

Testimony of

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to the

**Pennsylvania Senate Judiciary Committee**

on

**Mandatory-Minimum Sentences**

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Mr. Chairman and Representatives:

I am Alfred Blumstein, a chaired university Professor emeritus at the Heinz College of Carnegie Mellon University and someone who has followed issues and policy debates in criminal justice for the 50 years since I was recruited to lead the Task Force on Science and Technology for Lyndon Johnson's President's Commission on Law Enforcement and Administration of Justice. Gov. Dick Thornburgh appointed me as the first chair of the Pennsylvania Commission on Crime and Delinquency, a position I held from 1979 to 1990. I also served for six years as a member of the Pennsylvania Sentencing Commission. More recently, I served from 2010 to 2014 as chair of the Science Advisory Board for the Office of Justice Programs of the US Department of Justice. I have done extensive research on many aspects of the criminal justice system, have chaired three panels of the National Academy of Sciences, including one on sentencing research, and am proud to have been awarded the Stockholm Prize in Criminology in 2007, the second year after its establishment.

### **1) Some Recent History**

I was quite pleased when I learned that the Supreme Court had found constitutional flaws in Pennsylvania's various mandatory-minimum sentencing laws because I had always viewed mandatory-minimum sentencing laws as an anomaly in the efficient and effective operation of the criminal justice system. They showed up mostly in the early 1980s when the public became concerned about the growing problem of drug abuse and called on the political system to "do something" about it. In truth, there wasn't very much they really **could do** about it.

But "tough on crime" has always been a favorite political response, at least in large part because the public responds quite positively to any such proposal. It is too easy to conclude that locking up a criminal is effective in two ways: 1) it **incapacitates** the identified offender by taking him off the street so that he can't do any more of his crimes; 2) sending the message of punishment and visibly carrying it out is intended to **deter** others who might consider doing similarly. But there are important subtleties in both of these approaches that complicate this logic and that typically don't get addressed in the clamor of "doing something".

During the high demand for response from the political system during this period we saw a wide variety of tough political responses. Perhaps most notable of those were the passage in many state legislatures of mandatory-minimum sentencing laws. They were particularly targeted at drug offenses because the criminal justice system at that time was not focused seriously at a responsibility for controlling drug abuse, so when someone was convicted of a drug offense the response too often would have been probation. Thus, the understandable political response was to enforce some kind of incarceration, at least to show that they were "doing something". That typically started at perhaps two years, that didn't do much good as drug abuse continued to spread, it could be upped to three years, still not much good, perhaps five years, and the drug war rolled on without very much success.

The problem in achieving success gets back to one of the subtleties of deterrence and incapacitation. When one locks up a rapist, that is likely to take his rapes off the street and perhaps also sending a message to other potential rapists of the risks in doing so. On the other hand, when dealing with a market crime like selling drugs, as long as the demand persists, the market can recruit a replacement, thus nullifying any incapacitation effect associated with the original offender. Similarly, as long as there is a large enough pool of potential replacements, undeterred sellers will be found. One would anticipate that as more sellers are incarcerated, the users will have to pay a higher price for the drug product, but drug prices have not only failed to rise but have been declining fairly steadily since the drug war started.

## **2) The Growth of Incarceration**

This tough on crime approach largely started with drugs but soon propagated to a wide variety of other crimes, and that political contagion gave rise to the mass incarceration we have all seen. I did a paper with Jacqueline Cohen and Harold Miller that was published in 1980 on the demographic effects associated with the aging of the baby boomers into the high crime ages. We projected Pennsylvania's growth in crime and in prison population. The paper was based on data from the policy-stable 1970s. We projected that crime would peak in 1980, and indeed it

did. We also projected that prison populations would rise from 8,000 in 1980 to a peak of about 12,000 in 1995 and then come down. I might note that the prison population in Pennsylvania has been hovering around 50,000 for the last several years, although I understand it dropped modestly to about 48,700 most recently. The problem with our projection was that we only looked at predictable demographic changes and couldn't forecast the rather dramatic "tough on crime" policy changes that took place in the 1980s and 1990s.

Those changes took place across the country and so grew the US incarceration rate from about 100 per 100,000 population in 1980 to a current level of about 500 per 100,000 population, a quintupling of the incarceration rate. The states collectively have been impressively stable since about 2000, well before the 2008 recession that bit into state budgets. This was a sharp contrast to the impressive stability of the nation's incarceration rate of about 110 for the previous 50 years from 1925 to 1975. This was a period when prison populations were the product of decisions within the criminal justice system. As prisons got more crowded, release on parole became somewhat easier; as more space became available, there would be room for pornographers or other marginal criminals. That was followed by a much more political period, when policies could only move in the "tough on crime" direction.

Allen Beck and I did a paper for a panel the National Academy of Sciences convened to study the growth of incarceration. In that paper, we showed that the growth was attributable not to growth in crime, not to better policing as reflected in arrests per crime, but virtually all to increases in commitments to prison per arrest and in time served. The initial growth was about 2:1 in commitments until about 1993, and after that about 2:1 in time served. The "mandatory" part of the sentences contributed initially to the growth in commitments and the increases in the "minimums" to the growth in the time served.

As we look at the highly polarized political environment around the nation today, we see only one issue on which both the left and the right agree: reduce prison populations. This agreement runs from the Right on Crime movement and the Koch-brothers on the right to the ACLU on the left, with impressively few dissenters. As a result, we have seen many states reduce or repeal their mandatory-minimum sentencing laws, reduce felonies to misdemeanors, and increase

community-based treatment. The movement most often has focused on reconsidering drug laws, as people have increasingly come to recognize the failure of incarceration as a primary weapon against drug abuse. The recognition has grown as typified by the widespread legalization of medical marijuana and the growing number of states that have approved recreational marijuana. We are even seeing some places proposing rehabilitation clinics to which addicts can enroll voluntarily.

### **3) Locus of Sentencing Decisions**

When one thinks about the structure of the criminal justice system, and specifically the locus of a sentencing decision, the obvious decision-maker is the judge. One of the important consequences of the legislature establishing constraints on the judge's sentencing decision through mandatory minimum laws is the diminution of the choices the judge can make. Inevitably, what is taken from the judge reverts to the prosecutor, who becomes the key player in the plea bargaining process that accounts for 95% of case dispositions. The natural explanation for the primary role of the judge is that he or she is presumably a neutral disinterested party who is charged with the responsibility of carrying out the law, treating the convicted offender fairly, with due concern for public safety. It is for that reason that elected judges have to answer to the public only every 10 years, and then only on a yes-no basis.

On the other hand, prosecutors cannot be seen as truly neutral parties. They have to run for reelection every four years, and if they can appeal to the public's taste for being "tough on crime", that is likely to help their chances for reelection. An important role of the prosecutor in dealing with defendants and their lawyers is in the plea bargain negotiation. Obviously, the stronger threat they can pose to a defendant, the more likely they will emerge with a guilty plea - even in the limited number of cases where the defendant was indeed innocent. It certainly is reasonable to expect that prosecutors armed with strong mandatory-minimum sentencing legislation will be more successful in their plea negotiation, will have defendants more willing to plead guilty to a more serious charge, thereby increasing prison populations.

One of the major approaches used by the large number of states that have been working to reduce prison populations has thus been repeal of mandatory-minimum laws. Those repeals are seen both as encouraging probation where appropriate or shorter sentences and also as restoring the sentencing decision to the hands of the judge.

### **5) Sentencing Guidelines**

One of the important mechanisms Pennsylvania has to facilitate appropriate sentencing is the Pennsylvania Commission on Sentencing, established in 1978, the second such commission in the nation. The commission is comprised of a cross-section of key criminal justice players, including judges, prosecutors, and criminal defense attorneys. That commission collects information on sentences imposed in individual cases and uses that information to establish and modify guidelines suggesting appropriate sentences based on the specifics of the offense and the prior record of the convicted offender. This provides information to each judge of the sentencing norms for each defendant that takes into account features of his or her criminal background. A judge can deviate from those proposed guidelines, but is required to provide the reasons based on the specifics of the case to warrant a large deviation. As the Commission sees a growth of deviations, that provides a basis for reconsidering the proposed guidelines.

The Sentencing Commission is also considering use of a risk-assessment instrument to provide information to the judge on the risk to public safety attributable to a particular defendant. The development of such a risk assessment instrument would initially be based on details of the offender's criminal background. It could eventually account for other features of the defendant's life situation, such as marital status, employment status, and other factors that could be indicative of risk to the community. Similar instruments have been developed across the country for use in deciding on pretrial status, thereby avoiding the anomaly of not-yet-convicted individuals spending pretrial time in jail because they can't afford even a small bond and costing the counties considerable expense.

The guidelines provide information to the judge based on a broad range of experience, and that could eventually include information from a risk assessment instrument. It thereby strengthens

the capability of the judge to reach a sentencing decision that fully accounts for the specifics of the crime, the defendant, and public safety. Again, this provides a much more appropriate opportunity for the judge to deliver the specific most appropriate sentence in each individual case, a process that is so much more fitting than being bound by a broad-reaching mandatory-minimum sentence established by the legislature that binds all judges in the Commonwealth.

#### 6) Conclusions and Recommendations

It is very clear throughout the nation and in Pennsylvania in particular that prison sentences have been cranked up excessively over the past 30 years, generating prison populations much larger than appropriate and so less effective in ensuring public safety. At the estimated cost of about \$41,000 per prisoner year, Pennsylvania's prisoners represent a cost of over \$2 billion.

As has been shown in many other states, many of the individuals currently in prison and likely to be sent to prison under current rules could be much more effectively treated in the community at much lower cost. Since criminal activity is so often associated with drug abuse, this warrants significant investment in addiction-treatment centers.

Mandatory-minimum sentencing laws provide inappropriate distortion and constraints in the sentencing process that should be the primary responsibility of the judge. The judge can gain considerable benefit in reaching an appropriate sentence by taking account of the sentencing guidelines, and perhaps augmented by tested risk assessment instruments.

In view of the more appropriate use of judge-based sentencing, I would recommend that the Senate not enact any new mandatory-minimum laws and consider repealing the large majority of those still on the books, and especially so for those that relate to drug offenses.