

Criminal Justice Reform Must Start with Sentencing Reform



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I. Introduction**

In an unpredictable political season, Congress nonetheless seems poised to pass a criminal justice reform bill. That's the good news. The bad news is that the bill under consideration, the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person (FIRST STEP) Act may yet exclude meaningful sentencing reform and, as a result, would fall far short of reducing mass incarceration.¹

It's for this reason that the Brennan Center has argued that any reform bill that Congress considers—FIRST STEP Act or otherwise—must include strong sentencing reform provisions.² No bill can reduce the unnecessarily and dangerously large federal prison population without tackling the laws that put people there in the first place. Worse, in our view, settling for a compromise bill that excludes sentencing reform would amount to a step backwards and risk undermining the broader strategy to end mass incarceration.

This article explores research and history that inform our position and suggests an alternative “first step” for Congress to take. Specifically, Congress should either (1) pass the FIRST STEP Act together with the Sentencing Reform and Corrections Act (SRCA), a robust bipartisan bill to reduce some federal drug sentences;³ or (2) incorporate the SRCA's most important sentencing provisions into a compromise bill. While neither bill would fully end mass incarceration, even at the federal level, prioritizing sentencing reform would begin to significantly decrease the federal prison population. Even in a fraught political cycle, sentencing reform must remain the sine qua non of any bipartisan criminal justice reform effort.

II. How Federal Drug Sentences Exacerbated Mass Incarceration

Mass incarceration is a national problem with no single cause. But the federal system's size makes it an important target for reformers. While most incarcerated people remain under state custody, the federal prison system still holds the plurality of incarcerated people in America, narrowly edging out Texas as the nation's largest incarcerator.⁴ It wasn't always this way: between 1980 and 2013, the federal prison population exploded by nearly a factor of ten.⁵

New and longer federal drug sentences explain this dramatic expansion. Between 1986 and 2014, the average

length of a federal drug sentence increased from 62.2 to 77.6 months.⁶ This change is the result of a policy choice, not an accident. In 1986, Congress passed the Anti-Drug Abuse Act, which created new mandatory minimum penalties for a multitude of drug trafficking offenses and established the tiered mandatory minimum structure that is still in use for many federal drug trafficking offenses today. Under this tiered structure, penalties are tied to the quantity and type of controlled substance as well as a defendant's prior record, with greater quantities, different drug types, and criminal history corresponding to higher mandatory minimums. Firearm penalties associated with these offenses were also increased.⁷

Other new mandatory minimums followed. All told, Congress passed more than a hundred new laws imposing mandatory minimum penalties over the past three decades, steadily eroding judicial discretion.⁸ The number of prosecutions also grew: between 1986 and 2017, the number of major firearm prosecutions ballooned from around 900 to just over 8,000.⁹

Lawmakers believed these sentences would help them confront a steady rise in crime: between 1960 and 1980, the violent crime rate nearly quadrupled. However, despite harsher sentencing laws, the crime rate would continue rising through 1991.¹⁰ Crime declined after 1991, but our research shows that the growing prison population wasn't the reason why.¹¹

While they didn't solve America's crime problem, mandatory minimums did help fill federal prisons. By 2016, more than half of those in federal custody were convicted of an offense carrying a mandatory minimum penalty.¹² Mandatory minimums also exacted a devastating toll among communities of color. In 2016, more than 70% of those convicted of an offense carrying a mandatory minimum penalty were people of color, with Hispanic offenders representing the largest group (40.4%), followed by black offenders (29.7%).¹³

But this destructive trend can be reversed: by reducing unnecessarily long sentences, we can reduce incarceration without endangering public safety.¹⁴ After 2013, the federal prison population began to taper down slightly, dropping by roughly 15% from a high of 219,298 in 2013 to 185,617 in 2017.¹⁵ This decline coincided with policies enacted during the Obama Administration by Attorney General Eric Holder that limited the application of mandatory minimums in

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some drug cases.¹⁶ It remains unclear how much of the drop can be attributed to those policies. However, the number of incarcerated drug offenders—the very population targeted by those reforms—fell sharply over the same period, from a little over 100,000 to a little under 80,000.¹⁷

III. The Urgency of Sentencing Reform

These recent declines suggest that the trend toward ever-higher incarceration can be reversed. This is good news, because America's prisons have reached a tipping point, especially in the federal system. Federal prisons are overcrowded, posing dangerous conditions for incarcerated people and guards alike.¹⁸ On January 20, 2017—President Trump's inauguration day—the federal prison system supervised a total of 189,450 people.¹⁹ That total has continued to decline, but we cannot assume that the federal prison population will continue falling.²⁰

Even as the prison population declines unevenly, research on the damage caused by overly long sentences continues to pile up. Formerly incarcerated people face trouble finding work, contributing to lower economic productivity and translating, by some estimates, to a 1.0% reduction in overall employment.²¹ In 2016, President Obama's White House put the issue starkly, explaining that mass incarceration is an economic issue as well as a question of fairness.²² (Future Brennan Center research will expand on this finding.) People of color bear the brunt of the economic loss caused by the criminal justice system; after accounting for incarceration, the "real" unemployment rate among black men rises from 11% to 19%.²³ Of course, a broadening racial wealth gap is just one of the damaging social consequences of that divide. Amid all these harms, social science research now indicates that lengthening of prison sentences has diminishing returns with regard to crime reduction and can even lead to higher recidivism rates.²⁴

Recognizing the damage done by federal mandatory minimum sentences, for the past decade reform efforts have focused on reducing sentences, or restoring judicial discretion, with the goal of blunting the impact of overly long federal drug sentences. Starting with the Fair Sentencing Act of 2010 (FSA), legislators began targeting the worst, most unnecessarily punitive or discriminatory aspects of federal drug sentencing. The FSA achieved two key reform priorities: first, it eliminated a prior mandatory minimum for simple possession offenses. Second, it reduced the sentencing disparity between crack cocaine and powder cocaine.²⁵ Previously, a single gram of crack incurred the same punishment as 100 grams of powder, and the FSA reduced this to an 18:1 disparity.²⁶ The 100:1 disparity had no scientific basis and promoted stark racial disparities: crack was more accessible to poor Americans, many of whom were black, and powder cocaine was more accessible to white, affluent Americans. Unfortunately, the FSA failed to entirely close the gap between drugs that present the same harm, though it helped diminish what had been a significant driver of incarceration in

communities of color.²⁷ Notably, the bill counted then Senator Jeff Sessions (R-AL) as a sponsor.²⁸

Five years later, the Sentencing Commission reported that the FSA had accelerated a downtrend in crack cocaine prosecutions, produced more equitable sentences, reduced the federal prison population—and accomplished all that without compromising law enforcement objectives. Crack cocaine use continued to decline after the FSA, and offenders continued to cooperate with law enforcement at the same rate—defanging two arguments frequently used by reform skeptics.²⁹

Despite such positive results, Congress has not followed through on the FSA's success. Over the past several years, legislators from both parties have pursued additional legislation aimed at tackling still-high mandatory minimums. Those bills have at times counted even conservative stalwart Ted Cruz (R-TX) as a cosponsor.³⁰ And yet none have passed.

IV. Competing Reform Proposals: SRCA and FIRST STEP Act

Consensus for criminal justice reform seemed to be building again in 2015, even leading up to the presidential election. Late that year, Senators Charles Grassley (R-IA) and Dick Durbin (D-IL) introduced the SRCA—the most promising bill to attempt to reduce overly long federal drug sentences since the FSA. Designed as a compromise measure to attract conservative votes, the bill sailed through the Judiciary Committee but was weaker than many progressives would have hoped.³¹ And it was weakened further in April 2016, in an ultimately unsuccessful attempt to head off criticisms from the far right.³²

The SRCA failed to pass in 2016. But it remains an option for legislators today—the bill was reintroduced in 2017, with the same sponsors and compromises, and again voted easily out of the Senate Judiciary Committee with bipartisan support.³³ Indeed, the bill's main detractor remains the person who helped kill it in 2016: Jeff Sessions, then a Senator and until recently the Attorney General.³⁴ In its current form the bill would confront several of the most draconian aspects of the federal justice system head-on:

- Section 101 reduces mandatory minimum penalties for certain repeat drug offenders from twenty to fifteen years and eliminates the three-strike mandatory life provision, reducing the penalty to twenty-five years. As a compromise measure, Section 101 would also expand current law to include serious violent felonies as past convictions that would trigger the mandatory minimums.
- Section 102 broadens the application of the statutory "safety valve" provision to cover a larger group of offenders.³⁵ The safety valve allows judges to sentence below the statutory mandatory minimum, as well as reduce sentences, for offenders who qualify.
- Section 103 restores some federal prosecutorial and judicial discretion for low-level, nonviolent drug

offenders by allowing judges to sentence certain low-level offenders using a five-year rather than a ten-year mandatory minimum.

- Section 104 reforms the “stacking” provision contained in 18 U.S.C. § 924(c). Under this provision, second and subsequent firearm offenses are treated as prior convictions and “stacked” even if charged in the same indictment, effectively treating a first-time offender as a career offender. Section 104 would clarify that the enhanced mandatory minimum sentence for multiple § 924(c) convictions—an additional twenty-five years for each conviction—apply only to offenders who have previously been convicted *and served a sentence* for such an offense.
- Section 105 applies the FSA retroactively to people who committed offenses before its passage in 2010.

Given its broad support, one would assume that the SRCA would be the starting point for any negotiations around criminal justice reform. Not so: instead, the White House’s opening offer, the Prison Reform and Redemption Act, focused squarely on “prison reform”—that is, improving the conditions of confinement for incarcerated people.³⁶ That bill was superseded by the FIRST STEP Act, but its focus on prison conditions, to the exclusion of sentencing reform, remains. Among its provisions, the FIRST STEP Act would:

- implement a ban on shackling pregnant and postpartum women;
- require the Federal Bureau of Prisons (BOP) to provide sanitary napkins and tampons to incarcerated women for free;
- require that incarcerated people be placed within 500 driving miles of their families;
- expand the compassionate release program, allowing certain elderly incarcerated people to be released from prison early;
- authorize funding for rehabilitative programming;
- require the BOP to use home confinement for low-risk, low-needs people for the full amount of time permitted under law;
- create evidence-based recidivism programming, which incarcerated people can participate in to potentially earn eligibility for pre-release custody, allowing them to spend part of their prison sentence in a halfway house or home confinement; and
- fix the “good time” credit system so that incarcerated people can earn fifty-four days of good time credit per year as Congress intended, rather than the forty-seven days that the BOP allows.³⁷

As to late 2018, these two bills remain the most promising options for any sort of criminal justice reform in a divided political climate. For those of us who have studied the causes of and possible solutions to mass incarceration, that poses an important question: Is either bill worthy of our support? And, if so, which offers the best chance for change?

V. Why Any Congressional Bill Must Include Sentencing Reform

To answer these questions, we must go back to the causes of over-incarceration in the federal system. Any bill that aims to reduce federal over-incarceration should target overly long federal sentences. The FIRST STEP Act, while offering much-needed improvements to federal prison conditions, currently stops short of tackling unnecessarily long federal sentences. Although the Act contains one notable “back-end sentencing reform” provision, it does not address the draconian mandatory minimum sentences that continue to fuel mass incarceration and constitutes a step backwards from recent progress toward sentencing reform.

Given that shortcoming, the Brennan Center—while expressing cautious support for negotiations to add sentencing reform to the FIRST STEP Act—insists on meaningful sentencing provisions before committing to support the bill. Our position is based largely on our research and understanding of what can help cut mass incarceration at the federal level. But our view is also informed by strategy. In a tough political climate, while we may not be able to make all the progress we would like, we cannot settle for a bill that falls short of significantly reducing the federal prison population.

Indeed, it’s also unclear whether prison-reform-only bills like the original FIRST STEP Act retain any real political advantage over more aggressive sentencing reform options. Initially, it seemed that the FIRST STEP Act could succeed for the very reason the SRCA failed: because it avoided sentencing reform entirely, it would be more palatable to the far right of the Republican Party. But the Party’s most extreme members opposed the FIRST STEP Act anyway, with Senator Tom Cotton (R-AR) working behind the scenes to destroy it³⁸ and then Attorney General Sessions attempting to sink the bill publicly.³⁹ Any criminal justice reform effort designed with the goal of appeasing reactionaries like Sessions or Cotton will achieve nothing, because nothing will appease those who oppose the fundamental goal of reform. Senator Cotton has even said, “We have an under-incarceration problem.”⁴⁰ The reactionary right is simply not persuadable on this issue. For progress to be made, they have to be worked around, not brought on board.

In an ordinary political climate, circumventing the Attorney General to enact federal criminal justice reform would be a herculean task. But Sessions’s star has been waning in the current administration, as demonstrated by the FIRST STEP Act’s progress despite opposition from the Justice Department and his ultimate firing.⁴¹ At the same time, Republican leaders like Senator Grassley and other conservative advocates have remained committed to sentencing reform. If our Republican allies have the President’s ear, now may be the time to push for meaningful sentencing reform, hecklers’ vetoes notwithstanding.

While this strategic argument informs our thinking, more vital for us is the quantitative case for sentencing reform. Though neither the FIRST STEP Act nor the SRCA would solve mass incarceration overnight, the SRCA’s

provisions would target some of the worst excesses of the federal sentencing regime, significantly improving lives and reducing unnecessary imprisonment.

If the SRCA's key sentencing provisions were to become law, some 2,500 people each year would receive a sentence reduction of 22% to 50%, and around 3,000 currently incarcerated drug offenders would become immediately eligible for a sentence reduction of nearly 30%.⁴² These sentence reductions would become hugely significant over the long term. What's more, some of the SRCA's provisions are especially important to restoring fairness and racial equity to the justice system.

Take Section 101 of the SRCA, which would benefit an estimated 3,095 people currently in prison through retroactive application, as well as sixty people each year going forward.⁴³ The Sentencing Commission estimates an average 22.1% sentence reduction for these offenders.⁴⁴ Section 102 would work to alleviate entrenched racial disparities: in 2016, more than 77% of black drug offenders convicted of an offense carrying a mandatory minimum penalty had criminal histories that would disqualify them from consideration for the safety valve under current law, compared to 61% of all offenders.⁴⁵ Section 102's expansion of the safety valve would cut into this disparity. Section 102 would also help reduce the prison population going forward—it affects an estimated 2,100 people per year, providing an average estimated sentence reduction of 23.1%.⁴⁶ And Section 103, another key provision of the SRCA, would affect an estimated 207 offenders annually going forward, providing an average estimated sentence reduction of 34.2%.⁴⁷

One of the most disturbing elements of federal criminal justice today is § 924(c) “stacking”—and Section 104 of the SRCA would fix it. Under current law, some of the longest mandatory sentences can be given to first-time drug offenders. Take the case of Weldon Angelos: for selling roughly \$1,000 worth of marijuana during two controlled buys, Angelos was sentenced to a mandatory fifty-five years in prison: five years for possessing a firearm during the first buy with the confidential informant, twenty-five years for possessing a firearm during the second buy with the confidential informant, and an additional twenty-five years for a handgun found in Angelos's home. The judge who sentenced Angelos called his punishment “unjust, cruel, and even irrational,” comparing it to much shorter federal sentences given to repeat child rapists.⁴⁸ If Angelos were sentenced after the passage of the SRCA, or if this reform were retroactively applied to his case after the passage of SRCA, the two twenty-five-year mandatory minimums he received would not apply—restoring a semblance of fairness to his case and to the treatment of offenders like him.

Angelos's case is not an isolated matter, either: the SRCA's fix for this provision, found in Section 104, would affect 721 offenders retroactively, and 61 offenders annually going forward, providing a sizable average sentence reduction of approximately 50%.⁴⁹ The fix would go a long way toward alleviating racial disparities in the system, too:

in 2016, a shocking 94% of offenders with multiple § 924(c) convictions were people of color.⁵⁰

Lastly, Section 105 of the SRCA, which retroactively applies the FSA, would affect around 3,147 currently incarcerated people and reduce their sentences by 28% on average.⁵¹ Its impact is illustrated by the case of Eugene Downs, who was sentenced the day before the FSA was passed to a mandatory minimum of ten years for conspiring to distribute crack cocaine.⁵² Downs's coconspirators, all sentenced shortly after the passage of the FSA, benefited from a lower penalty pursuant to the FSA. Downs was left to languish in prison after his coconspirators—convicted of the same offense—were set free.

To be sure, the FIRST STEP Act would accomplish sentencing reform through one “back-end” provision. The Act fixes the formula for calculating good time credits so that people in federal prison can receive up to fifty-four days of good time credit per year as Congress intended, rather than the forty-seven days that the BOP currently allows. This provision impacts a large percentage of the federal prison population.⁵³ However, the effect on each person is small—a less than 2% sentence reduction, amounting to weeks or months, not years, of time off their sentence. While this fix is important, it would do nothing to address the stark racial disparities in our system or the draconian mandatory minimum sentences that continue to fuel mass incarceration.

On the other hand, each of the SRCA's sentencing reform provisions would not only make significant progress toward reducing mass incarceration, but would work also to alleviate entrenched, systemic racial disparities, directly addressing the overrepresentation of communities of color in our federal prison system. The SRCA would take a major step toward reducing mass incarceration—a goal fundamental to any criminal justice reform effort.

VI. Conclusion

The sentencing reform provisions of the SRCA address the main cause of over-incarceration in the federal system: drug laws that send people to prison for far too long. These reforms will not end mass incarceration overnight, but they will serve as a meaningful start and will provide significant relief to thousands of people unfairly treated by our justice system. The urgency of taking meaningful steps toward this goal cannot be overstated: on a daily basis, our federal sentencing regime needlessly deprives people of their liberty, devastates communities of color, and stagnates economic growth. What's more, given the current strong bipartisan support in Congress to reduce overly long sentences, it would be a mistake to settle for anything less.

Notes

- * The authors thank Bryan Furst, Marina Pino, Adureh Onyekwere, and Ruth Sangree for their research assistance.
- ** This article was written in Fall 2018 to express concerns about the FIRST STEP Act as passed by the House of

Representatives, and then under consideration by the Senate. After this article was completed, many of the authors' concerns were addressed by a compromise bill that merged key parts of the Sentencing Reform and Corrections Act into the FIRST STEP Act. President Donald J. Trump endorsed the compromise, which remained pending in Congress at the time of publication.

While still not ideal, and still not as strong as the authors would prefer, the Brennan Center elected to endorse the compromise FIRST STEP Act based on its inclusion of key sentencing reform provisions.

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- 19 Grawert & Cullen, *supra* note 10, at 8 & n.80.
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- ⁴⁵ See U.S. Sentencing Comm'n, *supra* note 8, at 40.
- ⁴⁶ U.S. Sentencing Comm'n, *supra* note 43.
- ⁴⁷ See *id.*
- ⁴⁸ FADM, *Prisoner Profile: Weldon Angelos*, <https://famm.org/stories/weldon-angelos/>; Sari Horwitz, *Former Federal Judge to President Obama: Free the Man I Sentenced to 55 Years in Prison*, Wash. Post (Feb. 6, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/02/09/former-federal-judge-to-president-obama-free-the-man-i-sentenced-to-55-years-in-prison/?utm_term=.bae12c5071f8.
- ⁴⁹ U.S. Sentencing Comm'n, *supra* note 43.
- ⁵⁰ In 2017, Black offenders accounted for more than two-thirds of offenders convicted of multiple counts under 924(c) (70.5%), Hispanic offenders accounted for 23.1%, and White offenders accounted for 6.4%. See U.S. Sentencing Comm'n, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System 24* (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/researchpublications/2018/20180315_Firearms-Mand-Min.pdf.
- ⁵¹ U.S. Sentencing Comm'n, *supra* note 43.
- ⁵² Kara Gotsch, *Thousands Are Stuck in Prison— Just Because of the Date They Were Sentenced*, Wash. Post (Jan. 31, 2018), https://www.washingtonpost.com/opinions/thousands-are-stuck-in-prison—just-because-of-the-date-they-were-sentenced/2018/01/31/0c1629e2-fd68-11e7-ad8c-ecbb62019393_story.html?utm_term=.16d784f3712a.
- ⁵³ Eighty-seven percent of federal prisoners who are eligible for good time credit earn all of their available credit. See U.S. Gov't Accountability Off., GAO-12-320, *Bureau of Prisons: Eligibility and Capacity Impact Use of Flexibilities to Reduce Inmates' Time in Prison 21* (2012), <https://www.gao.gov/assets/590/588284.pdf>; and Fed. Bureau of Prisons, *Sentences Imposed* https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last updated June 30, 2018).