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Mandatory Minimum Prison Sentencing and Systemic Racism

Faizal R. Mirza

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Mandatory Minimum Prison Sentencing and Systemic Racism

Abstract

This article discusses the relationship between racist policing, the exercise of prosecutorial discretion, and the disproportionate imposition of mandatory prison sentences on Black-Canadians. It argues that the retention and expansion of mandatory prison sentences for serious offences will serve as a powerful means to perpetuate systemic racism in the criminal justice system. Reporting and applying surveys on systemic racism in the criminal justice system, the article sets out to demonstrate that mandatory prison sentences enhance the quasi-judicial role of prosecutors, providing Crown attorneys with greater leverage to convict a disproportionate number of Black persons. In addition, it argues that if mandatory prison sentences are retained and expanded, Black persons will confront intensified pressure to plead guilty to avoid lengthy pre-trial imprisonment and the prospect of extended prison time, if convicted.

Keywords

Mandatory sentences; Discrimination in criminal justice administration; Racism; Blacks--Social conditions; Canada

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MANDATORY MINIMUM PRISON SENTENCING AND SYSTEMIC RACISM[©]

BY FAIZAL R. MIRZA*

This article discusses the relationship between racist policing, the exercise of prosecutorial discretion, and the disproportionate imposition of mandatory prison sentences on Black-Canadians. It argues that the retention and expansion of mandatory prison sentences for serious offences will serve as a powerful means to perpetuate systemic racism in the criminal justice system. Reporting and applying surveys on systemic racism in the criminal justice system, the article sets out to demonstrate that mandatory prison sentences enhance the quasi-judicial role of prosecutors, providing Crown attorneys with greater leverage to convict a disproportionate number of Black persons. In addition, it argues that if mandatory prison sentences are retained and expanded, Black persons will confront intensified pressure to plead guilty to avoid lengthy pre-trial imprisonment and the prospect of extended prison time, if convicted.

Cet article examine la relation qui existe entre le racisme au sein des services policiers, l'exercice de la discrétion de la Couronne, et l'imposition disproportionnée des peines obligatoires aux Canadiens de race Noire. L'auteur suggère que le maintien et l'expansion des peines obligatoires pour les infractions graves pourrait servir d'outil puissant qui aurait pour effet de perpétuer le racisme systémique dans le système pénal. À l'aide de sondages au sujet du racisme systémique dans le système pénal, l'auteur tente de démontrer que les peines obligatoires augmentent le rôle quasi-judiciaire des procureurs en leur offrant une plus grande influence sur la déclaration de culpabilité d'un nombre disproportionné de gens Noirs. De plus, l'auteur maintient que si les peines obligatoires sont maintenues et développées, les gens de couleur seront contraints de plaider coupable afin d'éviter de longues périodes d'emprisonnement avant le procès et seront assujettis à la possibilité d'une peine plus longue s'ils sont déclarés coupables.

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There is a critical nexus between racist policing, the exercise of prosecutorial discretion, and the disproportionate imposition of mandatory prison sentences on Black-Canadians.¹ The retention and expansion of mandatory prison sentences will have a disproportionate negative impact on Black-Canadians because of the prevalence of racist policing and improper use of prosecutorial discretion.

This article proceeds in four Parts, commencing with an introduction to the relationship between mandatory prison sentences and systemic racism in the criminal justice system. Second, the prevalence and impact of the disproportionate targeting of persons of colour, particularly Black-Canadians, for criminal investigations will be examined. Third, the impact of mandatory prison sentences on the plea bargaining and bail processes will be discussed. Fourth, some other far-reaching ways that mandatory prison sentences promote racial inequity in the criminal justice system will be addressed.

I. INTRODUCTION

Mandatory minimum sentences were first proposed in Canada in 1908. In 1917, the first mandatory prison term pertaining to selling insurance without a licence was passed.² Currently, in Canada, there are twenty-nine offences in the *Criminal Code*³ that carry a mandatory minimum prison sentence. Mandatory prison sentences cover a spectrum of crimes including first- and second-degree murder, aggravated sexual assault, and drunk driving.⁴

Since 1995, the bulk of laws passed carrying a mandatory prison sentence have been offences committed with the use of a firearm. Over this same period there have been a large number of private members bills proposing to introduce mandatory prison sentences for a variety of offences.⁵ For instance, the “three strikes and you’re out” provision (originally adopted in California in 1994, requiring twenty-five years to life

¹ This article will refer to persons as “Black” and “White,” not to promote the concept of race or racial difference, but simply to note the adverse impact of racism on certain visible minority populations.

² N.M. Crutcher, “The Legislative History of Mandatory Minimum Penalties of Imprisonment in Canada” (2001) 39 Osgoode Hall L.J. 273.

³ *Criminal Code*, R.S.C. 1985, c. C-46.

⁴ *Ibid.* s. 235(1).

⁵ *Criminal Code*, *supra* note 3.

prison terms for defendants with convictions for two previous serious offences and any other felony) was recently endorsed by the Canadian Alliance Party as a useful crime-fighting measure.⁶ A three strikes bill has been introduced twice in Canada's Parliament: first in 1995, and again in 2000.⁷

Mandatory minimum prison sentences alter the criminal justice framework. They drain the control of the judiciary over punishing offenders and bestow quasi-judicial powers on police and prosecutors. This shift in powers contradicts the accepted understanding that in the criminal justice system the police, the Crown, and the judiciary assume distinct, albeit complementary roles. The police are responsible for investigating crimes, arresting, and charging persons suspected of breaching the law. The role of the Crown attorney is to prosecute the offenders. Finally, judges preside over trials and are responsible for imposing sentences.

When mandatory prison terms are integrated into the justice system, the gatekeeping role of the police assumes even greater power. Individuals investigated and charged by the police are confronted by two stark options: proceed to trial and, if found guilty, face mandatory prison time (in which the judge has no discretion to consider the circumstances of the offence and offender) or, upon agreement between defence counsel and the prosecutor, plead guilty to a lesser charge that carries a lighter sentence. Being charged with an offence with a mandatory sentence means that individuals, regardless of their culpability, may be placed into a situation in which pressure to assert their guilt is intensified.

Moreover, when plea bargains are invoked, the discretionary decisions made by the police and prosecution are hidden from public view. The trial process allows for the exposure and denunciation of improper decisions made by the police and the prosecution. When plea bargains replace trials, discretionary decisions become invisible and police and prosecutorial accountability is more difficult to achieve.

The reduction of checks and balances on police and prosecutorial discretion in the criminal justice system is detrimental to everyone. However, Black people who experience racist policing and the racist application of prosecutorial discretion are particularly vulnerable to the ills of low-visibility decision making. The high number of minority youth police shootings over the past few decades and the emergence of studies that demonstrate the tendency of the police to target members of visible

⁶ *Ibid.*

⁷ *Ibid.*

minorities for criminal investigations make evident the problem of racial profiling by the police. This problem threatens the liberty and safety of persons of colour, especially Black-Canadians.⁸ Racial inequity in the exercise of prosecutorial powers endangers the freedom and rights of Black people. However, the impact of racial profiling and the poor use of prosecutorial discretion are even more severe under mandatory prison sentencing laws: Black people who are unfairly and disproportionately targeted for criminal investigations will likely succumb to more guilty pleas, stiffer penalties, and higher incarceration rates.

II. RACISM IN POLICING

This Part argues that the police enforce the law in a discriminatory manner against Black people. Since Black people are more likely to be arrested and charged with an offence, they are subject to a disproportionate risk of criminal liability for offences carrying mandatory prison sentences. Police officers have the discretionary authority to decide which vehicles and pedestrians they will stop and question and which they will let pass by undisturbed. Several criminal justice scholars note that the exercise of police discretion is an optimal example of low-visibility decision making in criminal justice, with the potential to deteriorate into discrimination.⁹

The *Stephen Lewis Report on Race Relations in Ontario* documented the existence of strong anti-Black sentiments in Southern Ontario and the overall impact of racism on the Black community. It provides pertinent background information regarding the prevalence of anti-Black racism in Ontario:

First what we are dealing with at root, and fundamentally, is anti-Black racism. While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Black people who are being shot, it is Black youth who are unemployed in excessive numbers, it is Black students who are being inappropriately streamed in

⁸ Commission on Systemic Racism in the Ontario Criminal Justice System, *Attorney-General's Files, Prosecutions and Coroners' Inquests Arising out of Police Shootings in Ontario* by H. Glasbeck (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1993).

⁹ See J. Senna & L. Segal, *Introduction to Criminal Justice*, 7th ed. (St. Paul: West, 1996). See also J. Skolnick, *Justice Without Trial: Law Enforcement in a Democratic Society* (New York: John Wiley and Sons, 1966).

schools...it is Black employees, professional and non professional, on whom the doors of upward equity slam shut.¹⁰

Widespread racism in Ontario and its adverse impact on persons of colour, especially Black people, has been judicially noted in *R. v. Parks*¹¹ and *R. v. Wilson*.¹² In *Parks*, Mr. Justice Doherty concluded that "our institutions, including the criminal justice system, reflect and perpetuate negative stereotypes. These elements combine to infect our society as a whole with the evil of racism. Black people are among the primary victims of that evil."¹³

In *R. v. RDS*,¹⁴ the Supreme Court of Canada took judicial notice of the specific tendency of police officers to mistreat Black people. Specifically, in *RDS*, the trial judge used her knowledge of the tendency of police officers to overreact when dealing with minorities to determine that a police officer had overreacted when dealing with a Black youth. Mister Justices La Forest and Gonthier and Madame Justices L'Heureux-Dubé and McLachlin maintained that awareness of the context within which a case occurred is consistent with the highest tradition of judicial impartiality. Madame Justices L'Heureux-Dubé and McLachlin also noted that a reasonable person must be taken to possess knowledge of the local population and its racial dynamics. Such knowledge includes a history of widespread and systemic discrimination against Black people, and high profile clashes between the police and the Black-Canadian population in the community.¹⁵

Evidence in Nova Scotia and Ontario indicates that there is a perception, especially amongst Black people, that Black people are

¹⁰ Ontario, *Stephen Lewis Report on Race Relations in Ontario* (Toronto: Government of Ontario, 1992) at 2.

¹¹ (1993), 84 C.C.C. (3d) 353 (Ont. C.A.) [hereinafter *Parks*].

¹² (1996), 47 C.R. (4th) 61 at 68, 70 (Ont. C.A.) [hereinafter *Wilson*]. The Ontario Court of Appeal extended the opportunity for defence counsel to screen jurors for prejudice towards Black people in courts throughout Ontario. See also *Parks*, *ibid.* According to Chief Justice McMurtry, any distinction based on a geographic boundary between Metro Toronto and other Ontario communities would be arbitrary and should not become a judicial exercise of discretion. Further, he held that, given the impact of the media, and the fact that racism also occurs in areas where there is little interaction between Black people and White people, it was unrealistic and illogical to assume that anti-Black attitudes stop at the borders of Metropolitan Toronto.

¹³ *Supra* note 11 at 371-72.

¹⁴ [1997] 3 S.C.R. 484 [hereinafter *RDS*].

¹⁵ *Ibid.* (per Madame Justices L'Heureux-Dubé and McLachlin).

discriminated against by the police. For example, a survey taken in 1989, in Nova Scotia for the *Royal Commission on the Prosecution of Donald Marshall Jr.*, found that about 60 per cent of respondents agreed that police discriminate against Black people.¹⁶ In addition, a survey by the *Commission on Systemic Racism in the Ontario Criminal Justice System* found that 74 per cent of Black Metro Toronto residents believe that the police treat Black people worse than White people.¹⁷ The *Report of the Commission* also found that the Black community feels that discriminatory treatment from the police is a precursor to the unjustified shooting of Black civilians.¹⁸ Since 1978, on-duty police officers have shot at least sixteen Black people in Ontario, ten of them fatally.¹⁹ In nine cases, criminal charges were laid against the officers, but none resulted in convictions.²⁰ In the past two decades, the number and circumstances of police shootings in Ontario have convinced many Black Ontarians that they are disproportionately susceptible to police violence. The Black community has concluded that,

the police are quicker to use their guns against Black people and that the shootings are unduly harsh responses to the incidents under investigation. The resulting deaths and injuries have also come to represent the ultimate manifestation of daily discrimination and harassment that many Black people experience, especially in interactions with the police. In short the shootings are perceived not as isolated incidents, but as tragedies that affect the entire Black community—and as a reflection of the destructive force of systemic discrimination.²¹

Recent studies of the interaction of Black people with law enforcement officials provide compelling evidence of racist policing. Specifically, the data demonstrates that there is an over-policing of communities with concentrated Black populations, specifically through the

¹⁶ See Royal Commission on the Donald Marshall Jr. Prosecution, *Discrimination Against Black People in Nova Scotia: A Research Study* by W. Head & D. Clairmont (Halifax: Royal Commission on the Donald Marshall Jr. Prosecution, 1989) at 31-33.

¹⁷ Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in the Ontario Criminal Justice System, 1995) at Executive Summary IX [hereinafter *Report of the Commission*].

¹⁸ *Ibid* at 67.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

practice of racial profiling.²² Racial profiling occurs when certain criminal activity is projected onto a specific racial group, then acted upon by law enforcement using powers to stop, detain, and search. The African-Canadian Legal Clinic claims that in instances of racial targeting, race is illegitimately used as a proxy by the police for the criminality or general criminal propensity of an entire racial group.²³

The most common forms of racial profiling occur within the context of pedestrian and traffic stops. Under the guise of policing violations of the *Highway Traffic Act*²⁴ the police routinely stop Black people for criminal investigations. Statistics analyzed by Scot Wortley of the Centre of Criminology at the University of Toronto demonstrate that Black Metro residents (28 per cent) were more likely than White Metro residents (18 per cent) or Asian Metro residents (15 per cent) to report having been stopped by the police between 1993 and 1995.²⁵ Black residents (17 per cent) were also more likely than White residents (8 per cent) or Asian residents (5 per cent) to report multiple stops during this period.²⁶ Wortley also found that the odds ratio suggests that, after controlling for other variables, Black people are twice as likely as White or Asian people to experience a single stop, four times more likely to experience multiple stops, and almost seven times as likely to experience an unfair stop. When broken down by sex, the targeting of Black men is even more striking.²⁷ Between 1993 and 1995, 43 per cent of Black men, but only 25 per cent of White men and 19 per cent of Asian men, reported being stopped by the police. Significantly more Black men (29 per cent) than White men (12 per cent) or Asian men (7 per cent) reported two or more police stops during this period.²⁸

Wortley concluded that age reduces the probability of being stopped by the police for all racial groups. However, with respect to involuntary police contact, Black men and women do not benefit from

²² *Supra* note 17.

²³ See *R. v. Richards*, 26 C.R. (5th) 286 (Ont. C.A.).

²⁴ *Highway Traffic Act*, R.S.O. 1990, c. H-8.

²⁵ S. Wortley, "The Usual Suspects: Race, Police Stops and Perceptions of Criminal Injustice" (Address to the 48th Annual Conference of the American Society of Criminology, Chicago, November 1997) at 20-21 [unpublished] [hereinafter *The Usual Suspects*]. See also *Report of the Commission*, *supra* note 17.

²⁶ See Wortley, *ibid.*

²⁷ *Ibid.*

²⁸ *Supra* note 17.

aging to the same extent as White and Asian men and women. Indeed, 19 per cent of the Black respondents over fifty years of age still report that they were stopped by the police during this period, compared to only 7 per cent of the White and Asian respondents in the same age category.²⁹

Also, while educational attainment further insulates White and Asian people from police stops, it does not seem to protect Black people.³⁰ The findings suggest that, unlike White and Asian people, higher education may not safeguard Black people from involuntary contact with the police:

Cross-tabular analysis reveals that, in fact, university-educated Black people are slightly more likely to be stopped (34.0%) than Black people with lower educational attainment (27.2%).³¹ The opposite is true for Whites and Asians. Thus, racial differences in police contact are actually more prominent among respondents with a university degree (34% vs. 12.4%) than among those with less educational attainment (27.2% vs. 18.2%).³²

Heightened levels of education and age protect White and Asian individuals from police contact. There is a 30 per cent chance that young White and Asian males with less than a university education will be stopped by the police. The probability of being stopped drops to 6 per cent for older White and Asian males with a university education.³³ In contrast, university-educated, older Black males have almost the same probability of being stopped (40 per cent) as young Black males without a university degree (44 per cent).³⁴ Indeed, for Black people, racist enforcement of the law transcends economic class. Ultimately, discriminatory law enforcement, particularly against well-educated Black people, contributes significantly to a negative perception of the criminal justice system by Black-Canadians.³⁵

Table 1 shows that even information gathered by the police illustrates that the Black community in Toronto is subject to excessive targeting by the police. Consider, for instance, crime data that was presented to a community meeting by Julian Fantino in 1989, prior to becoming Chief of Police for Metropolitan Toronto:

²⁹ See Wortley, *supra* note 25 at 21.

³⁰ See Wortley, *supra* note 25.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

Table 1: Metro Toronto Police, 31 Division Crime Totals (1 January 1988–31 December 1988)²⁶

OFFENCE	NUMBER OF INDIVIDUALS ARRESTED	RACIAL DISTRIBUTION
Drug Arrests	444	51% Black Accused
Robbery/Muggings	118	82% Black Accused
Robbery/Purse Snatching	104	55% Black Accused

Notably, at the time he made the comments, Mr. Fantino's goal was to support the contention that for professional reasons the police are required to engage in exorbitant numbers of confrontations with Black youth because Black people are disproportionately involved in crime.³⁷ His assertion that statistics indicating high crime rates for Black people were the product of ethical policing served to deny that racist policing played any role in producing the disproportionate results and gave credence to the stereotype that young Black males are criminals. However, the data that Mr. Fantino presented provides *prima facie* evidence that the police wield their power to investigate and charge in a discriminatory manner.

The arrest statistics suggest that the disparate application of arbitrary stops against Black people and the over-surveillance of the Black population results in disparate numbers of Black persons being brought into the criminal justice system. Mandatory minimum sentences are, therefore, likely to have a disproportionate negative impact on Black people. The new mandatory minimum sentences for weapons offences will disproportionately impact Black people, since they are already over-represented among prisoners charged with weapons possession.³⁸ If mandatory prison sentences are expanded to apply to drug offences, it is likely that they will have a grave impact on the Black community.

³⁶ S. Fraser, "Straight Man" *Toronto Life Magazine* 34:16 (October 2000) 100.

³⁷ *Ibid.* at 106. See Mr. Fantino's comments: "It is an unfortunate fact that in Division 31 an inordinate number of serious crimes involve Black suspects. I point out that many victims of such crimes are also Black citizens, and readily concede that in many cases the suspects themselves are the casualties of a flawed society. In essence, police officers in Division 31, *for purely professional cause, are forced by circumstances* to have inordinate numbers of negative contacts with Black citizens, and far too many with Black youths [emphasis added].

³⁸ *Supra* note 17 at 70.

Research indicates that Black defendants are over-represented among prisoners charged with weapons possession. This data suggests that the new mandatory minimum sentences for weapons offences will have a disproportionate effect on Black defendants, thereby perpetuating systemic racism in the criminal justice system.

III. DRUG MANDATORIES AND RACIST POLICING: CANADA AND THE UNITED STATES

A contextual and systematic analysis of the nexus between mandatory prison sentences for drug offences and the over-incarceration of Black people in the United States supports the argument that the expansion of mandatory prison terms to cover drug offences in Canada will perpetuate race-based inequity in the criminal justice system.

Proposals for mandatory prison sentences for drug offences might be acceptable to Canadian parliamentarians. Drug-related mandatory minimum sentences were passed in 1922, repealed in 1961, and proposed again in 1974, 1976, and 1984.³⁹ The recent concern with drug overdoses and violence at raves could precipitate the next private member's bill to impose mandatory prison sentences for drug offences.⁴⁰

In the United States, mandatory minimum prison sentences, especially for drug offences, have been inextricably linked to the over-incarceration of African-Americans. The advent of mandatory minimum sentences at the same time as the passage of the 1986 *Anti-Drug Abuse Act*⁴¹ has resulted in the over-incarceration of African-Americans.⁴² An increasing perception by the public and amongst politicians that crack cocaine, once considered a phenomenon of isolated inner cities, was seeping into the suburbs led to the *Drug Act*.⁴³ Among its provisions were

³⁹ *Supra* note 2.

⁴⁰ "Designer Drugs," *W-Five—CTV* (29 April 2000). It was noted that the use of ecstasy drugs—popular at raves amongst teenagers—rivals the use of marijuana. Ecstasy taken alone can cause death. Further, precursor chemicals necessary to manufacture the drug can be obtained legally in Canada. As a result, police have observed that the supply of the drug in Canada is significantly increasing.

⁴¹ *Anti-Drug Abuse Act*, 21 U.S.C. § 846, 963 (1986) [hereinafter *Drug Act*].

⁴² R. Dvorak, "Cracking the Code: 'Decoding' Colorblind Slurs During the Congressional Crack Cocaine Debates" (2000) 5 *Mich. J. Race & L.* 611 at 654.

⁴³ *Ibid.* at 650: Dvorak contends that 17 November 1985 was the first mention of crack cocaine in a major media source—the *New York Times*. The media picked up on the story and within eleven months more than one thousand stories were written about crack cocaine. Despite researchers'

stiff mandatory minimum prison sentences for narcotics trafficking. The penalties associated with the use of crack cocaine were by far the most harsh.

The stiff penalties associated with crack cocaine have a direct and immediate impact on the African-American community. Crack cocaine, due to its relatively cheap price compared to pure powder cocaine, is prevalent in lower-income areas with concentrated Black populations.⁴⁴ Under American drug laws, there is a one hundred to one ratio between the sentencing thresholds for powder cocaine and crack cocaine. This disparity means that a conviction of possession of five grams of crack cocaine will yield a five-year mandatory minimum prison sentence for the defendant. In stark contrast, in order to receive a five-year mandatory minimum prison term, an individual would have to be convicted of possessing five hundred grams of powder cocaine. Trafficking in five or even fifty grams of powder cocaine carries no mandatory minimum prison sentence under the statute.⁴⁵

Another cause of the over-incarceration of Black people for drug offences in the United States is racial targeting and the over-surveillance of the Black community.⁴⁶ Indeed, contemporary studies indicate that racial profiling and targeting transcend international and state borders. For instance, recent analysis of law enforcement records reveals that the New York City Police stop and frisk Black and Hispanic residents much more often than White residents.

The state of New York initiated an investigation into police stops following the controversial police shooting of Amadou Diallo, in the Bronx, in February 1999.⁴⁷ The study, conducted by the Centre for Violence Research and Prevention at Columbia University, was based on a review of "UF-250" forms. New York Police Department officers were required to complete these forms whenever they initiated a police stop. These forms provide a systematic manner to monitor racist policing. They require the officer to record the name, age, sex, and race of the person stopped, along

findings that crack cocaine was not a national plague, but a phenomenon isolated to the inner cities of less than a dozen urban areas, the myth that crack cocaine is pervasive was promoted by legislators and the media.

⁴⁴ *Ibid.*

⁴⁵ D.A. Sklansky, "Cocaine, Race, and Equal Protection" (1995) 47 *Stan. L. Rev.* 1233.

⁴⁶ D.A. Harris, "Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked" (1994) 69 *Ind. L. J.* 659.

⁴⁷ See Wortley, *supra* note 25 at 8. See also R. Suarez, "Police Divide" *PBS Online News* (23 February 2000).

with the reasons for the stop and whether or not the suspect was searched or arrested.

The researchers analyzed approximately 175,000 UF-250 forms completed by the police during 1998 and the first three months of 1999. They found that 51 per cent of those stopped were Black individuals, 33 per cent were Hispanic individuals, and only 13 per cent were White individuals. At the time of the study, Black people represented only 25 per cent, and Hispanic people, only 24 per cent, of the city's population. In contrast, White people comprised 43 per cent of New York City's residents.⁴⁸ Additional analysis of the UF-250 forms revealed that, even accounting statistically for the fact that minority neighbourhoods have a higher official crime rate, Black and Hispanic people were still stopped in excessive numbers by the police.⁴⁹ The results of the investigation were not unique to New York City. Maryland and Florida have also conducted studies providing powerful evidence of racial targeting by the police under the pretext of traffic stops.⁵⁰

The distinctions in sentencing under the 1986 *Drug Act* and the *Sentencing Guidelines*⁵¹ enacted in 1987 contributed to the disproportionate application of mandatory prison terms to African-Americans. Between October 1991 through September 1992, more than 91 per cent of all federal crack cocaine trafficking defendants were Black individuals, while only 3 per cent were White individuals. During this same period, Black defendants accounted for 27 per cent of federal prosecutions for powder cocaine trafficking and for 28 per cent of federal prosecutions overall. In contrast, 32 per cent of federal prosecutions for powder cocaine trafficking and more than 45 per cent of all federal prosecutions were against White individuals.⁵² Likewise, in 1993, 88 per cent of those convicted in federal courts of selling crack cocaine were Black accused, while only 4 per cent of those convicted were White accused. In the same year, 27 per cent of those convicted of selling powder cocaine were Black accused, while 32 per cent were White accused.⁵³

⁴⁸ See Wortley, *supra* note 25 at 8.

⁴⁹ *Ibid.*

⁵⁰ See D. Harris, "'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops" (1997) 87 *Crim. L. & Criminology* 544 at 562-66.

⁵¹ *Sentencing Guidelines for the U.S. Courts*, 18 Appendix U.S.C. (2000).

⁵² *Ibid.* at 1289.

⁵³ *Supra* note 17 at 642.

In the United States, the "war on drugs" has intensified the targeting of Black communities, ultimately resulting in a massive incarceration of Black individuals for drug offences. In 1994, although African-Americans represented about 13 per cent of drug users, they accounted for almost 35 per cent of drug arrests, 55 per cent of convictions, and 74 per cent of those sentenced to prison terms for drug offences.⁵⁴ By cross-referencing the high levels of arrests of Black people for drug offences with the fact that mandatory prison sentences for drug crimes comprise a huge proportion of the federal mandatory prison terms imposed, it becomes evident that racist policing and mandatory sentences devastate the Black community. Specifically, in the United States, over sixty statutes contain mandatory prison penalties; only four are used with frequency. These four, covering drug and weapons offences, account for 94 per cent of all federal mandatory minimum prison sentences imposed.⁵⁵

It may be presumed that the distinctions between crack cocaine and powder cocaine in sentencing for possession and trafficking apply only to the use of mandatory prison sentences in the United States. However, the effect of the over-surveillance of the Black community on the application of mandatory prison terms on Black people, especially for drug offences, applies directly to Canada. This is because Black persons in Canada, similar to their American counterparts, continue to be the focus of policing at a disproportionate level.

In Canada, although research indicates that Black people are not more likely than White people to engage in drug-related offences, the police have placed immense focus on investigating Black persons for criminality under the pretext of the war on drugs.⁵⁶ The systematic stopping, questioning, and searching of Black individuals results in their detection and arrest for drug violations more frequently than people of other ethnic backgrounds who engage in the same conduct.⁵⁷ Indeed, evidence suggests that racial biases in drug surveillance strategies, especially since the war on drugs began in the mid-1980s, disproportionately impacted Black persons in Canada.⁵⁸ Specifically, the number of Black people admitted to Toronto-

⁵⁴ *Ibid.*

⁵⁵ H.S. Wallace, "Mandatory Minimums and the Betrayal of Sentencing Reform: A Legislative Dr. Jekyll and Mr. Hyde" (1993) 40 Fed. B. News & J. 158.

⁵⁶ *Supra* note 17 at 67.

⁵⁷ See Wortley, *supra* note 25 at 29.

⁵⁸ *Ibid.*

area detention centres on drug trafficking charges increased dramatically from 131 in 1986 to 1156 in 1993—an increase of 1164 per cent.⁵⁹ In stark contrast, the number of White persons admitted for drug trafficking increased by only 151 per cent.⁶⁰

IV. PROSECUTORIAL DISCRETION, PLEA BARGAINS, AND MANDATORY PRISON TERMS

After the police, the Crown prosecutors assume the next stratum in the administration of criminal justice. Crown prosecutors are responsible for filtering, framing, and pursuing charges initiated by the police. In addition, only the prosecutor can alter charges (reduce the charge or set it below the mandatory minimum requirement) in exchange for a guilty plea. Indeed, prosecutors are not required to prosecute the charges with the maximum sentence.

Mandatory prison sentences enhance the quasi-judicial role of prosecutors, providing them with greater leverage to convict a disproportionate number of Black persons. Prosecutors are encouraged to make plea offers in order to keep the justice system moving.⁶¹ In fact, the use of plea bargains accelerated after the ruling by the Supreme Court of Canada in *R. v. Askov*⁶² in which the Court ruled that delays beyond six to eight months prior to trial violated the *Canadian Charter of Rights and Freedoms*.⁶³ Recent reports indicate that prosecutors work to resolve about 90 per cent of cases without going to trial.⁶⁴

In plea bargains, defence counsel and prosecutors work out an agreement in which the defendant will agree to plead guilty in exchange for a lesser charge and a reduced sentence. Defence counsel and the prosecutor will then submit the plea bargain, commonly known as a joint submission,

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ D. Vincent & N. Pron, "Closed Doors: Justice by Plea Bargain" *Toronto Star* (10 March 2001) A 26.

⁶² [1990] 2 S.C.R. 1199 [hereinafter *Askov*].

⁶³ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

⁶⁴ *Supra* note 61.

to the judge for approval.⁶⁵ The *Martin Committee Report*⁶⁶ recommended that judges be required to give significant weight to the punishments agreed to by defence counsel and the Crown because they encourage further joint submissions and reduce the need for trials. Judges are also encouraged not to depart from the joint submission unless the proposed sentence would bring the justice system into disrepute or is otherwise not in the public interest.⁶⁷

The expansion of mandatory minimum prison terms intensified the frequent reliance on plea bargaining by prosecutors and defence counsel. In fact, the United States Sentencing Commission aptly noted that a primary objective of mandatory minimum prison sentences is to garner judicial economies resulting from the increased pressure placed on defendants to plead guilty.⁶⁸ In addition, the *Sentencing Commission Report* formally recognized that mandatories tend to increase the severity of sentences that guilty-plea defendants will accept.⁶⁹ Furthermore, prosecutors who support mandatories tend to stress the value of mandatories as a tool for inducing cooperation.⁷⁰

The pressure to accept plea bargains poses significant risks to the liberty, personal security, and reputation of innocent persons accused of crimes and individuals who have been unfairly targeted by the police for criminal behaviour. Black people who have been the target of racial profiling may want to proceed to trial in order to expose racist policing. However, the Crown and defence counsel may place considerable pressure on an accused to plead guilty to a reduced charge by highlighting the strong risk of conviction and a possibly lengthy mandatory prison sentence should the case proceed to trial.

⁶⁵ *Ibid.*

⁶⁶ Ontario, *The Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (Toronto: Ontario Ministry of the Attorney General, 1993) at 6 [hereinafter *Martin Committee Report*].

⁶⁷ *Ibid.*

⁶⁸ District of Columbia, *Mandatory Minimum Penalties in the Federal Criminal Justice System: A Special Report to Congress* (Washington: United States Sentencing Commission, 1991) at 13-15 [hereinafter *Sentencing Commission Report*].

⁶⁹ S.J. Schulhofer, "Plea Bargaining as Disaster" (1992) 101 *Yale L. J.* 1979. See also G.T. Lowenthal, "Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform" (1993) 81 *Cal. L. Rev.* 61 at 67.

⁷⁰ S.J. Schulhofer, "Rethinking Mandatory Minimums" (1993) 28 *Wake Forest L. R.* 199 at 202.

Sentencing provisions that promote heightened levels of non-transparent decision making among state actors such as the police and Crown attorneys is a cause for fear and grave concern for members of the Black population. Mandatory minimum sentences further diminish the already low level of visibility regarding the exercise of prosecutorial discretion. The exercise of prosecutorial discretion to frame charges and offer plea bargains is largely out of the purview of the public eye, and thus prone to abuse and discriminatory exercises of power.⁷¹

American literature notes that discretionary waiving of charges with mandatory minimum prison sentences by prosecutors, in exchange for cooperation, appears to benefit White defendants more than Black ones. Research conducted in the United States indicates that by providing "substantial assistance,"⁷² defendants with knowledge implicating others are frequently rewarded with significantly reduced charges and sentences.⁷³ The *Sentencing Commission Report* found that White defendants were less likely to be charged at the highest indicated level and, once charged, less likely to be convicted than similarly situated Black and Hispanic defendants.⁷⁴ Of defendants facing a mandatory minimum prison term at sentencing, 25 per cent of the White defendants benefited from a prosecutor's "substantial assistance" motion, but only 18 per cent of Black defendants similarly benefited.⁷⁵ In total, almost half the eligible White defendants convicted were sentenced below the mandatory level, while less than a third of the Black defendants convicted received similar leniency.⁷⁶

This racial disparity may be partly attributable to crime structures in which the defendants best informed about criminal operations and thus with the most "substantial assistance" to offer, are usually White defendants. White defendants at the higher end of crime structures are most centrally involved in conspiratorial crimes.⁷⁷ This means that highly culpable White offenders situated at the top of the criminal hierarchy may be in the best position to obtain a break, whereas less culpable Black

⁷¹ See Senna & Segal, *supra* note 9.

⁷² See K. Lutjen, "Culpability and the Law" 10 *Notre Dame J. L., Ethics & Pub. Pol'y* 389.

⁷³ P. Oliss, "Mandatory Minimum Sentencing: Discretion, The Safety Valve and the Sentencing Guidelines" 63 *U. Cin. L. Rev.* 1851 at 1871.

⁷⁴ *Supra* note 68 at 82.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* at 212.

offenders, positioned at the lower end of the criminal hierarchy, are more likely to receive the brunt of the mandatory prison sentences.⁷⁸

The *Report of the Commission* found evidence to support the proposition that many prosecutors exercise their discretion with respect to the number and severity of charges, choice of summary or indictable offence, extent of bail, and recommendations for punishment in a manner that discriminates against Black accused.⁷⁹ Because Black defendants are more likely to be detained pending trial due to systemic racism, the retention and expansion of mandatory minimum prison sentences means Black defendants will confront intensified pressure to plead guilty in order to avoid both lengthy pre-trial imprisonment and the prospect of extended prison time if convicted.

Pre-trial imprisonment can have deleterious effects on an individual's economic and familial stability. The loss of jobs and the resulting inability to support dependants, especially for single parent households, can result in the removal of children from the home. These are powerful incentives for defendants to plead guilty in order to avoid lengthy detentions and the risk of prolonged incarceration periods, if convicted.

Decisions by the police and the prosecution to detain Black people at a higher rate than White people for the same charges prior to trial places a disproportionate number of Black defendants at a clear disadvantage with respect to plea negotiations and challenging charges. Recent studies demonstrate that undue pressure may be placed on Black defendants to accept plea bargains because of differential treatment by the police and prosecutors regarding pre-trial imprisonment and the framing of charges.

The *Report of the Commission* found that in general "Black accused (30 per cent) were significantly more likely than White accused (23 per cent) to be refused bail and imprisoned before their trials."⁸⁰ When the information is broken down into specific offences, the racial disparity in the bail process is even more dramatic. Specifically, between 1992 and 1993, the pre-trial admission rate of Black accused for drug trafficking and importing charges was twenty-seven times higher than the rate for White accused. The disparity in admission rates for convicted persons remains very high but

⁷⁸ *Ibid.* at 212.

⁷⁹ *Supra* note 17 at 143, 145-46, 172, 265-81. See also National Association of Women and the Law, *Stop Excusing Violence Against Women (Position Paper on the Defence of Provocation)* by A. Cote, D. Majury & E. Sheehy (Ottawa: National Association of Women and the Law, 2000).

⁸⁰ *Supra* note 17 at 123.

drops to a ratio of thirteen to one.⁸¹ For drug possession charges, the Black accused pre-trial admission rate was fifteen times higher than that of White accused.⁸² The disparity in admission rates for convicted persons, while still high, declines to a ratio of seven to one.⁸³ For obstructing justice charges, the Black accused pre-trial admission rate was thirteen times higher.⁸⁴ The disparity in admission rates for convicted persons, though still high, decreases to a ratio of seven to one.⁸⁵ Finally, the Black accused remand rates for weapons charges covered by mandatory prison sentences are nine times higher than remand rates for White accused.⁸⁶ The admission rate ratio for convicted persons remains high at eight to one.⁸⁷

The racial differences in pre-trial imprisonment cannot be explained away by previous criminal records. Almost twice as many Black accused (15 per cent) with no previous convictions were denied bail and imprisoned before trial compared to White accused (8 per cent) with no prior convictions.⁸⁸ Also, release on bail was denied to only 23 per cent of White accused compared to 31 per cent of Black accused who had a record of one to five previous convictions.⁸⁹ For drug offences, "72 percent of White accused who had no previous convictions but only 37 percent of Black accused without previous convictions were released by the police. Bail was denied to only 3 percent of White accused compared with 16 percent of Black accused."⁹⁰

The research indicates that employment status has a discernible impact on detention decisions and that Black accused experience a higher rate of unemployment.⁹¹ Nonetheless, discretionary decisions by both the police and the prosecution largely in favour of White accused indicate that

⁸¹ *Ibid.* at 98.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* at 130.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.* at 143.

race is a significant determinant in the decision to detain and recommend a denial of bail for Black defendants.

Police decisions to detain Black accused at a higher rate than White accused means that bail courts will inevitably see a dramatically higher number of Black accused. Studies indicate that the courts granted bail to similar proportions of Black and White accused who appeared before them, except when the accused were charged with drug offences. Within this subgroup, White accused were more likely than Black accused to be granted bail. Consequently, even similar rates of denying bail in court result in disparate numbers of Black accused being jailed before trial.⁹² *The Report of the Commission* noted that because the courts generally granted bail at about the same rate for White and Black accused, the decisions simply transmitted the disparity created by earlier police decisions.⁹³

If the trend to imprison Black accused at a much higher rate than White accused prior to trial persists and mandatory prison terms are retained and expanded, a disproportionate number of Black accused will confront the prospect of extended prison time. Overall, disparate rates of charging and pre-trial imprisonment of Black people combined with the threat of mandatory prison sentences upon conviction, may induce more Black defendants to accept a guilty plea and prison time (albeit reduced) regardless of their level of blameworthiness in order to avoid long periods in prison.⁹⁴

There is a tension between the argument that mandatory minimum prison sentences encourage Black persons to plead guilty to avoid long prison terms and the argument that mandatory minimum prison sentences are likely to increase the disproportionate incarceration of Black people. While some Black accused who plead guilty to a lesser charge will be convicted too easily but receive no prison time, many Black people who plead guilty will likely receive a reduced prison sentence, rather than no prison time. Mandatory minimum prison terms give the police and prosecutors increased leverage in plea negotiations. They also tend to heighten the severity of sentences that defendants who plead guilty will accept. These factors combined with evidence that the criminal justice system punishes Black people more severely than White people, supports

⁹² *Ibid.*

⁹³ *Ibid.* at 144.

⁹⁴ The improper exercise of discretion regarding prison disciplinary measures is an example of the ills of low-visibility decision making by law enforcement officials. *Supra* note 17 at 312

the contention that mandatory minimum prison sentences will perpetuate the over-incarceration of Black people.

VI. CONCLUSION: THE FURTHER RAMIFICATIONS OF MANDATORY PRISON SENTENCES AND PLEA BARGAINS

Criminal records resulting from guilty pleas further stigmatize Black individuals as consummate crime suspects, making Black individuals especially vulnerable to racist policing, prosecutorial indiscretion, and mandatory prison penalties. Continued stereotyping of Black people as crime suspects will inevitably cause a disproportionate number of Black people to be investigated, charged, convicted, and incarcerated under mandatory prison sentences. Innocent defendants pressured into pleading guilty are stigmatized by a criminal record and used by the police to buttress arguments that Black people engage in more crime than members of other ethnic groups. A criminal record also makes a defendant particularly vulnerable to racial targeting in the future, by heightening the suspicion of police officers performing investigations. Finally, a conviction will constitute "one strike" against the individual for the purposes of sentencing for any future convictions.

The improper administration of police and prosecutorial discretion helps to perpetuate a dangerous cycle or self-fulfilling prophecy rooted in falsehoods: Black people engage in more crime than other groups, therefore, a Black male is the epitome of a crime suspect, and thus systematically stopping and searching them on the street is a legitimate means of crime prevention.⁹⁵ Ultimately, the increased pressure to accept plea bargains in relation to charges for offences with mandatory minimum prison sentences will have a cyclical effect, encouraging the continued over-surveillance and, ultimately, over-incarceration of Black people.

Mandatory minimum sentences may also adversely impact Black communities beyond the production of escalating conviction and incarceration rates, by resulting in heightened numbers of plea bargains for Black accused. Here, mandatory minimum sentences may act as an institutional barrier to the adjudication of cases that possess major ramifications for the development of criminal procedure, especially procedure that has a powerful impact on the treatment of Black persons.

⁹⁵ See Wortley, *supra* note 25 at 4. Wortley contends that Black males are considered "symbolic assailants."

Even if mandatory minimum sentences do not dramatically increase the already high percentage of plea bargains, they pose the risk of encouraging the accused involved in cases with possible implications for procedural law to accept a plea bargain.

Fundamental areas of the criminal law require definitive statements, revision, and clarification by the higher courts. Police authority over investigative detentions, frisk searches, and strip searches are powerfully connected to the treatment and constitutional rights of all persons, particularly Black people. Restrictions placed on the exercise of police discretion in these and other areas will help preserve the rights to liberty and equality of persons who are unfairly the focus of criminal inquiries. Rulings that condemn racist policing and fetter police discretion in various areas of criminal law may assist the effort to constrain racial targeting.

Opportunities to attain responsive and definitive statements of the law pertaining to these and other important procedural issues will only develop through challenges to the procedures of criminal law and the enforcement actions of officers by defendants in the trial process. Organizations such as the African-Canadian Legal Clinic and Aboriginal Legal Services wait years for cases pertaining to the rights of persons of colour and the development of criminal law to arise and be heard at the provincial Courts of Appeal and Supreme Court of Canada.⁹⁶ Indeed, because of systemic barriers such as the prevalence of plea bargains and the inherent obstacles in the appeal process, there are limited opportunities to argue cases with clear ramifications for persons of colour. The encouragement of plea bargains inspired by mandatory minimum prison terms may further limit the availability of cases that are ripe for advancing the protection of the fundamental rights and freedoms of Black-Canadians under the criminal law.

The potential deleterious effects of mandatory prison terms on Black persons should receive urgent and genuine consideration during future debates over sentencing reform. The symbolic and political value of mandatory minimum sentences to politicians, combined with popular support for severe penalties for offenders, facilitate the expansion of mandatory prison sentences. Mandatory prison sentences are manipulated

⁹⁶ *R. v. Golden* [2001] S.C.J. No. 81 online: QL (SCJ) [hereinafter *Golden*] (Oral argument, Julian Roy, Counsel for the African-Canadian Clinic, stated that the Clinic waits extended periods for opportunities to advance race-sensitive arguments before the Court of Appeal and the Supreme Court of Canada because of limited trials and opportunities for appeal).

to address public outrage emanating from specific tragedies, and do not address the more lofty goal of advancing criminal justice.

The retention and expansion of mandatory minimum prison terms for serious offences could serve as a powerful means of perpetuating systemic racism in the criminal justice system. Mandatory prison sentences will likely produce long and severe punishments for Black defendants who have been discriminated against by the police and who insist on going to trial and lose. The significance of prosecutorial filtering of racist policing is heightened when mandatory prison terms are retained and expanded. By filtering charges premised on racial targeting, prosecutors will be able to reduce racially disparate pre-trial imprisonment and conviction rates.

Crown prosecutors should take notice of the proven tendency of police officers to over-police the Black community and to subject Black males to disproportionate numbers of stops and follow-up criminal inquiries. Prosecutorial filtration of charges premised on the acknowledgement of the prevalence of racial profiling would advance the goal of holding racist police officers accountable for their improper conduct. It would provide an important step towards deterring the practice of racial profiling. Proactive filtration of charges would help to reduce the excessive imprisonment of Black people, which is likely to be perpetuated by the retention and expansion of mandatory minimum prison sentences.