



**Statement of The Sentencing
Project**

**To the Senate Judiciary
Committee, Subcommittee on
The Constitution, Civil Rights
and Human Rights**

**Hearing on “The State of Civil
and Human Rights in the United
States”**

December 9, 2014

Members of the Subcommittee on the Constitution, Civil Rights, and Human Rights:

I am Marc Mauer, Executive Director of The Sentencing Project, an organization which has long been engaged in research and advocacy on federal sentencing policy, felony disenfranchisement, and racial disparities in the criminal justice system. I am submitting this statement on behalf of The Sentencing Project for inclusion in the record of the Subcommittee’s hearing on “The State of Civil and Human Rights in the United States.”

We commend the Subcommittee for continuing its examination of these important issues. In this written testimony, I seek to highlight the unsustainable rise in mass incarceration, the policies and practices that contribute to excessive imprisonment, associated racial disparities throughout the criminal justice system, and the deeply problematic policy of felony disenfranchisement. I urge the members of this Committee and the Congress as a whole to take action to address these problems.

MASS INCARCERATION IN THE UNITED STATES

The United States maintains the world’s largest criminal justice system.

Approximately seven million individuals are under some form of correctional control, including 2.2 million incarcerated in prisons or jails.¹ The U.S. incarcerates its people at a rate five to eight times that of the world’s other liberal democracies.²

In the past three decades, the number of federal prisoners has grown at a breathtaking rate of nearly 800%.³ Even more so than in state prisons, this growth has largely been caused by the War on Drugs. In 1980, about 4,700 individuals were incarcerated in federal prisons for a drug offense.⁴ By 2011, the number had grown to 94,600—a 20-fold increase in 30 years.⁵ In the past two decades, the number of

¹ U.S. Bureau of Justice Statistics, *Correctional Populations in the United States*, 2012.

² See International Centre for Prison Studies, *World Prison Brief*.

³ See The Sentencing Project, *Trends in U.S. Corrections*, 2014 (citing Bureau of Justice Statistics Prisoners Series).

⁴ *Id.*

⁵ *Id.*

annual drug trafficking cases has increased 79%, from 13,721 cases in 1992 to 24,563 cases in 2012.⁶ Today half of federal prisoners are incarcerated for a drug offense.⁷

Racial disparity pervades the U.S. criminal justice system. People of color are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to receive longer sentences.

African-American males are six times as likely to be incarcerated as white males and Latino males are 2.5 times as likely. If current trends continue, one of every three black American males born today can expect to go to prison in his lifetime, as can one of every six Latino males—compared to one of every seventeen white males.⁸

Racial and ethnic disparities among women are less substantial than among men but remain prevalent.

At the federal level, the heavy proportion of drug offenders has contributed to significant racial and ethnic disparities. In 2012, 74.4% of persons sentenced for federal drug trafficking offenses were either black (26.5%) or Hispanic (47.9%).⁹ For cases involving powder cocaine, crack cocaine, or heroin, more than 80% of offenders were black or Hispanic.¹⁰

The source of such disparities is deeper and more systemic than explicit racial discrimination. The U.S. in effect operates two distinct criminal justice systems: one for wealthy people and another for poor people and minorities. The former provides a vigorous adversarial system replete with constitutional protections for defendants. Yet the experiences of poor and minority defendants within the criminal justice system often differ substantially from that model due to the influence of policy and practice decisionmaking, allocation of resources, implicit bias, and other factors.

⁶ See USSC Webcast: Analysis of Drug Trafficking Offenders and Guidelines (available at: <http://www.ussc.gov/videos/webcast-analysis-drug-trafficking-offenders-and-guidelines>).

⁷ See The Sentencing Project, Trends in U.S. Corrections, 2014.

⁸ Id.

⁹ U. S. Sentencing Commission, 2013 Sourcebook of Federal Sentencing Statistics (available at: <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2013/sourcebook-2013>).

¹⁰ Id.

THE IMPACT OF MANDATORY MINIMUM PENALTIES IN FEDERAL SENTENCING

In 2011, the United States Sentencing Commission released an exemplary report to Congress, *Mandatory Minimum Penalties in the Federal Criminal Justice System*, which provides a comprehensive assessment of the impact of mandatory minimum penalties on federal sentencing. The Commission's analysis revealed that mandatory minimum penalties have contributed significantly to the overall federal prison population.

As Judge Patti Saris, chair of the U.S. Sentencing Commission, wrote to the Senate Judiciary Committee last year, "the bipartisan seven-member Commission unanimously agrees that [federal] mandatory minimum sentences in their current form have led to unintended results." Federal minimum penalties have not improved public safety but have exacerbated existing racial disparities within the criminal justice system.

Federal Mandatory Minimums Have Not Improved Public Safety

To date, there is virtually no data that demonstrates a direct link between federal mandatory penalties in particular and a decline in crime. Further, a broad range of research suggests that it is quite unlikely that these penalties would have such an impact.

In examining the effect of federal mandatory penalties, the key data problem is that the federal court system handles only a small fraction, less than 10%, of all criminal cases. Therefore, attempting to draw any conclusions about the specific impact of federal mandatory penalties on crime rates is fraught with imprecision. To state that the adoption of such penalties by Congress in the 1980s was directly responsible for reductions in a wide variety of crimes that are generally prosecuted in state courts requires a great leap of faith that is not supported by the evidence.

We can see this most clearly in the realm of drug offenses, the category in which federal mandatory penalties most often apply. Since drug offenses are widely prosecuted in both state and federal courts, a potential offender has no means of knowing in which court system he or she would be likely to be prosecuted (assuming, of course, that the offender is even thinking about the prospects of apprehension).

Therefore, it is virtually impossible to break out any uniquely federal impact of mandatory sentencing. Even aside from this problem, measuring the impact of harsh sentencing policies on crime rates is a complex undertaking. While it is the case that crime rates have generally been declining since the early 1990s and that this has taken place at a time when the prison population was rising, this does not necessarily suggest that there is a clear and unambiguous relationship between these two factors. Just prior to the beginnings of the crime decline, in the period 1984-1991, incarceration rates increased substantially and yet crime rates increased as well.

While incarceration has some impact on crime, this effect is generally more modest than many believe. In its comprehensive 2014 report, *The Growth of Incarceration in the United States*, the National Research Council concluded that "...studies support the conclusion that the growth in incarceration rates reduced crime, but the magnitude of the reduction remains highly uncertain and the evidence suggests it was unlikely to have been large."¹¹ While there is little relevant data on the overall impact of federal mandatory penalties, there is nonetheless a broad range of evidence which suggests that it is unlikely that mandatory penalties for drug offenses have a significant impact on enhancing public safety. This is the case for several reasons:

- *Deterrence is primarily a function of the certainty, not severity, of punishment.* To the extent that sentencing policies may deter individuals from engaging in crime, the research literature generally shows that increases in the certainty of punishment are much more likely to produce an effect than enhancements to the severity of punishment, particularly when punishments in American courts are already severe. Merely extending the amount of punishment that will be imposed, when most offenders don't believe they will be apprehended, does little to add to any deterrent effect. In this regard, mandatory penalties increase severity, but have no direct impact on increasing certainty, and are therefore not likely to provide any significant additional deterrent effects.
- *Mandatory penalties are particularly ineffective in addressing drug crimes.* Drug offenses are particularly immune to being affected by more and longer prison terms. This is largely due to the "replacement" nature of these offenses, the fact that there is a

¹¹ National Research Council, *The Growth of Incarceration in the United States*, 2014.

virtually endless supply of potential offenders in the drug trade. Since the vast majority of incarcerated drug offenders are from the lower and middle ranks of the drug trade, their imprisonment in effect creates a “job opportunity” for someone else seeking to earn some quick money. As long as there is a demand for illegal drugs, there will be a large pool of potential sellers.

- *Mandatory penalties may adversely affect recidivism.* Whatever one may think about the wisdom of mandatory sentencing, it is undeniable that such penalties serve to increase the length of time that offenders serve in prison by restricting the discretion of judges, corrections, and parole officials. By doing so, these policies may have a criminogenic effect. A 2002 review conducted by leading Canadian criminologists concluded that longer periods in prison were “associated with a small increase in recidivism” and that “the results appear to give some credence to the prison as ‘schools of crime’ perspective.”¹²
- *Federal mandatory penalties increase the challenges for successful reentry.* While not a problem exclusive to mandatory sentencing, the combination of expanded federal prosecution of drug offenses along with the lengthier prison terms produced by mandatory penalties exacerbates the challenges of reentry. This is due to the fact that since federal prisoners can be housed anywhere in the country, many are in prisons far from their homes and are also serving long prison terms. This combination of circumstances contributes to eroding ties to family and community, the critical ingredients of successful reentry.

Mandatory Minimums Exacerbate Racial Disparity

In addition to the counterproductive effects of mandatory sentencing on public safety, mandatory minimum penalties also serve to exacerbate racial disparities within the criminal justice system. A combination of circumstances virtually ensures that this will be an inevitable outcome of such penalties.

We have seen for some time that racial disparities are produced in federal case processing. As far back as 1991, the U.S. Sentencing Commission documented that,

¹² Paula Smith, Claire Goggin, and Paul Gendreau, “The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences,” Solicitor General of Canada, 2002.

“The disparate application of mandatory minimum sentences in cases in which available data strongly suggest that a mandatory minimum is applicable appears to be related to the race of the defendant, where whites are more likely than non-whites to be sentenced below the applicable mandatory minimum.” In its 2011 report on mandatory minimum penalties, the Commission found that of federal drug offenders convicted of an offense carrying a mandatory minimum penalty, 18.4% of white defendants were subject to a mandatory minimum penalty at sentencing, compared to 40.4% of black defendants and 39.6% of Hispanic defendants.¹³

Why, though, would mandatory penalties uniquely produce such disproportionate racial and ethnic effects? Several factors are key in understanding these dynamics. First, and most critical, is the fact that mandatory penalties in the federal system have most often been applied to the prosecution of drug offenses. As a wealth of documentation has shown, the drug war has had extremely disproportionate effects on African American communities in particular. This is not initially a function of sentencing policy, but rather law enforcement priorities; ultimately, this results in the application of harsh penalties to a population that is not necessarily representative of all persons who have violated the applicable laws. Blacks are no more likely to use or sell drugs than whites, and yet they have a significantly higher rate of arrests. African Americans encompass 14 percent of regular drug users but are 37 percent of those who are arrested for drug crimes. There is no more obvious example of this than the figure of African Americans constituting at least 80% of those being charged with federal crack cocaine offenses over a 20-year period, a finding that contributed to the adoption of the Fair Sentencing Act by Congress in 2010.

A second, and somewhat more subtle, effect of mandatory penalties is that many such policies provide increasingly harsh punishments to offenders based on prior convictions. This produces a disproportionate racial impact because defendants of color are more likely to have a prior record than are white defendants. Some people would argue that this is due to greater involvement in crime, while others would contend that this results from disproportionate processing by the criminal justice

¹³ U.S. Sentencing Commission, Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System, 2011.

system. But regardless of one's perspective, it is undeniable that this will be the case. Therefore, it is virtually inevitable that minority defendants will experience these penalties disproportionately.

FELONY DISENFRANCHISEMENT

The United States is the most restrictive nation in the industrialized world in denying the right to vote to citizens convicted of crimes. A remarkable 5.85 million Americans are prohibited from voting because of a current or past felony conviction.¹⁴

Felony disenfranchisement policies vary widely by state.¹⁵ Two states, Maine and Vermont, place no restrictions on voting, including for persons currently incarcerated in state prisons. The other 48 states and the District of Columbia deny the right to vote while incarcerated for a felony; 35 of these states disenfranchise persons on probation and/or parole as well; and in 12 states some or all individuals convicted of a felony lose the right to vote even after completing all conditions of their sentence. Incarcerated persons represent only about a quarter of the total disenfranchised population. The other 75 percent of disenfranchised citizens live in their communities, either under probation or parole supervision or having completed their sentence. This includes an estimated 2.6 million people, or 45 percent of the total disenfranchised population, who are disenfranchised in states that restrict voting rights even after completion of sentence.¹⁶

Rights restoration practices vary widely across states and are subject to the turns of political climate and leadership, which has led some states to vacillate between reform and regression.¹⁷ In Florida, the clemency board voted in 2007 to automatically restore voting rights for many persons with non-violent felony

¹⁴ Uggen, C., Shannon, S., & Manza, J., The Sentencing Project, State-level estimates of felon disenfranchisement in the United States, 2010 (available at: http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disenfranchisement_10.pdf).

¹⁵ See The Sentencing Project, Felony Disenfranchisement: A Primer (available at: http://www.sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf).

¹⁶ *Id.*

¹⁷ *Id.*

convictions. As a result, more than 100,000 people regained the right to vote. But with a new governor taking office in 2011, this decision was reversed and individuals must now wait at least five years after completing their sentence to apply for rights restoration. Similarly, in Iowa, then-Governor Vilsack issued an executive order in 2005 automatically restoring the voting rights of all persons who had completed their sentences, but this order was rescinded in 2011 by Governor Branstad.

Felony disenfranchisement policies have a disproportionate impact on communities of color. Black Americans of voting age are four times as likely to lose their voting rights than the rest of the adult population, with one of every 13 black adults disenfranchised nationally.¹⁸ In three states – Florida (23 percent), Kentucky (22 percent), and Virginia (20 percent) – more than one in five black adults is disenfranchised. In total, 2.2 million African Americans are banned from voting.¹⁹

Public opinion surveys report that eight in ten U.S. residents support voting rights for citizens who have completed their sentence, and nearly two-thirds support voting rights for those on probation or parole.²⁰ In recent years, heightened public awareness of felony disenfranchisement has resulted in successful state-level reform efforts, from legislative changes expanding voting rights to grassroots voter registration initiatives targeting individuals with felony convictions. Since 1997, 23 states have modified felony disenfranchisement provisions to expand voter eligibility. Among these:

- Eight states either repealed or amended lifetime disenfranchisement laws.
- Two states expanded voting rights to persons on probation or parole.
- Ten states eased the restoration process for persons seeking to have their right to vote restored after the completion of their sentence.
- Three states improved data and information sharing. As a result of successful reform efforts from 1997 to 2010, an estimated 800,000 citizens have regained the right to vote.

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

Although reform efforts have been substantial in recent years, the overall disenfranchisement rate has increased dramatically in conjunction with the growing U.S. prison population, rising from 1.17 million in 1976 to 5.85 million by 2010.

Restoring the vote to persons leaving prison can aid in their transition back into community life. The revocation of voting rights compounds the isolation of formerly incarcerated individuals from their communities. Civic participation has been linked with lower recidivism rates. In one study, among individuals who had been arrested previously, 27% of nonvoters were rearrested, compared with 12% of voters.²¹

Although the limitations of the data available preclude proof of direct causation, the authors state that it is clear that “voting appears to be part of a package of pro-social behavior that is linked to desistance from crime.”

The dramatic growth of the U.S. prison population in the last 40 years has led to record levels of disenfranchisement. Denying the right to vote to an entire class of citizens is deeply problematic to a democratic society and counterproductive to effective reentry. Fortunately, many states are reconsidering their archaic disenfranchisement policies, but there is still much work to be done.

CONCLUSION

Recent events in Ferguson, Missouri and in New York City have heightened awareness about our criminal justice system and highlight the need for a broad national examination of the policies and practices that contribute to excessive incarceration and racial disparities. For communities of color, confrontations with law enforcement are far too common. Excessive police encounters erode trust and cooperation, contribute to the over-representation of people of color in prisons and jails, and lead to the disproportionate rate of fatal police encounters among unarmed African American men. We can only hope that these tragedies will lead to a constructive response that brings national attention, and ultimately reform, to the problems of race and our criminal justice system.

²¹ Id.