

**Disparate Impact of Federal Mandatory Minimums  
on Minority Communities in the United States**

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## **Introduction**

Families Against Mandatory Minimums (FAMM) is a nonprofit, nonpartisan organization dedicated to research, advocacy, and education of the public regarding the excessive social costs of mandatory minimum sentencing in the United States. FAMM does not oppose imprisonment, but urges that punishment be proportionate to the offense and the culpability of the offender. FAMM opposes sentencing systems that rely on mandatory minimum statutes and mandatory sentencing rules. Such systems result in unduly harsh punishment while masking unwarranted sentencing disparities, including racial disparity.

FAMM conducts research, promotes advocacy, manages a litigation project that identifies important cases and assists prisoners in securing pro bono counsel, and works to reform harsh sentencing laws in Congress, state legislatures, and before sentencing commissions. Founded in 1991, today FAMM has 30 chapters and 35,000 members throughout the United States.

The National Council of La Raza (NCLR) – the largest national Hispanic<sup>1</sup> civil rights and advocacy organization in the United States – works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations (CBOs), NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. The organization is headquartered in Washington, DC and serves all Hispanic subgroups in all regions of the country.

In 2000, NCLR adopted a new priority issue area of criminal and juvenile justice with the purpose of shedding light on the disproportionate representation of Latinos in the justice system. Expansion into this field emerged out of NCLR’s civil rights portfolio and brought to the surface the need to educate and mobilize the Latino community specifically around criminal and juvenile justice issues. NCLR has developed a multi-pronged strategy that involves all levels of government – federal, state, and local – and provides opportunities for Latino CBOs to engage in advocacy, public education, and capacity-building critical to improving the justice system in the United States.

Research has shown that certain policies and procedures in the criminal and juvenile justice systems have a disparate impact on the African American and Latino communities in the United States. Mandatory minimums systematically and disproportionately affect minority groups in this country.

## **Mandatory Minimums: An Overview**

The United States Congress adopted the Sentencing Reform Act of 1984<sup>2</sup> (SRA), which established the United States Sentencing Commission and charged it with the task of creating guidelines for judges to use when imposing sentences on defendants convicted of federal crimes. The SRA was motivated by concerns about unbridled judicial discretion and its contribution to

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<sup>1</sup> The terms “Latino” and “Hispanic” are used interchangeably to refer collectively to Mexicans, Puerto Ricans, Cubans, Central and South Americans, and others of Spanish and Latin American descent. Hispanics can be of any race.

<sup>2</sup> Pub. L. No. 98-473, 98 Stat. 1837 (1984).

what appeared to be unwarranted sentencing disparities. Congress members thought that guidelines would channel judicial discretion, eliminate unwarranted disparity, encourage uniformity, and correct undue leniency and harshness. The guidelines are a calibrated, factor-sensitive means of locating a sentence based on the crime, offense, and offender characteristics and criminal history. Built into the system was an escape valve – departure authority – by which a judge could credit circumstances or characteristics not adequately accounted for in the guidelines.

While the Commission was drafting the federal Sentencing Guidelines, Congress responded to some high-profile criminal cases by passing a set of drug and gun crime statutes containing mandatory minimum penalties. Mandatory minimums were heralded by some as the best way to ensure that crime would be prevented, wrongdoers would be incapacitated, criminals would be induced to assist the government, and the most culpable would not escape appropriate punishment by virtue of the judge or prosecutor they happened to draw. For example, in the Anti-Drug Abuse Act of 1986,<sup>3</sup> drug kingpins were to receive sentences of at least ten years for first offenses and 20 years for second offenses. In 1988, Congress extended mandatory minimum penalties to reach conspirators as well as principals, ensuring that minimum penalties would apply with equal force to peripheral players.<sup>4</sup>

The mandatory minimum penalties differ from the guidelines in that they take a charge-centered approach to sentencing. That is, conviction of a given charge will result in a predetermined and, for the most part, inescapable sentence. While the guidelines (either in their former mandatory or current advisory state) permit judges certain latitude to individualize sentences in appropriate circumstances, mandatory minimums do not. This rigidity is cause for a great deal of criticism.<sup>5</sup>

### **Mandatory Minimums and Racial Disparity**

Some criticism of mandatory minimums comes from their observed relationship to racial disparity in sentencing. As early as 1991, in its groundbreaking report, *Mandatory Minimum Penalties in the Federal Criminal Justice System*<sup>6</sup> (*Mandatory Minimum Report*), the Sentencing Commission concluded that some of “[t]he disparate application of mandatory minimum sentences . . . 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.”<sup>7</sup> The report showed that:

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<sup>3</sup> Pub. L. No. 99-570, 100 Stat. 3207 (1986).

<sup>4</sup> Pub. L. No. 100-690, § 6470(a), 102 Stat. 4377 (1988).

<sup>5</sup> See, e.g., American Bar Association, Report of the ABA Justice Kennedy Commission (June 23, 2004) Judicial Conference of the United States Resolution, contained in *Report and Proceedings of the Judicial Conference of the United States*, March 13, 1990, reprinted in U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991) App. G; see also, resolutions of the 12 circuit courts of appeals reprinted in *Mandatory Minimum Report*, App. G; Federal Judicial Center, *The Consequences of Mandatory Prison Terms* (1994); Leadership Conference on Civil Rights, *Justice on Trial* (2000).

<sup>6</sup> The report was commissioned by Congress in Pub. L. No. 101-647, § 1703, 104 Stat. 4846.

<sup>7</sup> *Mandatory Minimum Report*, ii.

- Defendants involved in cocaine and cocaine-related offenses were more frequently charged and convicted under mandatory minimum statutes than were their marijuana and methamphetamine defendant counterparts.<sup>8</sup>
- 67.7% of Black and 57.1% of Hispanic defendants received sentences at or above the mandatory minimum compared with 54% of White defendants.<sup>9</sup>
- A greater proportion of Hispanic and a lesser proportion of Whites were initially indicted at the mandatory minimum level, and Whites were more likely to plead guilty and avoid conviction at the mandatory threshold.<sup>10</sup>
- Downward departures from mandatory minimum sentences (available to defendants who provide “substantial assistance” to the government in the investigation or prosecution of others) were most frequently granted to Whites and least frequently to Hispanics.<sup>11</sup>

The Federal Judicial Center published a report showing that, in 1990, Blacks (21%) and Hispanics (28%) were more likely than Whites to receive a mandatory minimum penalty for offenses that were punished by such penalties.<sup>12</sup> Subsequent reports on the design and impact of the cocaine penalties demonstrated how one mandatory minimum sentencing structure leads to racially disparate outcomes. The Sentencing Commission published reports in 1995, 1997, and 2002 demonstrating that the severe penalties for crack cocaine possession and possession with intent to distribute were unwarranted in light of the fact that crack cocaine is, in most significant respects, indistinguishable from powder cocaine.<sup>13</sup> Despite the lack of any meaningful difference between the two forms of the drug, crack defendants are subject to the same five- and ten-year mandatory minimum sentences reserved for powder cocaine defendants, even though it takes 100 times more powder cocaine to trigger the minimums.

In its most recent report, the Sentencing Commission found that:

[T]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are Black; about 85 percent in 2000 . . . This has contributed to a widely held perception that the current penalty structure promotes unwarranted disparity based on race . . . [T]o the extent that the 100-1 drug quantity ratio is shown to result in unduly severe penalties for most crack cocaine offenders, the impact of that severity falls primarily upon Black offenders.<sup>14</sup>

The mandatory minimum sentencing structures contribute to striking disparity and harsh results for defendants of color.

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<sup>8</sup> *Id.*, 69 The majority of crack cocaine defendants are Black while the majority of powder cocaine defendants are Hispanic, *infra* page 3.

<sup>9</sup> *Id.*, 76.

<sup>10</sup> *Id.*, 81-82.

<sup>11</sup> *Id.*, 82.

<sup>12</sup> Meierhoefer, Barbara S., *The General Effect of Mandatory Minimum Prison Terms* (Federal Judicial Center, 1992), 20.

<sup>13</sup> See U.S. Sentencing Commission, (USSC), *1995 Special Report to Congress: Cocaine and Federal Sentencing Policy* (February 1995); USSC, *1997 Special Report to Congress: Cocaine and Federal Sentencing Policy* (April 1997); USSC, *2002 Report to Congress, Cocaine and Federal Sentencing Policy* (May 2002).

<sup>14</sup> USSC, *2002 Cocaine Report*, viii.

- The 2000 Census shows that Latinos make up 12.5% of the population in the United States, yet according to the Sentencing Commission's own data, Hispanics accounted for 43.4% of the total drug offenders in 2000; of those, 50.8% were convicted for possession or trafficking of powder cocaine, and 9% for crack cocaine. This is a significant increase from the 1992 figures that show that 39.8% of Hispanic drug offenders were convicted for possession or trafficking of powder cocaine, and 5.3% for crack cocaine (Figure 27).<sup>15</sup> Contrary to popular belief, the fact that Latinos and other racial and ethnic minorities are disproportionately disadvantaged by sentencing policies is not because minorities commit more drug crimes, or use drugs at a higher rate, than Whites. According to federal health statistics, drug use rates per capita among minorities and White Americans are remarkably similar.<sup>16</sup>
- In 2002, the average length of imprisonment was 119 months for crack cocaine, compared to 78 months for powder cocaine, 94 months for methamphetamine, and 38 months for heroin.<sup>17</sup> The gap between sentences for Black and White drug defendants is wide; Blacks serve an average of 92.1 months compared to 57.9 months for Whites.
- As of 2003, Hispanics constituted 69% of all defendants convicted of powder cocaine offenses compared to 17.3% White defendants.<sup>18</sup> The majority of defendants convicted of powder cocaine offenses receive mandatory minimum sentences; 32.5% are sentenced to the five-year mandatory minimum and 43.5% the ten-year mandatory minimum sentence.<sup>19</sup>
- As of 2003, Blacks constituted 80.8% of all defendants convicted of crack cocaine offenses compared to 7.8% White defendants.<sup>20</sup> The majority of defendants convicted of crack cocaine offenses receive the mandatory five- (28.9%) and ten-year (47.5%) mandatory minimum sentences.<sup>21</sup>
- In recent years, it has been popular for legislatures to provide specifically-defined mandatory minimum sentences for drug offenses. For example, during 1999, U.S. attorneys prosecuted 84% of the persons referred to them for drug offenses. Suspects involved with opiates and marijuana – many of whom were Hispanic – were among those most likely to be charged and sentenced. Suspects investigated solely for being part of a conspiracy (e.g., kingpins), on the other hand, were among those most likely to be declined for prosecutions.<sup>22</sup>

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<sup>15</sup> U.S. Sentencing Commission. *Cocaine and Federal Sentencing Policy*, Washington, DC (May 2000).

<sup>16</sup> Substance Abuse and Mental Health Service National Administration, *2000 National Household Survey on Drug Abuse*, Washington, DC: U.S. Department of Health and Human Services (2001).

<sup>17</sup> USSC, *Fifteen Year Study*, 131.

<sup>18</sup> USSC, *2003 Sourcebook of Federal Sentencing Statistics* (2003 Sourcebook), Table 34.

<sup>19</sup> *Id.*, Table 43.

<sup>20</sup> *Id.*, Table 34.

<sup>21</sup> USSC, *2003 Sourcebook of Federal Sentencing Statistics* (2003 Sourcebook), Table 43.

<sup>22</sup> U.S. Department of Justice, Bureau of Justice Statistics. (August 2001). *Federal drug offenders, 1999, with trends 1984-99*. Washington, DC.

## **Other Factors that Contribute to the Racial Disparities**

Other mandatory minimums, and particularly decisions about when to invoke them, continue to promote sentencing disparities based on race in the United States. For example, the statute penalizing use of a gun during a drug trafficking offense carries severe, consecutive mandatory minimum sentences.<sup>23</sup> The Sentencing Guidelines contain an “enhancement” for use of a firearm during a drug trafficking offense that is sometimes used in place of a charge under section 924(c), the gun statute, and which generally results in a much lower sentence. In 1995, 34% of defendants who qualified for the statutory consecutive sentence received it; 30% received the much smaller guideline enhancement, and 35% of gun-involved defendants received no enhancement whatsoever. “Notably, Blacks accounted for 48% of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56% of those who were charged under the statute and 64% of those convicted under it.”<sup>24</sup> Data from 2000 reflected similar, disproportionate results for Black defendants.<sup>25</sup>

Similarly, choices about charging under a mandatory minimum statute affect the racial composition of defendants sentenced for otherwise similar conduct. The decision not to seek a conviction under a mandatory minimum-bearing statute can promote proportionality in sentencing “because statutory penalties . . . often trump the otherwise applicable guideline range and prevent mitigating adjustments contained in the guidelines from being taken into account.”<sup>26</sup> The decision whether or not to charge conduct under a mandatory minimum-bearing statute is in the hands of the government. In 2002, 10% of federal defendants received a mandatory minimum sentence that was greater than the sentence they would have received under the Sentencing Guidelines. Hispanic defendants – 40% of all defendants – were 49% of those sentenced to mandatory minimum penalties that exceeded what would have been the guideline sentence.<sup>27</sup>

Once a mandatory minimum offense is charged, defendants have two ways to escape their operation; low-level, first-time, nonviolent, truthful drug defendants may qualify for the Safety Valve which directs the judge to use the Sentencing Guidelines without regard for the mandatory minimum sentence.<sup>28</sup> Otherwise, the defendant may be able to cooperate with the government in the investigation and/or prosecution of others and earn a “substantial assistance” motion to depart below the guidelines by the government.<sup>29</sup> Blacks have consistently received a lower rate of substantial assistance departures.<sup>30</sup> It is unclear why this occurs.

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<sup>23</sup> 18 U.S.C. § 924(c) Five years for possession, seven years for brandishing, ten years for discharging, and 25 years for second and subsequent offenses, all consecutive to the underlying drug offense and each other.

<sup>24</sup> USSC, *Fifteen Year Study*, 90.

<sup>25</sup> *Id.*, 91.

<sup>26</sup> USSC, *2002 Cocaine Report*, viii.

<sup>27</sup> *Id.* The Commission notes that more research needs to take place about the contribution of charging decisions on the disproportionate disadvantage to minority defendants.

<sup>28</sup> 18 U.S.C. § 353 (f).

<sup>29</sup> 18 U.S.C. § 3553 (e).

<sup>30</sup> USSC, *Fifteen Year Study*, 105.

## Conclusion

Federal sentencing laws in the United States impose heavy burdens on defendants of color. The impact of mandatory minimum sentencing, both directly by its operation and indirectly in its effect of trumping and driving up guideline sentences, has fallen heavily on minority communities. The percentage of minorities charged in federal court has grown since the imposition of the guidelines and crime bills of the 1980s. The proportion of Hispanic defendants has doubled. The majority of federal defendants prior to that time were White while today they are Black and Hispanic. While the difference in average sentences between Whites and minorities was relatively small before, it began to widen with the dawn of mandatory and guideline sentencing.<sup>31</sup> In the five most recent years, and controlling for legally relevant considerations, the Sentencing Commission reported that a typical Black drug defendant was 20% more likely, and a typical Hispanic drug defendant was 40% more likely, to be imprisoned than their White counterparts. Typical Black and Hispanic drug offenders received sentences 10% longer than Whites.<sup>32</sup>

The disparities cannot be solely ascribed, according to numerous studies, to racial discrimination by judges. Rather, it is believed that sentencing rules and practices, such as the crack cocaine penalties and charging decisions, result in a growing disparity in the sentencing of defendants of color.

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<sup>31</sup> *Id.*, xiv.

<sup>32</sup> *Id.*, xiv-xv.