

The Case For the Smarter Sentencing Act



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[Mr. Malcolm's article is adapted from his presentation on the Smarter Sentencing Act to the Senate Republican Policy Committee on March 31, 2014. Professor William Otis of Georgetown Law School took the opposing view. His adapted remarks are also published in this Issue at 26 *FED. SENT'G REP.* 302 (2014). —Editor]

As a former Assistant United States Attorney and Deputy Assistant Attorney General in the Criminal Division of the Department of Justice, it is perhaps unusual for someone with my background to support the Smarter Sentencing Act of 2014,¹ but I do. Let me be clear at the outset, though, that drug dealing is harmful to society and poses a threat to public safety. Indeed, I prosecuted several drug dealers when I was an AUSA. Drug dealers should be punished, but the question is for how long. In my opinion, the pendulum has swung too far when it comes to drug sentencing. I believe that the Smarter Sentencing Act represents a modest, but important, adjustment to mandatory minimum sentences for drug offenders.

The bill, which was co-sponsored by Senators Dick Durbin (D-IL) and Mike Lee (R-UT), recently passed out of the Senate Judiciary Committee by a 13-5 vote. The matter has not yet been taken up by the full Senate, and Congressmen Raul Labrador (R-ID) and Bobby Scott (D-VA) have introduced a companion bill in the House.²

Some opponents of the Smarter Sentencing Act have suggested that it lacks support among conservatives and is only supported by liberal organizations, but this is simply not true. While this may be a tough vote for some conservatives, it is worth noting that in addition to Senator Lee, who is a former Assistant United States Attorney and the son of a former U.S. Solicitor General, the bill was supported in the Senate Judiciary Committee by Senators Jeff Flake (R-AZ) and Ted Cruz (R-TX), whom nobody would think of as being “soft on crime.” Additionally, the Smarter Sentencing Act is supported by a number of conservative groups and influential players in the law enforcement community including Americans for Tax Reform, the Faith & Freedom Coalition, Heritage Action for America, Justice Fellowship, the Texas Public Policy Foundation, the R Street Institute, the American Conservative Union, the Major Cities Chiefs Association, the International Union of Police Associations, the American Correctional Association, and the Association of Prosecuting Attorneys. Obviously, there are some prosecutors, whom I admire and whose opinions I respect greatly, who oppose the Smarter

Sentencing Act. However, when it comes to this particular issue, I just disagree with them.

To assess the merits of the Smarter Sentencing Act, it is important to understand how mandatory minimum sentencing works and what the Smarter Sentencing Act would actually do.

There are dozens of mandatory minimum offenses covering a variety of offenses.³ In terms of sentence reductions, the Smarter Sentencing Act only deals with drug offenses.⁴

When it comes to drug offenses, mandatory minimums are primarily triggered by the type and amount of drug involved. For example, if someone possesses with intent to distribute 1 gram of LSD (less than a teaspoon) or 5 grams of pure methamphetamine (a packet), that triggers a mandatory minimum of 5 years for a first offense, 10 years for a second offense, 20 years for a first offense in which death or serious bodily injury resulted, or life for a second offense in which death or serious bodily injury resulted. If the amount is 10 grams of LSD or 50 grams of pure meth (less than 2 ounces), that triggers a mandatory minimum of 10 years for a first offense, 20 years for a second offense or a first offense in which death or serious bodily injury resulted, or life imprisonment for a third offense or a second offense in which death or serious bodily injury resulted. These are the minimum sentences that judges generally must impose. Of course, drug crimes invariably carry statutory maximum sentences well above these minimums,⁵ so a sentencing judge is always free to impose a higher sentence if he or she believes it is warranted under the circumstances.

Once someone has been convicted of an offense that carries a mandatory minimum sentence, there are two ways under existing law for that offender to get out from under the mandatory minimum penalty at the time of sentencing: substantial assistance and the safety valve.⁶ The offender may provide information that the government uses to prosecute others, and the government may choose, in its sole discretion,⁷ to file a substantial assistance motion.⁸ If granted, this permits the court to sentence the offender below the mandatory minimum sentence.⁹

Under the current “safety valve,”¹⁰ the offender may qualify for a sentence below the mandatory minimum if he or she satisfies five objective criteria. First, a defendant cannot be an organizer, leader, manager, or supervisor of the drug activity (i.e., he or she must be a “mule” or street dealer, in other words, someone at the very bottom of the

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totem pole in the drug ring). Second, the defendant must provide complete and truthful information to the government (although since the defendant is at the lowest level in the organization, the government is likely to know already what the defendant has to say). Third, the offense cannot have resulted in death or serious bodily injury to anyone. Fourth, the offense cannot have involved the use or possession of a dangerous weapon or the making of a credible threat of violence. And fifth, the defendant must have no more than one criminal history point (i.e., no more than one prior conviction which resulted in a sentence of 60 days' incarceration or less).

The Smarter Sentencing Act would change the current sentencing scheme in five ways. First, the Smarter Sentencing Act would modestly expand the safety valve's fifth criterion to two criminal history points, so long as none of the past convictions were for a violent offense or certain other designated offenses.¹¹ This means that a defendant could have two prior convictions, each resulting in a sentence of less than 60 days' incarceration, or one prior conviction resulting in a sentence of incarceration between 60 days and one year, provided that none of those convictions falls into one of the prohibited categories.

In 2010, Congress passed the Fair Sentencing Act, which reduced the disparity between the amount of crack cocaine and powder cocaine that triggers mandatory minimum penalties from a weight ratio of 100:1 to 18:1 for offenses committed after August 3, 2010. In other words, this law was not made retroactive. Prior to the passage of this law, an offender with 5 grams of crack cocaine was subject to a 5-year mandatory minimum penalty, whereas it would take possession of 500 grams of powder cocaine to trigger the same penalty. Following passage of this law, an offender now must possess 28 grams of crack cocaine to trigger the 5-year mandatory minimum sentence and 280 grams, rather than 50 grams, to trigger the 10-year mandatory minimum sentence.

Second, the Smarter Sentencing Act would permit offenders sentenced under the old 100:1 regime and who would not have been subject to the same mandatory minimum sentence under the new regime¹² to petition the sentencing court for a reduction in their sentences unless the court has previously done so or denied such a petition.¹³ The sentencing court would remain free, of course, to deny such a petition if it chose to do so. Although Congress obviously chose to apply the new regime only on a prospective basis back in 2010, it makes sense for Congress to revisit this issue and to create the possibility of retroactive application depending on the facts of each case. After all, Congress made the determination in 2010 that the old 100:1 disparity resulted in unjust, unduly harsh sentences being meted out to some relatively low-level crack cocaine dealers, and that reducing the sentences of some drug offenders would not pose an undue risk to public safety. The same logic applies to people who fit into this category but were sentenced prior to Fair Sentencing Act.

Third, the Smarter Sentencing Act would reduce the aforementioned mandatory minimum sentencing levels from 5-10-20 years to 2-5-10 years, unless death or serious bodily injury resulted, in which case the penalty would remain at 20 years for a first offense and life imprisonment for a second offense.¹⁴

Fourth, the Smarter Sentencing Act would create some new mandatory minimum penalties and enhance existing ones for certain federal crimes, specifically, sexual assault offenses, domestic violence offenses, and offenses related to terrorism or the proliferation of weapons of mass destruction.¹⁵

Fifth, the Smarter Sentencing Act would take a significant step toward making the law more fair and transparent to average citizens by implementing a "good government" measure. Citizens are currently subject to a dizzying and ever-expanding number of criminal statutes and regulations without any realistic way of knowing what those laws might be, even though violations could result in incarceration and being branded as criminals for the rest of their lives. To ameliorate this situation, the Smarter Sentencing Act would require the Attorney General to identify all crimes in the U.S. Code within one year, to state how many prosecutions have been brought under each of those provisions over the past 15 years, and to state what the *mens rea* ("guilty mind") requirement is for each of those provisions. The Act would also require all regulatory agencies to do the same within one year with respect to regulations carrying criminal penalties that fall under their purview. Finally, the Act would require the Attorney General and each of these agencies to make these lists available to the public for free on their websites within two years.¹⁶ This would provide people who cannot afford an attorney and are concerned that some activity that they are thinking of undertaking might run afoul of some criminal law, with some ability to research the issue and discover which activities they ought to refrain from doing.

In short, while the Smarter Sentencing Act would reduce some mandatory minimum sentences for certain drug offenders, it would not eliminate any mandatory minimum sentences; it would not reduce any statutory maximum sentences; and it would, in fact, create some new mandatory minimum sentences and enhance others.

The groups that are supporting the Smarter Sentencing Act do so for a variety of reasons. For sure, some want to reduce, if not eliminate, drug laws; some want to eliminate mandatory minimum sentencing either because they think it is unfair or because they believe such sentences disproportionately affect minorities; and some want to close prisons and reallocate the money for other purposes that may or may not be related to the criminal justice system. I have different reasons for supporting the Smarter Sentencing Act and would support the Act even if didn't result in shutting down a single prison.

Since the enactment of mandatory minimum sentencing laws for drug offenses in the 1980s, the federal prison population has increased by more than 800 percent; a little

over half of the more than 216,000 inmates in federal prisons today are there for violating federal drug laws.¹⁷ In a recent speech at Georgetown Law School, Patti Saris, Chief Judge of the United States District Court for the District of Massachusetts and current Chair of the United States Sentencing Commission, stated:

[M]andatory minimum penalties sweep more broadly than Congress likely intended. Many in Congress emphasized the importance of these penalties for targeting kingpins and high-level members of drug organizations. Yet the Commission found that 23 percent of federal drug offenders were low-level couriers who transported drugs, and nearly half of these were charged with offenses carrying mandatory minimum penalties. The category of offenders most often subject to mandatory minimum penalties were [*sic*] street level dealers—many levels down from kingpins and organizers.¹⁸

Ah, but wait. The argument has been made by some prosecutors that stiff mandatory minimum sentences provide strong incentives for “little fish” to cooperate against “bigger fish,” and that lowering mandatory minimum sentences will eliminate that incentive. Although I do not mean to underestimate that argument and would concede that lowering mandatory minimum sentences will reduce some of the leverage that prosecutors currently enjoy to induce cooperation, even under the Smarter Sentencing Act there would still be plenty of incentives for defendants to cooperate against “bigger fish.” First, those who wish to qualify for the existing safety valve would still have to provide complete and truthful information to the government. Second, while the Smarter Sentencing Act would reduce the level of mandatory minimum sentences, it does not eliminate any mandatory minimum sentences. Third, I would note that even if there were no mandatory minimum sentences at all, there would still be incentives for defendants to cooperate in order to obtain a favorable recommendation from the prosecutor, which often carries considerable sway with a sentencing judge. Sentencing judges are far more likely to look favorably on a defendant when the prosecutor says, “Your honor, the defendant has told us everything he knows and is cooperating with our ongoing investigation,” as opposed to when the prosecutor says, “Your honor, we have reason to believe that the defendant has a lot of useful information which we could use, but he has refused to cooperate with our ongoing investigation.” Finally, regardless of the merits of this argument, as a general matter, in this country, people are sentenced based on what they deserve considering the gravity of the crimes they committed. If all we cared about was leveraging cooperation against other wrongdoers, then we would make all federal crimes involving more than one person, including all “conspiracy” charges, into mandatory minimum offenses. The reason we don’t do that is because it would result in lots of disproportionate sentences, which

is precisely what happens now to too many “little fish” involved in the drug trade.

The fact of the matter is that in Fiscal Year 2001, the Bureau of Prisons constituted roughly 20 percent of the Department of Justice’s discretionary budget. Today, it is 25 percent of DOJ’s budget and is projected to exceed 28 percent by Fiscal Year 2018.¹⁹ This does not include the costs of the Marshal’s service to detain and transfer prisoners, which is currently 4.3 percent of the Department’s budget. This means less money for investigators, prosecutors, victim’s services, grants to state and local law enforcement authorities, and other Departmental priorities. Federal prisons are 36 percent over capacity today and, at the current rate of incarceration, are projected to climb to 44 percent over capacity by 2018.²⁰

Over the last three years, the Department of Justice’s budget has declined slightly. Given current fiscal constraints, I think it is safe to say that the federal government will not be embarking on a federal prison expansion project in the foreseeable future. Much as some might wish that the federal government would make cuts elsewhere and increase the Justice Department’s budget for prison expansion, wishing will not make it so.

Given this reality, I see each prison cell as very valuable real estate that ought to be occupied by individuals who pose the greatest threat to public safety. In my opinion, under our current system, too many relatively low-level drug offenders are locked up for 5, 10, and 20 years when lesser sentences would, in all likelihood, more than satisfy the legitimate penological goals of general deterrence, specific deterrence, and retribution. Some of these offenders, particularly those with only a modest prior record who take advantage of prison rehabilitation and skills training programs, might even end up becoming productive members of society. Regardless, this would free up prison cells for other drug dealers or for people who pose an even greater threat to public safety.

Many states, including conservative states such as Texas, Georgia, Indiana, and South Carolina, have already begun the process of reforming their sentencing practices, with very promising results. According to the Vera Institute of Justice, at least 29 states have taken steps to roll back mandatory sentences since 2000.²¹ Crime rates have continued to drop. For example, Michigan eliminated mandatory minimum sentencing for most drug offenses in 2002 and applied the change retroactively (nearly 1,200 inmates became eligible for immediate release), yet between 2003 and 2012, violent crime rates dropped 13 percent and property crime rates dropped 24 percent. Texas has reduced sentences for drug offenders, and crime rates are the lowest in that state since 1968. According to a recent Pew study, the 19 states that cut imprisonment rates over the past ten years have all experienced declines in crime rates.²²

I do not mean to undervalue the role that incarceration has had in reducing the crime rate in this country. Increased incarceration has contributed to the reductions in crime. Indeed, the person most cited by those who oppose

the Smarter Sentencing Act, Prof. Steven Levitt of the University of Chicago, argues that increased incarceration may be responsible for 25 percent of the reduction in crime. However, in addition to the fact that there are other factors that would account for the remaining 75 percent and that incarceration, while necessary, is a very expensive option, even Prof. Levitt has recognized that the continued increase in the number of drug offenders in prisons may lead to a “crowding out” effect in which the high number of incarcerated drug offenders prevents the incarceration of offenders prone to more serious crime, thereby reducing the effectiveness of incarceration to reduce crime.²³ That is exactly correct, and that’s why the Smarter Sentencing Act is smart on crime, not soft on crime.

Notes

* The views expressed in this article are my own and should not be construed as representing any official position of The Heritage Foundation.

¹ A copy of the Smarter Sentencing Act of 2014 as reported out of the Senate Judiciary Committee (S. 1410) is available at <https://www.govtrack.us/congress/bills/113/s1410/text>.

² The bill, also called the Smarter Sentencing Act, is H.R. 3382.

³ A complete list of federal mandatory minimum offenses is available at <http://famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf>.

⁴ A second bill, S. 619, the Justice Safety Valve Act, which would have applied to all mandatory minimum sentences, was not voted out of committee. Available at <http://beta.congress.gov/bill/113th-congress/senate-bill/619>.

⁵ For example, possession with intent to distribute one gram of LSD carries a minimum mandatory sentence of 5 years and a statutory maximum sentence of 40 years. A second offense (or first offense involving 10 grams of LSD) carries a minimum mandatory sentence of 10 years and a statutory maximum sentence of life imprisonment.

⁶ Of course, if a prosecutor engages in “charge bargaining” and never charges the offender with a mandatory minimum offense, then the offender would not be subject to a mandatory minimum penalty. Similarly, the president could invoke his Pardon Power authority under Article II, Section 2, Clause 1 and grant clemency to reduce the sentence of somebody who has received a mandatory minimum penalty, but this would occur, if at all, long after the defendant was sentenced by a judge.

⁷ The only exception to this rule is if the government’s refusal to file a substantial assistance motion is based on an unconstitutional motive such as the defendant’s race or religion. See *Wade v. United States*, 504 U.S. 181 (1992).

⁸ This is sometimes referred to as a § 5K1.1 motion, a reference to the applicable provision in the United States Sentencing Commission Guidelines Manual.

⁹ The substantial assistance provision is codified at 18 U.S.C. § 3553(e).

¹⁰ The safety valve is codified at 18 U.S.C. § 3553(f).

¹¹ See Section 2 of the Smarter Sentencing Act, *supra* note 1.

¹² This would apply to drug dealers who possessed at least 5 but less than 28 grams of crack cocaine who received a five-year sentence (or who committed a second such offense and received a ten-year sentence), and drug dealers who possessed at least 50 but less than 280 grams of crack cocaine who received a ten-year sentence (or who committed a second such offense and received a twenty-year sentence).

¹³ See Section 3 of the Smarter Sentencing Act, *supra* note 1.

¹⁴ See Section 4 of the Smarter Sentencing Act.

¹⁵ See Sections 8 to 10 of the Smarter Sentencing Act.

¹⁶ See Section 7 of the Smarter Sentencing Act.

¹⁷ See Bureau of Prisons, Historical Information, *available at* <http://www.bop.gov/about/history/>, and Inmate Statistics: Offenses, *available at* http://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp.

¹⁸ See Hon. Patti B. Saris, A Generational Shift For Drug Sentences, Address at the Georgetown University Law Center (March 26, 2014) at 4, *available at* <http://www.uscc.gov/sites/default/files/pdf/training/online-learning-center/supporting-materials/Saris-Georgetown-Law-Center-Speech-20140326.pdf>.

¹⁹ See Michael E. Horowitz, Department of Justice Inspector General, *Top Management and Performance Challenges Facing the Department of Justice—2013* (December 2013, updated May 2014), *available at* <http://www.justice.gov/oig/challenges/2013.htm>.

²⁰ *Id.*

²¹ Ram Subramanian & Ruth Delaney, *Playbook for Change? States Reconsider Mandatory Sentences*, Policy Report, at 8 (VERA Institute of Justice, February 2014, updated April 2014), *available at* <http://www.vera.org/sites/default/files/resources/downloads/mandatory-sentences-policy-report-v2b.pdf>.

²² Pew Center on the States, *State of Recidivism: The Revolving Door of America’s Prisons* at 5 (April 2011), *available at* <http://www.pewtrusts.org/en/research-and-analysis/reports/2011/04/12/state-of-recidivism-the-revolving-door-of-americas-prisons>. The 19 states are Alaska, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Kansas, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Oklahoma, South Carolina, Texas, Utah, and Wisconsin.

²³ Ilyana Kuziemko & Steve Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. Pub. Econ. 2056–62 (2004), *available at* <http://pricetheory.uchicago.edu/levitt/Papers/KuziemkoLevitt2004.pdf>.