



12-2015

Alternative Visions for the Federal Criminal Justice and Corrections System: Is True Change Possible?

Nora V. Demleitner

Washington and Lee University School of Law, demleitner@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Nora V. Demleitner, *Alternative Visions for the Federal Criminal Justice and Corrections System: Is True Change Possible?*, 28 Fed. Sent'g Rep. 121 (2015).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Alternative Visions for the Federal Criminal Justice and Corrections System: Is True Change Possible?

States are guided by constitutions that enshrine their core values. Organizations write mission statements setting out their values and goals, and develop strategic plans to make those goals a reality. Congressional values and goals can be inferred from legislation.

The sentencing reform proposals currently before Congress set out different visions—some very limited, others quite comprehensive—for federal sentencing and corrections. Frank Bowman suggests there is a bi-partisan consensus that “federal prisons hold too many people for too long, and that Congress ought to do something about that.”¹ That is, however, where the agreement ends. The proposals now before Congress reflect the divergent underlying tenets, views, and ideologies of their congressional authors. There is no discernible agreement on a set of core values, let alone an overarching vision for the federal criminal justice system. Rather the proposals appear largely animated by ideological values ranging from cost cutting to a visceral reaction against mandatory minimums, which all have declared the primary culprit for the overcrowding of federal prisons.

Even though crime no longer dominates the headlines the way it did in earlier decades, compromise to decrease our comparatively and historically high sentences, and invest in crime prevention and re-entry seems hard to come by. Relatively intricate sentencing legislation, with increases and decreases, may make it easier to package reduced sanctions for some members of Congress who fear being labeled “soft on crime,” but such provisions may not substantially alleviate overcrowding in federal prisons, let alone lead to dramatic overall change in the way our criminal justice system operates.

Some have hailed the bipartisan nature of current legislative proposals as a hopeful augury that some bill will move forward. In a polarized Congress any consensus garners acclaim. We should, however, acknowledge that not all bi-partisan agreement—perhaps especially in criminal justice—is necessarily salutary. The grand coalition of conservatives and liberals that united to pass the Sentencing Reform Act of 1986, which spawned the federal sentencing guidelines, may serve as a cautionary example of how compromises, praised at the time, may have unexpected ramifications. The concomitant War on Drugs, with its proliferation of mandatory minimum drug sentences, also drew bipartisan support—a development that has led to the dramatic rise in federal inmates.

Section I of this article critiques the approaches to mandatory minimums in the pending bills. Section II analyzes the corrections provisions of the Sentencing Reform and Corrections Act (SRACA). The corrections portion of the SRACA deserves more attention than it has so far received because of its ideologically driven approach that is unlikely to lead to a substantially decreased prison population. Section III turns to the reclassification of drug offenders as non-violent, while violent offenders are being singled out for increasing punitiveness. Section IV develops the role cost and race have played in these proposals.

I. Sentence Reform—Or Rather, Some Reform of Some Mandatory Minimums

In its 2011 report on mandatory minimums, the U.S. Sentencing Commission found mandatory minimums to have contributed to the dramatic expansion of the federal prison system, but not to be the sole cause.² Nevertheless, the bills now before Congress focus primarily on mandatory minimums, especially those for drug offenses. The bills adopt some of the proposals the Commission made in its 2011 Report, albeit a limited number with a narrow focus.³

As the Sentencing Commission’s 2011 Report outlines, some object to mandatory minimums as inherently unjust as they do not allow for consideration of individual characteristics of either the offense or the offender. Mandatory minimums, however, would constitute a much lesser problem—practically and philosophically—if set at lower levels than they currently are. After all, many countries, and domestic criminal codes, set out sentence minimums in statutory sentence ranges, presumably to indicate the lowest possible retributive sanction. These have been subject to little objection because they are set to fulfill minimally acceptable levels of retributive justice. Proportionality considerations do not appear to be part of the current discourse, however, which may partially explain the focus on the safety valve rather than broad-based decreases of all mandatories.

Nonetheless, for legislators concerned about being labeled soft on crime, an outright decrease in sentence lengths for all mandatories remains challenging, or perhaps unthinkable. That seems true with respect to most drug mandatories. Perhaps for this reason, some of the pending bills do not reduce the length of existing mandatories, but broaden the reach of so-called “safety



NORA V. DEMLEITNER

Roy L. Steinheimer Jr. Professor of Law
Washington and Lee University
School of Law
Editor, *Federal Sentencing Reporter*

Federal Sentencing Reporter, Vol. 28, No. 2, pp. 121–126, ISSN 1053-9867, electronic ISSN 1533-8363.
© 2015 Vera Institute of Justice. All rights reserved. Please direct requests for permission to photocopy or reproduce article content through the University of California Press’s Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/fsr.2015.28.2.121.

valve” provisions that grant the federal judiciary the option—and responsibility—to choose the appropriate sentence. This approach allows Congress to create some leeway for a smaller prison population without shouldering the blame should individual offenders commit serious crimes after an earlier release.

The Smarter Sentencing Act of 2015 (SSA), proposed by Senators Lee and Durbin, presents a direct response as it would about halve mandatory minimum drug sentences for select drug offenders. It would also expand the statutory safety valve to those within Criminal History Category II. Despite the signaling effect of the level of mandatory minimums on sentences in general, especially with the Sentencing Commission instructed to adjust guideline ranges in light of the new mandatories, judges are able to go well above and beyond them, up to the statutory maximum.

Because of its explicit recognition that drug mandatories are too high and the Commission guidance it requires to be given federal judges in drug cases, the SSA is preferable over the Leahy-Paul Justice Safety Valve Act of 2015. That legislation would undermine—though not formally abolish—all mandatory minimums as federal judges could sentence below them as long as the sanction achieves the purpose of punishment. This approach provides federal judges with nearly unfettered and unguided discretion, and destroys any semblance of sentence uniformity. Such an approach leads inevitably to the problems the federal guidelines were designed to address. It also sets federal judges up to fail, as they will provide an easy target for blame should offenders who receive lower sentences than the still existing mandatory recidivate.

Lest one misunderstood, with the exception of the Justice Safety Valve Act of 2015, none of the congressional bills proposed recognize the inherent problems with all (high) mandatory minimums. Rather they present a very limited approach, largely focused on what are now declared “non-violent drug offenders.” Generally mandatory minimums remain in place at least for some drug (and gun) offenders. Low-level and non-violent drug offenders would be increasingly likely to receive a below-mandatory sentence in light of expanded safety valve provisions. In addition, some of the proposed bills include new mandatory minimum sentences, now focused on the *en courrant* most dangerous, terrorists and violent criminals, both groups whose precise contours remain to be defined.⁴

II. What Reform Worthy of Its Name Would Require

Sentencing law largely determines the size and composition of the federal prison population. However, other factors play a role, including the allocation of policing and investigatory resources, the division of responsibility between state and federal authorities, and the exercise of prosecutorial power and discretion.⁵ Whereas most of the proposed legislation is focused on sentencing, with particular emphasis on mandatory sanctions, the Sensenbrenner-Scott SAFE Justice Act and SRACA provide additional changes, albeit with very different visions. The former sets

out a broad-based reform proposal for sentencing and corrections, which recognizes and responds to the interplay of various factors that has led the United States to become the world’s jailer, but the latter will cause serious challenges at the back end without constructively addressing the size of the criminal justice system.

A. Criminalization and Prosecutions

The SAFE Justice Act recognizes the continuum of the criminal justice system and focuses on some of the unique characteristics of the federal system. It attempts, for example, to better balance federal and state prosecutions by limiting the former to their core. It also implicitly recognizes the proliferation of agency actions and civil sanctions, and encourages limitations on the proliferation of multiple venues of proceeding against a defendant.

Limits on criminalization and protections against convicting the innocent are a part of this package.⁶ The bill also proposes restrictions on pre-trial detention. Even though these aspects of the bill do not specifically address sentencing, they would have a substantial impact on federal prosecutions. For sentencing and the number of inmates in federal prisons to be truly impacted, it will take more than changes to some sentences.

B. Corrections, Supervision, and Re-Entry

The SAFE Justice Act propagates more expansive use of probation to reserve prison space for the most dangerous offenders, such as serious and high-level drug offenders, violent and sex offenders. In the federal system, probation has been very restricted.⁷ An expansion would allow offenders to remain at liberty while under supervision, which would lead to them retaining employment and family and community ties. It would also facilitate the payment of fines, restitution, and fees.

The SAFE Justice Act would allow for judicial consideration of early compassionate release for the elderly, the very ill, and those with care-giving obligations for minor children. Both the SAFE Justice Act and SRACA allow for the inmate as well as the Bureau of Prisons to petition a court for such release, though the latter bill does not include caregivers.⁸ Under the SAFE Justice Act, care-giving duties are to be considered only when the current caregiver of the children is no longer available and no other suitable caregiver can be found. Although conviction of certain offenses makes the offender ineligible for such release, recognition of caregiving duties as a reason for early release is notable. It is not necessarily a gendered provision, though it is possible that more women would benefit.

The provision is remarkable as it recognizes the impact of imprisonment on the family of the offender and especially on the offender’s minor children. A recent American Bar Foundation study indicates that the repercussions of maternal imprisonment extend well beyond the inmate’s own children to other children in the same community.⁹ The impact of this provision in federal prisons would likely be limited despite the high percentage of imprisoned

parents.¹⁰ Nevertheless, it may influence reconsideration of family impact at sentencing, in both state and federal courts.

Of much broader applicability are the in-prison programming and re-entry aspects of the two legislative proposals. Programming builds on evidence-based practices and begins in prison, based on individual needs assessments, which are to determine criminogenic risks and needs. The SAFE Justice Act includes comprehensive alcohol- and cognitive-needs-based programming as well as vocational training. The goal is to make available the appropriate level of treatment and training to every inmate. Although the Act provides for time credit to those complying with their case plan, it does not extend such credits to those convicted of intentional homicide, terrorism, and sex offenses, though other incentives may be provided to these inmates. Nevertheless, it opens the programs to all inmates who need them.

The SRACA, on the other hand, excludes a substantial and much broader group of offenders from earning time credits, based on their prior criminal record or the crime of conviction.¹¹ It is unclear whether this provision is meant to provide additional punishment. It seems curious that those most likely to recidivate¹² will not be able to benefit from the most valuable rewards for completing prison-based programming.

The Federal Probation and Pretrial Services employ a risk assessment instrument, the Post Conviction Risk Assessment (PCRA), that was created over a number of years based on the largest data set ever used by them.¹³ It was developed to accomplish the mission-critical goal of recidivism reduction. It is based on the principles of “[i]dentifying and working most intensively with the highest risk offenders (risk principle), identifying criminogenic needs (need principle), and identifying and compensating for potential barriers to treatment (responsivity principle). . . .”¹⁴ It allows identification of factors that increase the likelihood of recidivism and helps in developing responsive strategies to address an offender’s needs. By statute, federal probation officers are mandated to “use all suitable methods, not inconsistent with the conditions specified by the court, to aid a probationer or a person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition.”¹⁵ That approach seems to contrast jarringly with SRACA.

The approach SRACA proposes is likely to increase tensions in federal prisons as offenders will be given different levels of access to services and to time-based rewards, in a way that must appear random and unfair to many inmates. It will also prove counterproductive in reducing recidivism as all evidence indicates that the prison-supervision continuum of treatment and care is most effective in decreasing future crime.

To some extent the denial of services and time credit appears to reflect a desire that these inmates be never released—despite the unlikelihood of that outcome.¹⁶ The exclusion of those perceived to have the highest risk of

re-offending resembles the inclusion of a formal incapacitative component in their sentences. Although some countries recognize such an additional sentence element, it is usually imposed at sentencing and subject to some procedural protections. Here it will be largely, though not exclusively, the Bureau of Prisons that will make the determination that may set up an offender for further failure. As the Federal Defenders explain in their letter, this proposed approach contradicts the practice in all state corrections systems that use risk assessment tools. It indicates a further move away from proportionate punishment and toward risk-based punishment. Here that sanction is particularly crude as it is solely tied to the likelihood of recidivism but not to the magnitude of the potential harm inflicted.¹⁷

Even if it were feasible to move one’s risk category down while imprisoned, the value of such a change upon release may be questionable. After all federal prisons differ significantly from life on the outside. They do not operate under a mandate to approximate such conditions, as, for example, German prisons do.¹⁸ Long sentences reinforce concerns about the SRACA risk instrument and its use as they increase an inmate’s distance from society and increase the likelihood that family connections and skills atrophy.

Even for those who can earn time credit, the reward is limited. Under the SAFE Justice Act, program participation will reduce the sentence by up to one year. Among the positive features are the focus on mental health and substance abuse residential treatment and grants to the states for medicated abuse treatment. However, the maximum reward time that can be earned for good behavior, program and work participation amounts to not quite a one-third reduction in the sentence. Any supervision violations are to carry graduated sanctions, and supervision successes will be rewarded with earlier discharges from supervision.

This post-sentence structure is critical. The Federal Probation and Pretrial Services supervise approximately 130,000 people annually.¹⁹ In contrast to the SAFE Justice Act, under SRACA any reward time would be converted into supervision time outside prison, not outright release. That means that an offender would be released earlier but to a residential re-entry program, home confinement, or community supervision. This approach is disconcerting for two reasons: First, at least in the short and medium term, the number of those under supervision would presumably rise even if the imprisonment numbers were to fall. Second, this could facilitate a move from mass imprisonment to mass supervision of offenders. Private contractors may benefit from this increase as they frequently run residential re-entry facilities and supervise home confinement. The financial stake such a development would create might become challenging to dismantle later.²⁰

Most federal offenders are being sentenced to post-prison supervision, either based on statutory mandate or judicial orders.²¹ In only approximately 12 percent of cases is supervision terminated early. Revocations from

post-sentence supervision stand at approximately one third of all cases, with those supervisees with a higher criminal history background failing at higher rates.²² The SAFE Justice Act includes performance incentive funding for judicial districts that reduce their revocation rates. Although some of the proposals included would presumably add some costs for services, decreased recidivism would constitute a substantial financial gain. The bill includes a number of additional proposals that would likely add expenses but also dramatically change federal prisons and police forces. It suggests an increase in the number of psychologists and social workers in federal prisons to better prepare inmates for their release. This is a model used in a number of European countries. Although desirable, an increase in the quantity and quality of psychologists and social workers can only have a limited impact as long as sentences remain as long as they currently are. Re-entry and reintegration after five, let alone ten or more years of living in a closed, artificial institution with its own subculture will remain challenging.

III. The New Darling: The Non-Violent Offender

The new darling of criminal justice reform is the “non-violent offender,” who has been declared to deserve another opportunity and therefore is eligible for treatment and a shorter prison sentence. Rand Paul’s presidential platform, for example, focuses all efforts on this offender, who is apparently the only one to experience the ugliness and despair of our criminal justice system.²³ In addition to the Justice Safety Valve Act of 2015, Paul’s other legislative proposals all concentrate on non-violent offenders, including the possibility of sealing their records to address the negative impact of a criminal record, especially in the job market, and restoring federal voting rights for non-violent felons. His suggestion to downgrade minor possession offenses to misdemeanors fits within this spirit.

Drug offenders who had previously been collectively labeled violent criminals are now partially exempted from that stigma. The SAFE Justice Act, for example, declares minor drug violations no ground for the revocation of supervision. On the other hand, violent and sex offenders have become the *bête noire* of the criminal justice and corrections system. Domestic violence offenders are deemed violent criminals, as indicated in SRACA’s addition of a new mandatory minimum offense for interstate domestic violence.²⁴

Beginning in the 1990s, all drug offenders were generally painted as dangerous and grouped with violent offenders. Now at least some of them—“low-level” participants who have not actually committed acts of violence—are escaping this opprobrium. The fault lines of social, political, and legal categorization have shifted, with violent offenders—however defined, though excluding some drug offenders—and sex offenders carrying the brunt of long sentences and mandatory minimums.

The SRACA continues the condemnation of violent offenders while providing some relief to non-violent drug

offenders. Much of the respite comes through expansion of the established safety valve and creation of a new one. Those are limited changes, however. Even though the established safety valve will be available to defendants with a more extensive criminal history, anyone with a prior sentence of more than sixty days for a drug trafficking or violent offense is excluded. The ineligible include those with relatively minor criminal records, labeling them unfit and too dangerous for a below-mandatory sentence.

The shift in focus may provide some relief for the large group of drug offenders and may shift the approach onto a more medical disease model and off law enforcement. To what extent the scourge of heroin addiction in often white, middle- and upper-middle-class communities has contributed to this change may be too early to answer.²⁵ Nevertheless, if the criminal justice system merely turns to another offender group, some of the stark shortcomings of our sentencing and corrections regime will remain unaddressed.

IV. Cost and Racial Disparity—Drivers of Reform?

The proposed bills are ostensibly animated by the sizeable number of inmates in federal prisons, making corrections an ever larger part of the Department of Justice’s budget at the expense of funding for law enforcement and prosecutors. For Republicans, cost is part of the agenda to reduce wasteful government spending and decrease taxes. Though cost savings remain nominal drivers of the new legislation, some of the proposals are unlikely to lead to substantial savings.²⁶ Instead they may lead to the privatization of a larger back-end component of federal corrections.

Some of the Democratic members of Congress reference wasteful spending because mandatory minimums are not empirically proven to decrease crime. In their view the budget for the Department of Justice should not be decreased but reallocated to include “money to hire federal prosecutors and FBI agents, . . . support . . . state and local law enforcement and . . . fund[] crime prevention, victim services and prisoner reentry programs.”²⁷ In its preamble, the SAFE Justice Act goes farther by stating that savings gained from smaller prison populations should be reinvested in recidivism prevention efforts. The Act sets a goal of filling, but not exceeding, current prison bed space.²⁸

The cost question is not a mere ideological artifact but of crucial consequence for the success of correctional reform. First, how cost will be measured will drive assessment of the success of this legislation. Second, if the money is being re-invested in reentry and prison programming, as the Sensenbrenner-Scott bill explicitly notes in its preamble, released inmates will have a better chance to abstain from crime post-release and re-integrate successfully into their communities and families. If the money is merely being saved or reallocated to law enforcement, recidivism will remain at least as high as it runs currently, and calls for greater harshness are likely to be heard soon again.

Although the term “mass imprisonment” is being used critically, racial disparity within the criminal justice system

is equally disconcerting and appears to be motivating at least some supporters of these reform proposals. Even though race has been mentioned only infrequently in the discussion of these bills, it pervades the discourse. References to the crack/powder cocaine equality measures and inclusion of retroactivity for the 2010 Fair Sentencing Act aim at greater racial equality. Senator Leahy, for example, has gone on record supporting retroactivity, stating that “[o]ur concerns with proportionality and racial disparity require that these reforms apply to old sentences as well as to new ones.”²⁹ Retroactivity will also be an important component of cost control as well as factor into the environment and control within federal prisons.

The focus on low-level drug crimes generally appears to be a nod toward the racial inequality pervading drug enforcement that is ultimately reflected in the make-up of the federal inmate population. The Democratic members of the House who co-sponsored the Sentencing Reform Act of 2015 frequently mentioned the impact of the legislation on African American inmates and drug offenders.³⁰ The SAFE Justice Act of 2015 explicitly demands that the U.S. Sentencing Commission, in determining drug sentences, consider a set of congressional mandates, including “the need to reduce and prevent racial disparities in Federal sentencing.”³¹

The impact, however, may be limited as many of the proposals seem headed for greater, though unacknowledged, disparity. The Justice Safety Valve Act of 2015, for example, does not recognize the potential inequalities that may be created by lifting all federal mandatories. In light of the disparities between districts in the percentage of defendants receiving *Booker* adjustments and those benefitting from prosecutorially authorized downward departures,³² unwarranted disparities may already be developing, which the expansion of the safety valve may further enhance. Unfettered discretion to sentence below mandatories will reinforce perceptions of, if not actual, disparity.

As offense and criminal history categories reflect distinct racial, gender, and socio-economic make-up, distinctions created on those bases will have a substantial differential impact. The Commission has highlighted its concern that SRACA’s back-end provisions, for example, will violate principles of non-discrimination based on such demographic differences.³³

Another area in which great disparity will occur is with respect to SRACA’s proposed juvenile sealing and expungement provisions that are, not surprisingly, only available to the “non-violent juvenile offender,” a negligibly small group in the federal system.³⁴ Although theoretically commendable, in effect these provisions hold out an empty promise. The Bureau of Prisons indicates that most juvenile offenders are violent, and historically the vast majority of them have been Native Americans.³⁵ For these reasons, the purpose of these provisions will have an insignificant but disparate impact.

V. Conclusion

The so-called reform proposals present very limited reforms. Although some of the individual provisions would provide salutary results, others set the stage for continuing severity in our sentencing and corrections system, justified by the fact that this time we are dealing with truly dangerous offenders. Rather than drug offenders, we now call them violent criminals, sex offenders, and terrorists. And who would argue for shorter sentences or earlier release for those groups?

Notes

- ¹ Frank O. Bowman, III, *Good Enough to Be Getting On With? The State of Federal Sentencing Legislation*, December 2015, 28 Fed. Sent’g Rep. 105 (2015).
- ² U.S. Sentencing Commission, *Report to the Congress: Mandatory Minimums in the Federal Criminal Justice System* 81-82 (Oct. 2011).
- ³ See *id.* at ch. 12.
- ⁴ In her support for the House’s Sentencing Reform Act of 2015 (SRA), Congresswoman Sheila Jackson Lee notes that this bill does not add any new mandatory minimum sentences, a development she would have called “the antithesis of reform.” See U.S. House of Representatives, Judiciary Committee, Press Releases: *House Judiciary Committee Unveils Bipartisan Sentencing Reform Legislation* (Oct. 8, 2015), http://judiciary.house.gov/index.cfm/press-releases?ContentRecord_id=D91C67B7-D894-4A4D-8B98-2744E4F6FE4B.
- ⁵ For other broad reform proposals in the federal and state systems, see Alex Kozinski, *Preface: Criminal Law 2.0*, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii (2015).
- ⁶ In both the House and the Senate, bills have now been introduced to clarify *mens rea* in the federal criminal code. See Mens Rea Reform Act of 2015, S. 2290, 114th Congress (2015–16) (introduced 11/18/2015); Criminal Code Improvement Act of 2015, H.R. 4002, 114th Congress (2015–16) (introduced 11/16/2015).
- ⁷ About 7% of all those sentenced receive a probation sentence. Those with probation/confinement sentences add another 3%. See U.S. Sentencing Commission, *Sourcebook 2014*, Fig. D (2015).
- ⁸ The two bills differ with respect to the scope of early release on medical grounds. SRACR refers to “terminally ill,” but the Safe Justice Act requires release to be “medically necessary” and references “extraordinary health condition” in the text. Both bills exclude select offenders, though only SRACR denies compassionate release to all offenders convicted of a crime of violence.
- ⁹ See, e.g., White House Parental Incarceration Workshop: ABF Convenes Conference at White House on Effects of Parental Incarceration on Children (Aug. 26, 2013), http://www.americanbarfoundation.org/research/White_House_Parental_Incarceration_Workshop0.html.
- ¹⁰ As of 2008, 63% of all federal prisoners had minor children. See Bureau of Justice Statistics, Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children* (rev. Mar. 30, 2010).
- ¹¹ For a critique of the proposed risk assessment tool, see Federal Defenders, *Critique of Corrections Act of 2015*, 28 Fed. Sent’g Rep. 151–53 (2015).
- ¹² Recidivism rates tend to increase with a more extensive prior criminal history. See, e.g., U.S. Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* (May 2004).
- ¹³ Administrative Office of the United States Courts, Office of Probation and Pretrial Services, *An Overview of the Post Conviction Risk Assessment* (Sept. 2011), at U.S. Courts, Statistics

- & Reports, *Post Conviction Risk Assessment* (2011), <http://www.uscourts.gov/statistics-reports/publications/post-conviction-risk-assessment>.
- ¹⁴ C.T. Lowenkamp et al., *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, Psychological Services (Nov. 12, 2012), Advance online publication, doi:10.1037/a0030343, at 1.
- ¹⁵ 18 U.S.C. §3603(3).
- ¹⁶ Less than 4% of federal inmates serve life terms or term sentences that effectively amount to life sentences. See U.S. Sentencing Commission, *Life Sentences in the Federal System* (Feb. 2015).
- ¹⁷ For a discussion of risk and uncertainty that has led to discarding proportionality in government responses to perceived risks in the British context, see Lucia Zender, *Fixing the Future?*, in *Regulating Deviance* 35 (Bernadette McSherry, Alan Norrie, & Simon Bronitt eds., 2009); Andrew Ashworth, *Criminal Law, Human Rights and Preventative Justice*, in *id.*, at 87.
- ¹⁸ Strafvollzugsgesetz § 3. For a critical attitude with respect to the feasibility of this mandate, see Bernd Maelicke, Knast-dilemma (2015).
- ¹⁹ See Federal Judicial Caseload Statistics 2014 Tables (Mar. 31, 2014), <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014-tables>.
- ²⁰ For a discussion of economic interests in the preservation of the carceral state, see Marie Gottschalk, *Caught: the Prison State and the Lockdown of American Politics* (2015).
- ²¹ Judicial compliance with the Guidelines recommendation to impose supervised release is exceptionally high. See U.S. Sentencing Commission, *Federal Offenders Sentenced to Post-Sentence Supervision* 69–70 (July 2010).
- ²² Federal Judicial Caseload Statistics, *supra* note 19, at Table E-7A, Federal Probation System Federal Judicial Caseload Statistics.
- ²³ See *Rand Paul Supports Reform to Our Criminal Justice System*, <https://www.randpaul.com/issue/criminal-justice-reforms>.
- ²⁴ The addition of export control offenses can be ascribed to their character as national security crimes.
- ²⁵ See, e.g., Katherine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. Times (Oct. 30, 2015), http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html?_r=0.
- ²⁶ Title II of SRACA is called the “Corrections Oversight, Recidivism Reduction, and *Eliminating Costs for Taxpayers in Our National System Act of 2015*” (emphasis added).
- ²⁷ See <http://www.leahy.senate.gov/issues/criminal-justice> (Senator Leahy’s statement).
- ²⁸ This approach begs the question how the current capacity has been determined to be appropriate.
- ²⁹ Leahy press release (Oct. 22, 2015), <http://www.leahy.senate.gov/press/leahy-senate-judiciary-committee-approves-historic-bipartisan-legislation-to-reform-criminal-justice-system>.
- ³⁰ See House Judiciary Committee Press Release, *supra* note 4.
- ³¹ H.R. 2944 IH, SAFE Act Sec. 406(b)(5).
- ³² See U.S. Sentencing Commission, *U.S. Sentencing Commission Preliminary Quarterly Data Report* (through third quarter, June 30, 2015).
- ³³ See Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, For the Hearing on “S. 2123, Sentencing Reform and Corrections Act of 2015” Before the Committee on the Judiciary United States Senate 10 (Oct. 19, 2015); see also Statement of Judge Patti B. Saris, Chair, United States Sentencing Commission, For the Hearing on “H.R. 3713, Sentencing Reform Act of 2015” Before the U.S. House of Representatives Judiciary Committee 11 (Nov. 18, 2015).
- ³⁴ In fiscal year 2014, only about 3% of the federal offenders were under 21 at the time of sentencing. See U.S. Sentencing Commission, *Sourcebook*, *supra* note 7, at Table O6.
- ³⁵ The Bureau of Prisons, *Juveniles*, at http://www.bop.gov/inmates/custody_and_care/juveniles.jsp. For older data on juvenile offenders in the federal system, see Bureau of Justice Statistics, John Scalia, *Juvenile Delinquents in the Federal Criminal Justice System* (rev. 12/15/1997), NCJ-163066.