



Right on Crime's Journalists' Guide to Federal Sentencing Reform



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Federal criminal justice reform may be the most important legislation that emerges from Washington, D.C. in 2016. Policymakers on both sides of the aisle have expressed a desire to make meaningful changes to federal sentencing laws. This guide will help you understand the background on sentencing, what is at stake, and what to expect this year and in the future.

Understanding the Language

The terms used in criminal justice reform are important, because although the problems are complex, the language used by reformers are “shortcuts” to expressing the issue at hand.

- **Overincarceration** – The overuse of incarceration as appropriate punishment. This term is preferred over “mass incarceration,” which suggests nefarious motivations by government or others to imprison Americans *en masse*. It is nearly indisputable that incarceration has been used more than necessary, especially as research tells us that there are often better options for punishment and rehabilitation, depending on the offender and the crime. (Committee on Causes and Consequences of High Rates of Incarceration).
- **Mandatory Minimums** – A sentence for which the minimum term of imprisonment has been determined by the legislature and is mostly immutable. This means that upon conviction of that particular offense, a judge must sentence a defendant to no less than the prescribed time. The judge loses his or her traditional role of having discretion in sentencing. Mandatory minimum sentences for low-level, nonviolent drug offenders is at the heart of the current conversation.
- **Safety Valve** – A provision that returns some discretion to judges by setting certain conditions when a defendant can be sentenced below a mandatory minimum sentence. This may include the type of crime, the defendant’s criminal history, the defendant’s cooperation with prosecutors, or other factors. This does not eliminate the mandatory minimum sentences.
- **Overcriminalization** – The practice of Congress and other legislative and executive bodies of attempting to control conduct by making crimes of activities that do little or no harm, or are better handled through the civil justice system. By making these activities a crime, the government deprives individuals of their liberty for actions that many of us would not consider “criminal.” The vast number of these “crimes,” such as mistakenly filed paperwork or washing a fish in a non-fish-washing faucet in a national forest, are written by unelected agency officials. “Overcriminalization” is also used to describe the overfederalization of crime—the way that the federal government has assumed police powers that should be under the states’ auspices.
- **Federalism** – In the context of federal criminal justice reform, federalism may refer to:
 - States being the “laboratories of democracy” and paving the way for the federal government by already proving the success of many reforms in sentencing and corrections; or
 - A reminder that the police power of the federal government should be limited, and that enforcement of common, “street” crime ought to be left to the states. This is an extension of the overfederalization argument.

Key Points

- Overincarceration is a problem in the federal criminal justice system, and requires thoughtful analysis.
- Politicians on both sides of the aisle have expressed a desire to make meaningful change by using the example of success in conservative states.
- Mandatory minimums contribute to overincarceration and are not always an effective tool for public safety.
- The American public supports sentencing reform.
- The lack of criminal intent standards contributes to overcriminalization.

- **Low-level, nonviolent offenders** – Offenders who had a nonenhanced role in a crime, and did not directly cause violence. In the drug trade, this often includes street-level dealers and below.
- **Mens rea or criminal intent** – A Latin term, used in law to mean “guilty mind,” or the state of mind that the prosecution must prove the defendant had when committing the crime. This is also known as the “criminal intent” of the defendant. Traditionally, with rare exceptions, the two key elements to a criminal offense consisted of the *mens rea* and the *actus reus*, the guilty action. Many laws have weak levels of *mens rea*, such as “negligence,” while others have no criminal intent requirement at all, meaning that an honest mistake can become a crime.

Understanding the Facts

There is a consensus on the right and left that, in the least, tweaks are necessary to improve America’s federal criminal justice system. There are roughly 195,000 federal prisoners, which is a 704 percent increase from 1980 (Bureau of Justice Statistics). Much of this growth can be attributed to the increased mandatory minimum sentences for drug crimes approved by Congress over that time period.

The reasons why these mandatory minimums for drug crimes became law differ by political perspective, but regardless of the reasons why, both sides thought it wise to relieve judges of their discretion in sentencing. Therefore, sentencing guidelines were born and mandatory minimums expanded (Geyh). The increase in incarceration led to even greater fiscal costs. In 1994, the Violent Crime Control Act, then also known as the “Biden Crime Bill,” was signed into law by then-President Bill Clinton, further incentivizing incarceration (Johnson). By that time, however, crime rates had already been plunging.

Nearly a decade ago, Texas was faced with a dilemma: build new prisons that would be quickly filled, costing billions of taxpayer dollars, or come up with another solution that would save money, and more importantly, protect public safety. Texas did the latter by using an evidence-based approach to criminal justice reform and adopting justice reinvestment policies. Among these were expanding drug and mental health treatment, adopting better probation policies that reduced unnecessarily long sentences for revocations, developing diversion programs, and finding other alternatives to incarceration. These initiatives continued in many conservative states throughout the southern United States, including South Carolina and Georgia.

The federal government has taken some action in this direction, though it still lags behind many conservative “red” states. The Fair Sentencing Act of 2010 (FSA) and the subsequent actions by the U.S. Sentencing Commission lowered the sentences of crack-cocaine offenders, resulting in early releases. Initiatives by the current administration have also helped to reduce incarceration rates, including a policy to focus more on serious crimes and not apply mandatory minimums to every offender (Seville).

Though these reforms are positive, it only takes a change in administration policy—or a new administration—to reverse these trends. The Sentencing Commission’s amendments are helpful as well, but to rely on an unelected body to make important reforms to the criminal justice system is insufficient. More permanent, legislative action is needed to ensure that the proper principles are applied that protect public safety and reduce incarceration rates.



Also important in the sentencing debate is the concept of criminal intent, or *mens rea*. This is based on the legal maxim that no one should be jailed for a mere accident. A good way to stop overcrowding the prison system is to ensure those who don’t belong there in the first place are never charged with a crime. Default standards of intent have been applied in over a dozen states, and the Model Penal Code calls for a default, minimum level of intent when none is specified.

What’s Happening Today

As of this writing, several bills have passed through their respective judiciary committees, and there are at least two others that include strong, important reforms.

S. 2123 – Sentencing Reform and Corrections Act (SRACA)

This comprehensive bill broadens the current safety valve and introduces a second safety valve that applies only to

defendants without an enhanced role in the drug trade. It introduces a “fix” on the recidivist mandatory minimum sentences for some firearms offenses. Many of these reforms apply retroactively, including the Fair Sentencing Act, which has been uncontroversial, though other retroactivity for firearms offenses has been questioned. Some senators have objected to lowering the mandatory minimum sentences for drug crimes where a firearm is involved, while others have objected to the *increased* penalty on one such violation. Though most of these reforms are positive, there are also two new mandatory minimum sentences added to the criminal code. Additionally, the bill includes prison reform based on the Cornyn-Whitehouse CORRECTIONS Act including expanded earned time and compassionate release for lower-risk geriatric and terminally ill offenders.

S. 2298 – *Mens Rea Reform Act*

Senator Hatch’s bill establishes a default level of culpability for all laws that do not have criminal intent prescribed. The application of this “willful” default standard is excluded for “any offense that involves conduct which a reasonable person would know inherently poses an imminent and substantial danger to life or limb,” and does not apply to jurisdictional elements.

H.R. 2944 – *Sensenbrenner-Scott SAFE Justice Reinvestment Act*

The SAFE Justice Act makes several significant changes to the federal criminal justice system. Drug sentences will be refocused based on the defendant’s role by broadly applying a safety valve. Sentencing changes will be retroactive, including the Fair Sentencing Act. Among the most innovative reforms are the greater eligibility for pre-judgment probation and requiring open discovery. The bill also includes expanded earned time credits, compassionate release for lower-risk geriatric and terminally ill offenders, and swift, certain and graduated sanctions for violations of supervision. The SAFE Justice Act has the most expansive sentencing reforms of any bill currently before Congress. This bill has a large number of cosponsors, but has not been brought before the House Judiciary Committee.

H.R. 3713 – *Sentencing Reform Act*

The House’s bill closely mirrors the sentencing provisions of the Senate’s SRACA, though retroactive application of mandatory minimum sentencing reductions is more limited, and there are no new mandatory minimums added. The House bill adds a sentencing enhancement for fentanyl.

H.R. 4002 – *Criminal Code Improvement Act of 2015*

Establishes a default “knowing” level of intent for all laws that

do not have a level of intent, though it makes an exception for an offense that “a reasonable person in the same or similar circumstances would not know, or would not have reason to believe, was unlawful, the government must prove that the defendant knew, or had reason to believe, the conduct was unlawful.”

H.R. 4003 – *Regulatory Reporting Act of 2015*

Requires federal agencies to report to Congress with a list of all regulatory rules that have criminal penalties, and for each one the agency must answer several questions, regarding the purpose and intent level.

Frequently Asked Questions

Are federal judges required to follow mandatory minimums and the Sentencing Guidelines?

Yes and no, respectively. Mandatory minimum sentences are made into law by Congress, binding the hands of judges when it comes to sentencing. The only exception is when safety valves might apply. The Sentencing Guidelines are now considered merely advisory guidelines, as determined by the 2005 Supreme Court case *United States v. Booker*. Prior to this decision, the “guidelines” were mandatory.

Were mandatory minimum sentences the primary reason for the crime decline? Wouldn’t eliminating them cause a crime wave?

Undoubtedly, the creation of mandatory minimum sentences and the increased incarceration rates resulting from it had some marginal positive effect on the crime rate, though there is significant debate over the magnitude of that effect. Some put the range at 10–25 percent in the 1980s and 1990s, but as crime decreased in the early 2000s, nationwide incarceration rates slowed, and in the ensuing years incarceration rates have dropped (Baumer, Rosenfeld, Wolff, 26; BJS). The National Research Council of the National Academies concluded that “the magnitude of the reduction is highly uncertain,” in part because these sentences focused on low-level, nonviolent offenders (Committee on Causes and Consequences of High Rates of Incarceration, 5-7).

Do sentencing reforms have public support?

Yes. When told that nearly half of the federal prison population is made up of drug offenders, 61 percent of Americans agree that “too many drug criminals are taking up too much space in our federal prison system. More of that space should be used for people who have committed acts of violence or terrorism.” Only 35 percent say “if that’s the number of people committing federal drug crimes, that’s

the number we need to have in federal prisons.” There is even greater support for eliminating mandatory minimum sentences (over 75 percent) and giving more discretion to judges. Most people do not believe that drug growers or producers, street-level drug dealers, or drug couriers and mules deserve the current mandatory minimum of 10 years (Pew).

More in-depth polling analysis shows that a large sample of Texans support rehabilitating offenders, and preferred alternatives to incarceration for nonviolent and drug offenders (Thielo). Other state-focused polling has also shown that large margins of voters are interested in seeing more criminal justice reforms at the federal level (USJAN).

How many federal crimes are there?

This is a much harder question than it ought to be. Though there is a “criminal code” section of the U.S. Code, that hardly scratches the surface. Criminal penalties are scattered throughout the code and in the Code of Federal Regulations. Even the Department of Justice doesn’t know the answer: the Department’s last attempt to count the crimes in 1982 took two years and resulted in only an estimate of 3,000. In 1998, the American Bar Association knew there were much more than 3,000, but could not come to a conclusive result (Fields and Emshwiller). Professor John Baker’s reports of the totals in 2000 and 2007 are estimated at 4,000 and 4,450, respectively. Yet this doesn’t account for the regulations, which number in the hundreds of thousands. It is for this reason a default term of criminal intent is useful.

Will default criminal intent reforms make it easier for corporate criminals and terrorists to go free?

No. Bills before Congress and the many that are on the books in the states find ways to ensure that crimes that cause harm to others will not be affected by the default standard. For example, certain sections of the code could be exempt, or the default term could be limited to not apply to jurisdictional issues. ★



Parting Thoughts to Keep in Mind

- The conservative/liberal “strange bedfellows” story line is overplayed, and it is not very accurate. Conservatives and libertarians have been working on criminal justice reform in states for years. The coalitions that have formed in criminal justice reform are not so novel for anyone who understands the core beliefs of these ideologies.
- There is an evolving definition of what it means to be a “law and order” conservative. Research shows us that alternatives to incarceration are often more effective ways of improving public safety, so those who favor reform are doing more to protect the public.
- There is robust debate among conservatives about how “far” reforms ought to go. Many conservatives would like Congress to adopt much more aggressive reforms that more closely mirror state reforms in conservative states and have led to drops in crime and incarceration.
- Criminal intent and *mens rea* reform has been championed by the left and right in many states, and is still touted by many on both sides of the aisle in Washington. Why is it that this has recently become a sticking point?

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THE RIGHT ON CRIME EXPERTS

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Dan Isett is the director of communications for Right on Crime. Prior to joining the Foundation, Isett served as the director of communications and policy for the Parents Television Council, director of external affairs at The Center for Education Reform, and as the executive director of the Texas Home School Coalition. In 2002, he was elected chairman of the Lubbock County Republican Party, the youngest county chairman in Texas at the time. Isett has been a guest on a variety of television and radio talk shows, and has been quoted by media. He is a graduate of Texas Tech University and has a degree in history and mass communications.

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About Right on Crime

Right on Crime (ROC) is the one-stop source for conservative ideas on criminal justice. ROC is a project of the Texas Public Policy Foundation, in partnership with the American Conservative Union Foundation and the Justice Fellowship.

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