence will further the various purposes of sentencing, such as "just desserts," deterrence, protection of the public and rehabilitation. Mandatory minimum sentencing reflects a deliberate election to jettison this entire array of undisputedly relevant considerations in favor of a solitary fact – usually a quantity of drugs that may bear no relationship to the defendant's particular culpability. Mandatory minimum sentencing declares that we do not care even a little about the defendant's personal circumstances. Mandatory minimum sentencing announces as a policy that we are utterly uninterested in the full nature or circumstances of the defendant's crime. Mandatory minimum sentencing blinds the court to the defendant's role in the offense and his or her acceptance of responsibility. Mandatory minimum sentencing is uniformly indifferent to the evaluation of whether the result furthers all or even any of the purposes of punishment.

The critical flaws of mandatory minimum sentences are not newly discovered and were well documented by the Commission's 1991 report, which found that:

- The “lack of uniform application [of mandatory minimum] creates unwarranted disparity in sentencing;”
- “honesty and truth in sentencing ... is compromised [because] the charging and plea negotiation processes are neither open to public view nor generally reviewable by the courts;”
- the “disparate application of mandatory minimum sentences ... appears to be related to the race of the defendant;”
- “offenders seemingly not similar nonetheless receive similar sentences,” thus creating “unwarranted sentencing uniformity;” and
- “[s]ince the power to determine the charge of conviction rests exclusively with the prosecution for the 85 percent of the cases that do not proceed to trial [now 96 percent], mandatory minimums transfer sentencing power from the court to the prosecution.”¹

It is of no importance whether some of the goals sought to be achieved by mandatory minimums are themselves unobjectionable or whether the statutes were well intentioned when enacted. History now reveals that the assumptions underlying these statutes have not been borne out, and experimentation with “one size fits all” sentencing has demonstrated that there are better, smarter, more compassionate, and ultimately more sensible approaches to sentencing policy.² Mandatory minimums as sentencing policy do not look any better today than they did

¹United States Sentencing Commission, Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System at ii-iv (1991) (“USSC Special Report”).

²The lesson is one that has been learned in the past, as illustrated by the repeal in 1970 of the mandatory minimum drug penalties passed in 1956. Pub. L. No. 91-513, 84 Stat. 1236

when the Commission issued its 1991 report calling for their repeal. As the Commission drafts its latest report for Congress, the arguments for repeal have only grown stronger.

I. The ABA Opposes Mandatory Minimums

Like the Sentencing Commission, the ABA opposes mandatory minimums and has done so for more than 40 years. The ABA's most recent *Standards for Criminal Justice on Sentencing* (3rd ed. 1994) states clearly 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,” and “[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.”³

(1970); Pub. L. No. 84-728, 70 Stat. 651 (1956); *see also* Families Against Mandatory Minimums, *Correcting Course: Lessons from the 1970 Repeal of Mandatory Minimums*, available at <http://www.famm.org/Repository/Files/8189>

[FAMM_BoggsAct_final.pdf](#).

³The current standards are consistent with the 1968 ABA *Standards Relating to Sentencing Alternatives and Procedures* § 2.1(c), which provided: “The legislature should not specify a mandatory sentence for any sentencing category or for any particular offense.” *See also* Commentary (e) to § 2.1(c) (“Suffice it to observe here that mandatory sentences rarely accomplish the ends they seek”). The 1968 *Standards* were followed in 1974 by a further

The ABA's focus on mandatory minimums was significantly heightened by an address at its August 2003 annual meeting by Justice Anthony M. Kennedy, who challenged the legal profession to begin a new public dialogue about American sentencing and other criminal justice issues. Justice Kennedy specifically addressed mandatory minimum sentences and stated, "I can neither accept the necessity nor the wisdom of federal mandatory minimum sentences." He

specific resolution of the ABA House of Delegates: "Be it Resolved, that the American Bar Association opposes, in principle, legislatively imposed mandatory minimum prison sentences not subject to probation or parole for criminal offenders, including those convicted of drug offenses." Proceedings of the 1974 Midyear Meeting of the ABA House of Delegates, Report No. 1 of the Section of Criminal Justice, at 443-44.

The 1980 second edition of the ABA's *Standards Relating to Sentencing Alternatives and Procedures* similarly opposes mandatory minimums: "Because there are so many factors in an individual case which cannot be assessed in advance and because a guideline drafting agency can respond to changed circumstances and factual complexity with greater flexibility and precision than can the legislature, it is unsound for the legislature to prescribe a minimum or mandatory period of imprisonment." § 18-4.3(a). *See also* Commentary to § 18-4.3 (mandatory minimums "result in injustice in a significant number of cases," "may actually aggravate the disparity problem" and "do not accomplish the ends for which they were designed;" "less drastic means exist to accomplish those ends [i.e., sentencing guidelines], and such means will probably prove more successful as well.").

continued that “[i]n many cases, mandatory minimum sentences are unwise or unjust.”⁴ Justice Kennedy also commented on the responsibility of the legislature to address the issue:

The legislative branch has the obligation to determine whether a policy is wise. It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just. ... A court decision does not excuse the political branches or the public from the responsibility for unjust laws.⁵

In response to Justice Kennedy’s concerns, the ABA established the Justice Kennedy Commission to investigate the state of sentencing and corrections in the United States and to make recommendations to address the problems Justice Kennedy identified. One year after Justice Kennedy addressed the ABA, its House of Delegates approved a series of recommendations submitted by the Kennedy Commission, including a resolution that urged all jurisdictions, including the federal government, to “[r]epeal mandatory minimum sentence statutes.”⁶ The resolution also called upon Congress to “[m]inimize the statutory directives to the United States Sentencing Commission to permit it to exercise its expertise independently.” The ABA reasserted its opposition to mandatory minimums in the policy it adopted in response

⁴Speech of Justice Anthony Kennedy, Address to the ABA (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

⁵*Id.*

⁶Recommendation 121A, Annual 2004, <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>. (“Justice Kennedy Commission Report”), at 9.

to the U.S. Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). It urged Congress to take several steps to ensure fair, effective and just federal sentencing practices, including expanded ranges and increased judicial discretion in departing from those ranges.⁷

II. The Flaws of Mandatory Minimums

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, sentences should be both uniform among similarly situated offenders and proportional to the crime that is the basis of the 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 floor for sentencing. As a result, all sentences for that crime, regardless of the circumstances of the crime or the offender, are arrayed above the mandatory floor. 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.⁸ The mandatory minimum

⁷Recommendation 301, Midyear 2005 (Criminal Justice Section).

⁸Justice Kennedy Commission Report, *supra* note 6, at 16-17; *see also* USSC Special Report, *supra* note 1, at 63 (“Overwhelmingly, the most frequent response given by judges, defense attorneys, and probation officers to the question about the effects of the mandatory minimums was that they are too harsh”).

sentences for drug offenses enacted in 1986 not only resulted in excessively severe sentences for those offenses, but also had an overall impact of increasing federal sentences virtually across the board. By imposing penalties higher than those imposed by federal courts over many years, Congress impelled the Sentencing Commission to increase many sentences to maintain some consistency in the Guidelines.⁹ Had Congress not enacted mandatory minimum penalties in 1986, the sentencing guidelines overall likely would have been less harsh and offenders would have received lower sentences in many cases. Thus, the effect of the mandatory minimums is not simply to incarcerate individuals who receive these sentences longer than a judge would have regarded as necessary. It is also to incarcerate many individuals who do not receive mandatory minimum sentences for longer than necessary as a result of the impact that mandatory minimum sentences have had on the federal sentencing guidelines as a whole.

Second, mandatory minimum statutes lead to arbitrary sentences. When the considerations in sentencing shifted from the traditional wide focus on both the crime itself and “offender characteristics” to an exclusive focus on a single fact – typically drug quantity or the presence of a firearm – a host of mitigating circumstances could no longer be considered in determining the sentence. As a result, persons with sympathetic mitigating factors based on degree of culpability, role in the offense, personal circumstances and background frequently

⁹See Statement of Stephen A. Saltzburg (DOJ Ex Officio Sentencing Commissioner, 1989-90) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, July 22, 2009; see also USSC Special Report, *supra* note 1, at ii (“The Sentencing Commission drafted the new guidelines to accommodate ... mandatory minimum provisions by anchoring the guidelines to them”).

receive the same punishment as kingpins and hardened criminals.¹⁰ Treating unlike offenders identically is as much a blow to rational sentencing policy as is treating similar offenders differently. Indeed, given the perversity that more culpable offenders are more frequently able to provide substantial assistance in the investigation and prosecution of others, it is often the case that mandatory minimum statutes result in symmetrically inverse justice. The masterminds bargain out from under the mandatory minimum, leaving only the lower level defendants in the net cast by the mandatory minimum statutes.¹¹ In addition, women offenders – typically minor players in drug dealing and disproportionately the sole caretaker parents of minor children – frequently bear the brunt of mandatory minimums. Their numbers and the duration of their confinement have increased dramatically under mandatory minimum sentencing.

¹⁰See Statement of the Honorable Paul G. Cassell (on behalf of the Judicial Conference) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, June 26, 2007, <http://judiciary.house.gov/hearings/June2007/Cassell070626.pdf> (“Mandatory minimum sentences produce sentences that can only be described as bizarre.”).

¹¹See *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992)(Easterbrook, J.) (“Mandatory minimum penalties, combined with a power to grant exceptions, create a prospect of inverted sentencing. The more serious a defendant’s crimes, the lower the sentence – because the greater his wrongs, the more information and assistance he has to offer to a prosecutor.”).

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. This is particularly the case with mandatory minimum statutes such as 18 U.S.C. § 924(c), which effectively apply only at the discretion of the prosecutor. Such statutes are not only poorly suited to accomplish the purposes of sentencing,¹² but actually frustrate those purposes by lending themselves as plea bargaining “chips” to be deployed by prosecutors in obtaining guilty pleas on more favorable terms.¹³ These statutes are both uncertain and inconsistent in their application¹⁴ and can easily be

¹²See Statement of Paul G. Cassell, *supra* note 10.

¹³See Stephen J. Shulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202-03 (1993); Ilene H. Nagel & Stephen J. Shulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S CAL. L. REV. 501 (1992).

¹⁴See USSC Special Report, *supra* note 1; United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 89-90 (Nov. 2004)(“USSC Fifteen Year Review”); see also General Accounting Office, GAO-04-105, *Federal Drug Offenses: Departures from Federal Sentencing Guidelines and Mandatory Minimum Sentences, Fiscal Years 1999-2001*, at 14-16, 79 (Oct. 2003)(finding that more than half of the drug sentences

manipulated through prosecutorial choices that are neither visible nor subject to review.

Mandatory minimums cause sentencing “cliffs” – dramatic differences in results for those whose conduct just barely brings them within the terms of a mandatory minimum. And sentencing that is driven by a single factor such as drug quantity is also highly susceptible to error, given the unreliability of informants in historical drug prosecutions and the potential for manipulation in investigations of ongoing drug offenses.¹⁵ Mandatory minimums also appear to disproportionately impact blacks and Hispanics.¹⁶

Fourth, mandatory minimums undermine judicial discretion and the proper allocation of authority among the parties. The ABA believes that a fair and just sentencing system must allow for the sentencing judge to exercise discretion in appropriate cases. In our adversarial criminal justice system, judges are expected to take an impartial role in the resolution of cases, siding with neither the prosecution nor the defense. For this reason, judges are entrusted to decide on a particular sentence within designated ranges. Mandatory minimum sentencing regimes, however, deprive judges of the discretion they need to fashion sentences tailored to the

imposed under mandatory minimums fell below the minimum sentence, typically because of prosecutor’s substantial assistance motions, fast-track reductions, and safety valve reductions).

¹⁵See Jeffrey L. Fisher, *When Discretion Leads to Distortion: Recognizing Pre-Arrest Sentence-Manipulation Claims under the Federal Sentencing Guidelines*, 94 MICH. L. REV. 2385 (1996).

¹⁶See USSC Special Report, *supra* note 1; USSC Fifteen Year Review, *supra* note 14, at 91, 135.

circumstances of the offense and the offender. And while judges are stripped of the discretion they need to do justice, at the same time, mandatory minimums often shift that discretion to prosecutors, who do not have the incentive, training or even the appropriate information to properly consider a defendant's mitigating circumstances at the initial charging stage of a case. To give prosecutors such unchecked authority dangerously disturbs the balance of power between the parties in an adversarial system, and deprives defendants of access to an impartial decision-maker in the all-important area of sentencing.

Prosecutors sometimes claim that mandatory minimums are necessary to induce defendants to cooperate with the investigation and prosecution of others. However, there does not appear to be a sound empirical basis for this claim, given that defendants cooperate in roughly equal numbers in cases where there are no applicable mandatory minimum sentences. Moreover, the ABA rejects the very premise that the inducement of cooperation is a legitimate aim of sentencing policy.

III. Opposition to Mandatory Minimums is Widespread

In addition to the organized bar's objections to mandatory minimum sentencing regimes, mandatory minimum sentencing is opposed by an unusually wide ideological array of thoughtful groups and individuals. The Judicial Conference of the United States has consistently opposed mandatory minimum sentences for almost 60 years.¹⁷ In 1990, the Judicial Conference approved

¹⁷See Statement of Honorable Julie E. Carnes (on behalf of the Judicial Conference) before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security, July 14, 2009, <http://judiciary.house.gov/hearings/pdf/Carnes090714.pdf> (reviewing Judicial Conference

a recommendation of the congressionally directed Federal Courts Study Committee urging 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.”¹⁸

In 1993, Chief Justice William Rehnquist criticized mandatory minimums as “perhaps a good example of the law of unintended consequences” and observed the politically unfortunate circumstances under which they are often enacted:

Mandatory minimums ... are frequently the result of floor amendments to demonstrate emphatically that legislators want to “get tough on crime.” Just as frequently they do not involve any careful consideration of the effect they might have on the Sentencing Guidelines, as a whole. Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the Sentencing Guidelines were intended to accomplish.¹⁹

opposition to mandatory minimums in 1953, 1962, 1965, 1967, 1971, 1976, 1981, 1990, 1991, 1993, 1994, 1995, 2006, and 2009).

¹⁸*Report of the Proceedings of the Judicial Conference of the United States*, March 13, 1990, published in USSC Special Report, *supra* note 1, at App. G.

¹⁹William H. Rehnquist, *Luncheon Address* (June 18, 1993), published in United States Sentencing Commission, *Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 286 (1993).

Judge William W. Wilkins Jr. also addressed mandatory minimums in 1993, and suggested in his capacity as Chair of the Sentencing Commission that the law should be changed so that the guidelines would “trump” the mandatory minimums.²⁰

Justice Stephen Breyer has spoken out against mandatory minimums, noting their fundamental inconsistency with the guidelines system:

[S]tatutory mandatory sentences prevent the Commission from carrying out its basic, congressionally mandated task: the development, in part through research, of a rational, coherent set of punishments. ... Every system, after all, needs some kind of escape valve for unusual cases. ... For this reason, the Guideline system is a stronger, more effective sentencing system in practice. ... In sum, Congress, in simultaneously requiring Guideline sentencing and mandatory minimum sentencing, is riding two different horses. And those horses, in terms of coherence, fairness, and effectiveness, are traveling in opposite directions. [In my view, Congress should] abolish mandatory minimums altogether.²¹

Many others have noted the defects of mandatory minimums, including the Federal Judicial Center,²² Sen. Orrin Hatch,²³ the Constitution Project’s Sentencing Initiative,²⁴ the U.S.

²⁰See Paul J. Hofer, *the Possibilities for Limited Legislative Reform of Mandatory Minimum Penalties*, 6 FED. SENT. REP. 2, at 63 (September 1993). This proposal was endorsed by the Judicial Conference. JCUS-SEP 93, p.46.

²¹Speech of Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited* (Nov. 18, 1998), *reprinted at* 11 FED. SENT. REP. 180, 184-85 (1999); *see also Harris v. United States*, 536 U.S. 545, 570-71 (2002)(Breyer, J., concurring in part and concurring in the judgment).

²²Barbara S. Vincent & Paul J. Hofer, *The Consequences of Mandatory Prison Terms*, Federal Judicial Center (1994)(“evidence has accumulated indicating that the federal mandatory

Conference of Mayors,²⁵ the RAND Corporation,²⁶ a panel of the National Academy of Sciences,²⁷ Families Against Mandatory Minimums,²⁸ and numerous judges²⁹ and academics.³⁰

minimum sentencing statutes have not been effective for achieving the goals of the criminal justice system”).

²³Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993).

²⁴The Constitution Project Sentencing Initiative, *Principles for the Design and Reform of Sentencing Systems* (June 7, 2005).

²⁵U.S. Conference of Mayors, *Resolution Opposing Mandatory Minimum Sentences* 47-48 (June 2006).

²⁶RAND Corporation Drug Policy Research Center, *Mandatory Minimum Drug Sentencing: Throwing Away the Key or the Taxpayers' Money* (1997)(concluding that mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing cocaine consumption or drug-related crime).

²⁷See Albert J. Reiss, Jr., & Jeffrey A. Roth, eds., *Understanding and Preventing Violence* 6 (1993)(finding that even tripling the length of punishment would result in only negligible reductions in crime).

²⁸Families Against Mandatory Minimums, FAMMGRAM, *The Case Against Mandatory Minimums* (Winter 2005), available at <http://famm.org/Repository/Primer/Final.pdf>.

²⁹*See, e.g., United States v. Powell*, 404 F.3d 678 (2d Cir. 2005); *United States v. Hiveley*, 61 F.3d 1358, 1363 (8th Cir. 1995)(Bright, J., concurring); *United States v. Abbott*, 30 F.3d 71 (7th Cir. 1994); *United States v. Madkour*, 930 F.2d 234, 236, 239-40 (2d Cir. 1991); *United States v. Vasquez*, 2010 WL 1257359 (E.D. N.Y. Mar. 30, 2010); *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006); *United States v. Redondo-Lemos*, 754 F. Supp. 1401 (D Ariz. 1990); John S. Martin, Jr., Editorial, *Let Judges Do Their Jobs*, N.Y. TIMES, June 24, 2003, at A31 (resigning from the bench because “[w]hile I might have stayed on despite the inadequate pay, I no longer want to be a part of our unjust criminal justice system”); Statement of Senior Judge Vincent L. Broderick (on behalf of the Judicial Conference Committee on Criminal Law) before the House Judiciary Subcommittee on Crime and Criminal Justice, July 28, 1993 (“I firmly believe that any reasonable person who exposes himself or herself to this [mandatory minimum] system of sentencing, whether judge or politician, would come to the conclusion that such sentencing must be abandoned in favor of a system based on principles of fairness and proportionality.”).

³⁰*See, e.g., Rachel E. Barkow, Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentences*, 152 U. PENN. L. REV. 33 (2003); David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J. L. & ECON. 591 (2005); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211 (2004); Paul G. Cassell, *Too Severe?: A*

Public support for mandatory minimum sentencing has also waned significantly in recent years.³¹ Indeed, mandatory minimums are so patently irrational as a sentencing policy that virtually no one lauds them after the day of their enactment.³²

IV. Conclusion

Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums), 56 STAN. L. REV. 1017 (2004); William W. Schwarzer, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405 (1992); Henry Scott Wallace, *Mandatory Minimums and the Betrayal of Sentencing Reform*, 30 FED. B. NEWS & J. 158 (1993).

³¹See Julian Roberts, *Public Opinion and Mandatory Sentencing*, CRIM. JUST. & BEHAVIOR, 30 (4), 483 (2003)(only one-third of those polled favored mandatory minimums); Peter D. Hart Research Associates, *Changing Public Attitudes toward the Criminal Justice System* (2002)(majority of those polled favored elimination of “three strikes” mandatory sentences); Eagleton Institute of Politics Center for Public Interest Polling, *New Jersey’s Opinions on Alternatives to Mandatory Minimum Sentencing* (2004)(more than three-quarters of those polled would support allowing judges to set aside mandatory sentences “if another sentence would be more appropriate”); Quinnipiac College Polling Institute for the New York Law Journal, *69% of New Yorkers Polled Favor Sentencing Discretion over State-Mandated Sentences* (1999).

³²But See Jay Apperson, *The Lock-‘em Up Debate: What Prosecutors Know: Mandatory Minimums Work*, WASH. POST, Feb. 27, 1994 at C1.

There is no question that criminals must be punished and that prison serves legitimate retributive and incapacitative purposes, but punishments must be 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 counterproductive, and many of our mandatory minimums approach the cruel and unusual level as compared to other countries as well as our own past practices.³³ On behalf of the American Bar Association, we urge the Commission to continue its unwavering opposition to mandatory minimums and to report the many and serious flaws of such statutes to Congress.

In closing, we appreciate the Commission's consideration of the ABA's perspective on these important issues and are happy to provide any additional information that the Commission might find helpful. Thank you for the opportunity to address you this morning.

³³See Statement of the Honorable Patricia M. Wald (former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit and Judge of the International Criminal Tribunal for the Former Yugoslavia) before the Inter-American Commission on Human Rights, Washington, D.C., March 3, 2006 (“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 did not come near to those imposed in my own country for dealing in a few bags of illegal drugs”).