



LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
U N D E R L A W

A nonprofit, nonpartisan legal organization formed at the request of President Kennedy in 1963

TESTIMONY OF

THE LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW

SUBMITTED TO:

U.S. SENATE JUDICIARY COMMITTEE

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**Testimony of the Lawyers' Committee for Civil Rights Under Law
Submitted by Kimberly Tignor, Interim Director of Public Policy**

**Before the U.S. Senate Judiciary Committee
Hearing on "S. 2123, Sentencing Reform and Corrections Act of 2015"**

October 19, 2015

I. Introduction

Chairman Grassley and all the members of the Senate Judiciary Committee, thank you for holding this critical hearing on the Sentencing Reform and Corrections Act of 2015. We appreciate this opportunity to express our support for this piece of legislation, encourage its speedy passage, and recommend further ways of improving the bill.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was established in 1963 as a nonpartisan, nonprofit organization at the behest of President John F. Kennedy. Our mission is to involve the private bar in providing legal services to address racial discrimination and to secure, through the rule of law, equal justice under law. For over 50 years, the Lawyers' Committee has advanced racial equality in areas such as educational opportunities, fair employment and business opportunities, community development, fair housing, voting rights, environmental justice, and criminal justice. With particular relevance to this hearing, the organization is committed to ending the over-criminalization and over-incarceration of individuals and communities of color.¹ Through this work, we have learned a great deal about the challenges confronting our nation as it continues to tackle issues of race and equality of opportunity for all.

The Lawyers' Committee supports the passage of the Sentencing Reform and Corrections Act of 2015. The Act is the most important piece of criminal justice legislation introduced since the Fair Sentencing Act of 2010. Passage of this bill would signal a turn away from the "tough on crime" policies that have been exacted with devastating consequences to American families and communities, that have been born largely by people and communities of color, and have undermined public safety.

II. Reversing Mass Incarceration is a Congressional Imperative

There is a growing consensus in the legal advocacy community that mass incarceration presents the greatest contemporary threat to civil and human rights in the United States. This

¹ The Lawyers' Committee recently launched the Criminal Justice Initiative with the release of the report, *Unequal Justice: Mobilizing the Private Bar to Fight Mass Incarceration*, which can be read here: <http://www.lawyerscommittee.org/admin/site/documents/files/0553.pdf>.

² National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and*

crisis encompasses more than the sheer number of individuals behind bars. Two-thirds of the 2.3 million people incarcerated in the United States are people of color, 60 percent of them are under the age of 40, and 93 percent are men. The seven-fold growth in incarceration over the past 40 years is almost exclusively concentrated among those with no college education.² The human toll of mass incarceration falls almost exclusively on the most disadvantaged communities.

III. Sentencing Reform

The single biggest contributor to mass incarceration in the last 40 years has been federal and state policymakers' decisions to increase the use and severity of prison sentences. For decades, the norm was a system of "indeterminate sentencing," premised on individualized assessment and wide judicial discretion. Waves of sentencing reform, however, started in the 1970s. Initial reforms were primarily aimed at making sentencing procedures fairer and more predictable, in an attempt to reduce racial and other unwarranted disparities. Later phases of reform aimed to make sentences for drug and violent crimes harsher and their imposition more certain; these later reforms included the introduction and proliferation of mandatory minimum sentencing and "three strikes" laws.

Through years of deliberate policy choices imposing harsher and lengthier sentences, Congress created one of the most punitive criminal legal systems in the world, with tremendous human, civil, public safety and economic costs. Federal prisons became the largest single prison system in the nation in 2002 and it retains that title today. At this writing, the Bureau of Prisons holds nearly 206,000 people. A disproportionate number of these are people of color: African Americans are represented at more than three times their share of the overall population, and Hispanics more than double their share. The increase in length of stay contributed to over half of the population increase from 1998 to 2010, and the increase in the time to be served by drug offenders alone accounts for one-third of total growth in the federal prison population.³

Drug crimes are a significant factor contributing to increased federal incarceration. According to the Bureau of Prisons, about half (100,549, or 49.7 percent) of all inmates in the federal system were convicted of a drug offense as of 2014, notwithstanding the significant variety of federal crimes punishable by a prison term.

a. Fair Sentencing Act Retroactivity

In 1986, Congress enacted harsh mandatory minimum penalties for crack cocaine which imposed excessive prison sentences for low-level crack cocaine offenders that far exceed penalties for offenses involving powder cocaine traffickers. The laws were passed without any hearings or debate and were largely the result of political usefulness and not based on scientific study or evidence-based policing practices. The five-year penalty for possessing five grams of

² National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press (2014) at 56-64.

³ Urban Institute, "Examining Growth in the Federal Prison Population, 1998-2010."

crack cocaine is the same for an offender selling 500 grams of powder cocaine. This created what became known as the 100:1 sentencing disparity between crack and powder cocaine.

The Fair Sentencing Act (FSA) was signed into law in August 2010, amending the quantity of crack cocaine needed to trigger the five- and 10-year mandatory minimum prison sentences to 28 grams and 280 grams, respectively. The bill received broad bipartisan support, passing unanimously in the Senate and by voice vote in the House. However, the bill as passed did not apply retroactively to the tens of thousands, most of whom were African American, serving sentences under the old laws.

Congress enacted the FSA because it believed that the sentences for crack cocaine were unjustifiably long and disproportionately impacted African-Americans. Lawmakers drew those conclusions from the lengthy prison terms imposed on and still being served by thousands of crack offenders. It would be a cruel injustice to change the law based on the hardships endured by those serving time only to then leave them behind. One federal court even found the racial disparities so blatant and severe as to constitute a violation of equal protection.⁴

The Sentencing Reform and Corrections Act provides Congress the opportunity to take a step to remedy this injustice by applying the Fair Sentencing Act retroactively. While the 18-to-one sentencing disparity between crack and powder cocaine would remain in place, applying the FSA retroactively is an important step toward reducing the impact of the racially discriminatory sentencing scheme.

b. Reforms to Mandatory Minimum Sentences

The Lawyers' Committee supports the reforms to mandatory minimum sentences included in the Sentencing Reform and Corrections Act as a first step toward reducing the impact of mandatory minimum sentences on the federal prisons population and its disproportionate racial composition.

The growth of the federal prison population and the racial disparities which are its most defining characteristic are attributable in part to the birth and spread of mandatory minimum sentencing. Mandatory minimum sentences operate by taking discretion away from judges, while at the same time placing greater emphasis on the original charging decision, granting prosecutors unjustified control over the range of sentences available to the judge and the potential to coerce guilty pleas from defendants.

Far from achieving their original goal of reducing the chance for bias in sentencing, mandatory minimum sentences have been applied unevenly to white and black defendants. Research has shown that mandatory minimums are applied to black defendants more frequently, black defendants are less likely to receive substantial assistance departures than white defendants, and white offenders also receive slightly larger sentence reductions for substantial

⁴ See *U.S. v. Blewett*, 719 F.3d 482 (2013) (“federal judicial perpetuation of the racially discriminatory mandatory minimum crack sentences for those defendants sentenced under the old crack sentencing law, as the government advocates, would violate the Equal Protection Clause”) (overturned on rehearing en banc).

assistance.⁵ Since the adoption of mandatory minimums, psychologists and social scientists have discovered that charging and sentencing decisions are particularly susceptible to implicit biases that skew those decisions against defendants of color regardless of the explicit attitudes of judges and prosecutors.⁶ Finally, greater enforcement of drug laws over the last four decades has also subjected blacks, more than whites, to mandatory minimum sentences, despite the fact that African Americans use and traffic drugs at equal or lower levels to their white counterparts.⁷

The Sentencing Reform and Corrections Act takes the first step toward tackling the institutionalized racial disparities which infect the federal criminal sentencing system. By reducing certain mandatory minimums for low-level and nonviolent federal offenders, the bill takes steps to minimize mandatory minimums' impact on these individuals.

IV. Corrections Reform

The Lawyers' Committee supports the Sentencing Reform and Corrections Act's establishment of a validated risk assessment tool, recidivism reduction programming and earned time credit. The most important societal purpose of imprisonment is rehabilitation, or ensuring that the person incarcerated does not return to their community and commit new crimes. To this important public safety end, prisons should be designed to address the underlying conditions which lead an individual to commit crime, a task not made easier by the fact that lengthy sentences and prison conditions in many federal facilities are anathema to rehabilitation. The bill's expectation that most, if not all, federal inmates benefit from recidivism reduction programming and productive activities will enable many more of those behind bars to make a successful reentry into our communities.

The bill's creation of a validated Risk Assessment System, which will ensure that every federal inmate receives the appropriate access to programming, productive activities, and substance abuse and mental health services, is a major component of this program's success. The Lawyers' Committee supports in particular the requirements that the Assessment System be validated and evidence-based, that it measure dynamic risk factors so as to enable all federal inmates to progress to lower risk levels, and the requirement that the Assessment system does not result in unwarranted disparities, including racial disparities.

This last requirement is necessary to ensure that racial disparities already existing in the federal prison system are not compounded by the use of a Risk Assessment System and good time credits. This provision should be read to include adjusting the Assessment System to

⁵ Fischman, Joshua and Max Schanzenbach, "Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums," 9, available [http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201212.pdf/\\$file/NSPI201212.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NSPI201212.pdf/$file/NSPI201212.pdf).

⁶ See, e.g., Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U. L. Rev. 795 (2012); Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 Notre Dame L. Rev. 1195, 1221 (2009).

⁷ National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington, DC: The National Academies Press (2014) at 3..

minimize disparities in the proportion of federal inmates classified at each risk level, and the proportion of each group able to progress to lower risk levels. For instance, to the extent that criminal history is taken into account in assessing an individual's risk level and appropriate programming and productive activities, the Assessment System should reflect the reality that individuals of color are arrested and convicted of drug crimes at higher rates than their white counterparts, despite using drugs at similar rates. Thus, criminal history based on arrest and conviction for drug crimes is not always an indicator of propensity to commit future crimes. Moreover, correctional officials' application of risk factors involving an inmate's propensity for crime, aggression, or violence may be tainted by implicit biases that falsely link people of color and those character traits.⁸ The Assessment System should compensate for, rather than incorporate, these existing racial disparities. This is imperative since an individual's liberty interest and ability to earn time credits is directly tied to his or her placement at lower risk levels.

V. Conclusion

The Lawyers' Committee for Civil Rights is committed to reversing mass incarceration nationwide, fighting to eliminate racial disparities throughout the system, and securing equal protection and due process for a more just criminal legal system. Mass incarceration is the natural result of criminal justice policies passed over the previous several decades. Time has proven these policies to have a severe disparate impact on the most disadvantaged living in our communities while being ineffective at ensuring public safety and exacting a real human and financial toll with incredibly harmful consequences. The Lawyers' Committee urges the Committee and Congress as a whole to pass the Sentencing Reform and Corrections Act as Congress as an important step towards reversing these trends.

⁸ See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. Personality & Soc. Psychol. 876 (2004). Lawyers' Committee notes that hearings regarding whether an inmate should receive a sentence reduction under the retroactivity provisions of the act may involve application of similar factors and thus cautions the Department of Justice to take measures to reduce the impact of implicit racial bias in such proceedings.