Testimony of the Office of the Public Defender,
State of Hawaii to the House Committee on Judiciary

January 25, 2013

H.B. NO. 248: RELATING TO OFFENSES AGAINST VULNERABLE PERSONS

Chair Rhoads and Members of the Committee:

We oppose H.B. No. 248 which seeks to expand the extended term sentencing law to specified offenses against a pregnant woman and also impose mandatory minimum terms of imprisonment for offenses against a pregnant woman. The bill provides that if a person, in the course of committing murder, manslaughter, felony sexual assault and other specified offenses or an attempt to commit those offenses, inflicts serious or substantial bodily injury upon a woman who is pregnant, the person would be subject to an extended term of imprisonment. Mandatory minimum terms are prescribed for felonies committed against a pregnant woman when the same types of injuries are caused. The woman's pregnancy must be known or reasonably should have been known to the defendant.

We have due process concerns with respect to when a defendant will be imputed with knowledge of a woman's pregnancy. The assumption is that, most often, a violent act against a pregnant woman will occur in the domestic setting. When will a defendant be assumed to have had reasonable knowledge of the woman's pregnancy? What if there is a history of fabrication between the partners about pregnancy? What if a recent discovery of pregnancy is hidden from the defendant? So many different scenarios can arise in a volatile domestic relationship which can cast doubt on the knowledge of a defendant.

Even more uncertainty can arise with respect to strangers involved in an altercation. When will a defendant be deemed to have reasonably known about the pregnancy status of a woman? If the woman is on the heavier side, will the authorities assume he had reasonable knowledge of her pregnancy?

Due to modern day fears of miscarriage and other factors affecting pregnancy, many women do not disclose their pregnancy until very late in their term. Medical records currently are shrouded in confidentiality under state and federal privacy laws. Quite often, a woman's pregnancy will not be apparent merely by her appearance. Under these circumstances, a defendant should not be subject to an extended term of imprisonment. Currently, under HRS § 706-606(1), the court must consider, in the imposition of sentence, "[t]he nature and circumstances of the offense and the history and characteristics of the defendant." Thus, the law now requires the court to take into account the fact that an offense was committed against a pregnant woman. No court takes such a circumstance likely. The present laws provide for adequate sentences when the courts are presented with such cases.

Thank you for the opportunity to comment on this bill.

AMERICAN CIVIL LIBERTIES UNION of HAWAI'I

Committee:	Committee on Judiciary
Hearing Date/Time:	Friday, January 25, 2013, 2:00 p.m.
Place:	Conference Room 325
Re:	*Testimony of the ACLU of Hawaii in Opposition to H.B. 248, Relating to Offenses Against Vulnerable Persons*

Dear Chair Rhoads and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in opposition to H.B. 248, Relating to Offenses Against Vulnerable Persons, which seeks enhanced sentences for crimes against pregnant women.

The ACLU of Hawaii is opposed to enhanced sentencing for crimes against persons whose pregnancy status "should be known." This is an extraordinarily subjective standard because it is not easily determined when a defendant should "reasonably" have known about a pregnancy. This language is particularly troubling because of the time delay between the date of the crime and trial: for example, a woman who was three months pregnant at the time of the assault may be eight or nine months pregnant at the time of trial – leading jury members to believe that the defendant should have known of the pregnancy (even though, at the time of the crime, the defendant might have had no reason to know of that pregnancy).

The ACLU of Hawaii also believes that greater resources for survivors of domestic violence – including greater resources to legal services and domestic violence organizations (such as the Domestic Violence Action Center, the Legal Aid Society of Hawaii, and the Hawaii State Coalition Against Domestic Violence) – and more effective investigation, enforcement, and prosecution of violations of temporary restraining orders early in the cycle of abuse (including greater resources to police and prosecutors for this purpose) are more effective at deterring domestic violence than extended sentences.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

The American Civil Liberties Union of Hawaii ("ACLU") has been the state's guardian of liberty for 47 years, working daily in the courts, legislatures and communities to defend and preserve the individual rights and liberties equally guaranteed to all by the Constitutions and laws of the United States and Hawaii. The ACLU works to ensure that the government does not violate our constitutional rights, including, but not limited to, freedom of speech, association and

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assembly, freedom of the press, freedom of religion, fair and equal treatment, and privacy. The ACLU network of volunteers and staff works throughout the islands to defend these rights, often advocating on behalf of minority groups that are the target of government discrimination. If the rights of society's most vulnerable members are denied, everyone's rights are imperiled.

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House Committee on Judiciary
Chair Karl Rhoads and Vice-Chair Sharon E, Har

Friday, January 25, 2013, 2:00 p.m. Conference Room 325

TESTIMONY
Jean Aoki, Legislative Committee Member, League of Women Voters of Hawaii

Chair Rhoads, Vice-Chair Har and Committee Members:

The League of Women Voters of Hawaii opposes the intent of HB248, Relating to Offenses Against Vulnerable Persons, which would impose a mandatory minimum term of imprisonment for certain crimes against victims who are pregnant. This approach which would join a list of crimes which are already subject to mandatory minimum terms.

The League is opposed to the imposition of mandatory minimum sentences by the Legislature as an intrusion on the responsibility of the courts to treat each defendant fairly, based on all of the facts of the case, the criminal history of the defendant and the circumstances surrounding the case.

One-size-fits-all sentencing policies are too inflexible to always lead to fair decisions in sentencing. The judge who is most familiar with each case should be the one to determine the appropriate sentence. If the defendant or the prosecution feels that the sentence is not appropriate, they have the right to appeal to a higher court. That is our system of justice.

Courts are accountable to the laws and the constitutions of our individual states and the Federal constitution. Courts best serve the public — all members of the public — by applying the laws fairly and protecting the rights of everyone. I, personally, wouldn't want it any other way. Whether I'm innocent or guilty of a crime or civil wrong, I want every protection for a fair verdict that the law affords me, and if found guilty, a fair sentence, not some draconian mandated sentence that leaves me frustrated and resentful.

We frequently read stories of attempts by legislative bodies of different states and cities, and yes, even Congress, to strip the courts of some of their jurisdiction and their independence because the courts stand in the way of their desire to enact laws that reflect their ideologies or their own sense of what is right and wrong.

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Laws can be changed and the constitutions amended, and the courts would have to apply those laws and the constitutional provisions as amended in the adjudication of cases before them.

Having said that, the Judiciary is a co-equal branch of government, sharing the responsibilities, the powers, and the obligations of keeping a check on the other two branches, the legislative and the executive. To maintain the proper balance among the three co-equal branches of government, each branch must respect the jurisdiction of the other two while exerting the appropriate checks on them.

An example of the negative results of the imposition of mandatory minimum sentencing is the harsh sentencing in drug cases that has resulted in swelling prison populations of young minority men. In an August 10, 2003 article in the San Francisco Chronicle staff writer Bob Egelko wrote, "U.S. Supreme Court Justice Anthony Kennedy, in a striking departure from his court's and the Bush administration's hard line on crime, criticized the nation's imprisonment policies Saturday and called for the repeal of mandatory-minimum sentences for federal crimes.

"Our resources are being misspent. Our punishments are too severe. Our sentences are too long," Kennedy said in a speech at the American Bar Association convention in San Francisco. According to the article, at that time, 2.1 million people were behind bars in the United States. About 1 in 143 Americans are incarcerated compared with 1 in 1000 in many European countries. "About 10% of African American men are behind bars," said Justice Kennedy.

In his speech, Kennedy said he agrees with the need for federal sentencing guidelines – established by federal law in 1984 to make sentences more uniform-- but believes they are too severe and should be shortened. "In contrast to the guidelines which allow judges some flexibility, mandatory minimums are virtually ironclad. I can accept neither the wisdom, the justice, nor the necessity of mandatory minimums,'Kennedy said. 'In all too many cases, they are unjust.'"

The League of Women Voters believes in judicial independence for the Judiciary and the judges and justices. Federal judges are given lifetime tenures so that they can made the decisions they think necessary even when some of those decisions may not be supported by the President of the United States, or the Congress, or even the majority of the people. Congress can change the laws or begin the

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process of amending the U.S. Constitution, if in its collective wisdom it feels that any decision is detrimental to the welfare of the people or of the United States.

We say yes to general sentencing guide lines, but no to mandatory minimum sentences. Let the judges be judges, not just clerks doing what the legislative branches decide for them.

Thank you for this opportunity to address HB 248.

Planned Parenthood® of Hawaii
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January 24, 2013

Comments on HB 248

To: Chair Karl Rhoads, Vice Chair Sharon Har and Members of the House Committee on Judiciary
From: Katie Reardon Polidoro, Director of Government Relations & Public Affairs
Re: Comments on HB 248, Relating to Offenses Against Vulnerable Persons

Planned Parenthood of Hawaii wishes to offer comments on HB 248. Specifically, we comment on subsection (c)1, which includes an exemption for "social and health care providers who administer emergency contraceptive pills;…." While we appreciate that the drafter's intention was to preserve access to safe and legal abortion, we believe the language regarding Emergency Contraception (EC) perpetuates misinformation about sexual and reproductive health care.

EC is a high dose of hormonal contraceptives that can be used to prevent pregnancy after unprotected sex. EC is not the abortion pill, nor does it terminate pregnancy. Most commonly, it is sold under the commercial names Plan B, Next Step, and ella. Plan B and Next Step are available over the counter to individuals age 17 and older.

According to medical authorities, such as the American College of Obstetrics and Gynecology and the National Institutes on Health, a pregnancy occurs when a fertilized egg implants itself on the uterine lining. EC works to prevent pregnancy primarily by preventing ovulation, so that an egg is not present to be fertilized. It also inhibits sperm's ability to fertilize the egg if ovulation has already occurred. EC may potentially prevent a fertilized egg from implanting on the uterine lining, however more recent studies show that EC does not function in that way.[1] Once a fertilized egg is implanted on the uterine lining, EC is ineffective. A social or health care provider would not administer EC to a pregnant patient.

There does exist a means of medication abortion, sometimes referred to as the "abortion pill." According to the National Abortion Federation, a combination of the drugs Mifepristone and Misoprostol, may be used to terminate an existing pregnancy.[2] A woman and her health care provider might choose medication abortion over a surgical option depending upon her unique circumstances. Medication abortion is provided under the care of a physician in a clinical setting and should not be confused with EC.

We believe that lawmakers should be dedicated to using legally and medically accurate language when legislating issues that effect health care. Women are done a large disservice when accurate information about their health care is disregarded. Therefore we encourage the Committee to replace the language in section (c)1 with medically accurate language.

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[1] US Department of Health and Human Services, Office on Women's Health, *Emergency Contraception Fact Sheet*, http://womenshealth.gov/publications/our-publications/fact-sheet/emergency-contraception.cfm .
[2] National Abortion Federation, *What is Medication Abortion? Fact Sheet*, http://www.prochoice.org/about_abortion/facts/medical_abortion.html

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January 24, 2013

Comments on HB 248, Relating to Offenses Against Vulnerable Persons

To: Representative Karl Rhoads, Chair
Representative Sharon E. Har, Vice-Chair
Members of the House Committee on Judiciary

From: Cathy Betts, Executive Director, Hawai'i State Commission on the Status of Women

Re: Comments, HB 248, Relating to Offenses Against Vulnerable Persons

On behalf of the Hawai'i State Commission on the Status of Women, I would like to provide comments on HB 248. Specifically, subsection c (1), which provides an exemption for social and health care providers who administer emergency contraception medication. For clarification purposes, emergency contraception is a safe and legal method to *prevent* pregnancy by preventing a woman's ovaries from releasing eggs—the process of ovulation. Pregnancy does not and cannot occur without an egg. Emergency contraception is not effective on individuals who are already pregnant because fertilization has already occurred. Further, a social or health care provider would not administer emergency contraception to an individual who was already pregnant.

Finally, it seems misleading to mention emergency contraception in the draft language of HB 248, a bill that is focused on harm to pregnant women. Thank you for this opportunity to clarify some very important information regarding women's health.

Sincerely,

Cathy Betts
Executive Director
Hawai'i State Commission on the Status of Women

hscadv

HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE

To:	HOUSE OF REPRESENTATIVES COMMITTEE ON JUDICIARY
From:	Veronika Geronimo, Executive Director Hawaii State Coalition Against Domestic Violence
Hearing Date and Time:	January 25, 2013, 2:00 pm
Place:	Conference Room 325
RE:	HB248 - COMMENTS

Dear Chair Rhoads and Members of the Committee on Judiciary:

The Hawaii State Coalition Against Domestic Violence wishes to offer comments on HB248, which adds the acts of killing or inflicting serious or substantial bodily injury upon a pregnant woman in the course of committing or attempting to commit a felony, to the offenses for which a person is subject to an extended or mandatory minimum term of imprisonment.

While the bill recognizes that women face an increased risk of domestic violence when pregnant and that the worst abuse tends to coincide with pregnancy, we are concerned that HB248 may be interpreted to apply to a woman's behavior during her pregnancy (such as smoking, drinking or using drugs). This unintended consequence of the bill will only marginalize domestic violence victims and make it harder to come forward and report the abuse.

Thank you for your consideration.

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COMMITTEE ON JUDICIARY
Rep. Karl Rhoads, Chair
Rep. Sharon Har, Vice Chair
Friday, January 25, 2013
2:00 p.m.
Room 325

OPPOSITION TO MANDATORY MINIMUM SENTENCING IN HB 248

Aloha Chair Rhoads, Vice Chair Har and Members of the Committee!

My name is Kat Brady and I am the Coordinator of Community Alliance on Prisons, a community initiative promoting smart justice policies for more than a decade. This testimony is respectfully offered on behalf of the 5,800 Hawai`i individuals living behind bars, always mindful that approximately 1,500 individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HB 248 adds the acts of killing or inflicting serious or substantial bodily injury upon a pregnant woman in the course of committing or attempting to commit a felony, to the offenses for which a person is subject to an extended or mandatory minimum term of imprisonment.

Although Community Alliance on Prisons abhors violent crime, we oppose this measure based on the fact that Hawai`i already has many statutes in place to address violent crime. We also find that it cannot be easily determined when a defendant should *reasonably* have known about a pregnancy. We, therefore, believe the standard is unreasonable .

Mandatory minimum laws are being challenged across the nation in red and blue states. In fact, Senator Leahy, Chair of the U.S. Senate Judiciary Committee, is addressing mandatory minimum sentencing in his committee. In a January 16, 2013 article[1] in the Legal Times he said, "*The reliance on mandatory minimum sentences has been "a great mistake," Leahy said. "Let judges act as judges and make up their own mind what should be done. The idea we protect society by one size fits all…it just does not work in the real world."*"

Mandatory minimum sentencing laws eliminate judicial discretion. These laws are problematic because they tie the courts' hands and mandate longer prison sentences, regardless of whether the Court believes the punishment is appropriate, based on the facts of the case. Repealing mandatory minimum sentences would restore judicial discretion and further the cause of justice.

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[1] http://legaltimes.typepad.com/blt/2013/01/leahy-says-immigration-reform-top-priority-for-senate-judiciary-committee.html

Prosecutorial discretion is essentially conducted behind closed doors, whereas that of a sentencing judge is conducted in an open courtroom. Thus, by shifting the locus of the use of discretion, mandatory sentencing not only fails to eliminate the use of discretion, but also subjects it to less public scrutiny.

There are numerous studies, data and research on the subject of mandatory minimum sentencing – here is a sampling of a few, including the recent guidelines passed by the U.S. Sentencing Commission:

FAMILIES AGAINSTMANDATORYMINIMUMS Poll[2]

- More than three-quarters of Americans feel that the court is the best qualified to determine sentences for crimes (78%).
- Both Democrats and Republicans feel that Courts, not Congress, should decide sentencing (81% vs. 78% respectively).

A Blue-Ribbon Indictment[3]
New York Times Editorial

"A 645-page report from the United States Sentencing Commission found that federal mandatory minimum sentences are often "excessively severe," not "narrowly tailored to apply only to those offenders who warrant such punishment," and not "applied consistently.""

MANDATORYMINIMUMSENTENCES:
EXEMPLIFYING THE LAW OF UNINTENDED CONSEQUENCES
CHRISTOPHERMASCHARKA, J.D.
Florida State University College of Law

"There has long been a plethora of experts declaring opposition to mandatory minimums. The Sentencing Commission, the Judicial Conference of the United States, the Federal Courts Study Commission, the Federal Judicial Center, the ABA, and an overwhelming majority of judges oppose mandatory minimums.(331)[4]

Even three current Supreme Court Justices have publicly spoken out against these penalties.(332)[5]

Even among prosecutors, who are currently empowered with wide discretion under mandatory minimums, only half viewed these provisions in a favorable light.(333)[6]

Additionally, some argue that certain areas of governmental policy should not be overly guided by public opinion.(334)[7]

Public attitudes on risk can be highly skewed from reality. Justice Breyer has compellingly contended

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[2] FAMM Poll Fielded July 31 – August 3 , 2008, Margin of error = ±3.1% in 95 out of 100 cases

[3] NY Times Editorial, Published: November 13, 2011, http://www.nytimes.com/2011/11/14/opinion/a-blue-ribbon-indictment.html?_r=1&partner=rssnyt&emc=rss

[4] (331) See Beale, supra note 77, at 27; cf. Breyer supra note 40, at 184 ("The Commission, from the beginning, has strongly opposed mandatory minimums.").

[5] (332) See Breyer, supra note 40, at 184. Chief Justice Rehnquist, Justice Kennedy, and Justice Breyer have all publicly spoken out against mandatory minimums. See Id.

[6] (333) See Schulhofer, supra note 63, at 216-17 (noting that not all prosecutors disfavored them solely on the harshness of the sentence).

[7] (334) For a comprehensive accounting of the public's opinions regarding crime and punishment, see Francis T. Cullen et al., Public Opinion About Punishment and Corrections, 27 CRIME & JUST. 1 (2000), which summarizes numerous public opinion studies on crime and punishment.

that in certain fields, cognitive errors create a public perception on risk so fundamentally flawed it should not be the basis for public policy.(335)[8]

Crime, and the resulting criminal justice decisions, are an area fueling highly emotional, and arguably irrational, public reactions. Considering that policy determinations affect the liberty interests of defendants, basing criminal justice policy on empirical research seems favorable to public-driven and politically motivated measures.(336)[9]

In sum, mandatory minimum sentencing does not eliminate sentencing disparities; instead it **shifts decision-making authority from judges to prosecutors, who operate without accountability.** Mandatory sentencing does not deter crime.

Hawai`i's Penal Code has enough penalties for violent crimes and we respectfully ask that the committee review the research (and we can supply much more) and rely on our existing statutes to address the crimes in this measure.

Community Alliance on Prisons, therefore, respectfully asks the committee to hold this measure.

Mahalo for this opportunity to testify.

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[8] (335) See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 59-81 (1993) (arguing primarily in the context of environmental risk); see also Beale, supra note 77, at 65 (paraphrasing Justice Breyer's sentiments on the issue). But see Beale, supra note 77, at 65 n.157 (stating that some would consider Justice Breyer's opinions "elitist").

[9] (336) See Cullen et al., supra note 334, at 3. The authors expressed the following concern: One immediate concern is whether public opinion should be the arbiter of sentencing and correctional policies. Public sentiments on policy issues must be accorded some weight in a democratic society, but justifying policies on the basis of what citizens want confronts a dismaying reality: much of the public— in the United States and elsewhere—is ignorant about many aspects of crime and its control.

Id. However, there are those who believe that the appropriate source of criminal justice policy lies with our elected politicians. Relegating criminal justice decisions to experts may raise complaints that it is undemocratic and elitist. See Beale, supra note 77, at 65 n.157. It may also be argued that in a democracy—given certain constitutional limitations—a society has a "moral right to punish" in accordance with the values and opinions of the law abiding majority. E.g., Ronald J., Rychlak, Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment, 65 TUL. L. REV. 299, 337-38 (1990).