



June 5, 2018

Chairman Charles Grassley
135 Hart Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

I write as one member of the U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole, to urge you to oppose the FIRST STEP and Smarter Sentencing Act bills.¹

Good and well-intentioned people are concerned about the large number of individuals who are incarcerated in the United States.² Many of these people are particularly concerned that black men are disproportionately likely to be incarcerated compared to white men.³ They hope that FIRST STEP and the Smarter Sentencing Act will ameliorate these problems. The FIRST STEP bill would allow prisoners to earn up to 15 days of time credits for every 30 days of participation in “evidence-based recidivism reduction programming or productive activities.” The Smarter Sentencing Act dramatically reduces sentences for drug offenses, for example by halving the minimum sentence for individuals who traffic in methamphetamines.⁴ The Smarter Sentencing Act even carves out special sentences for methamphetamine couriers, who can be sentenced to as little as 2 years of prison and 5 years if they have previously been convicted of a felony drug offense.⁵

Releasing prisoners early and reducing sentences are unlikely to have the beneficial effects promised by these bills’ sponsors. The FIRST STEP Act is premised on the belief that rehabilitation is mostly a matter of finding the right “evidence-based” programs and prisoner willingness to engage in such programs. The Smarter Sentencing Act’s sentencing reductions are retroactive.⁶ The evidence shows that the most likely outcome of these bills, should they become law, is that individuals will be freed to commit crimes sooner than they otherwise would have. And there is no evidence that racial disparities will be appreciably reduced.

In 2013, the U.S. Commission on Civil Rights held a briefing on the Equal Employment Opportunity Commission’s [EEOC] revised guidance on the use of criminal background checks

¹ H.R. 5682, “FIRST STEP Act,” <https://www.congress.gov/115/bills/hr5682/BILLS-115hr5682eh.pdf>; S. 1933, “Smarter Sentencing Act of 2017,” <https://www.congress.gov/115/bills/s1933/BILLS-115s1933is.pdf>.

² “Sen. Lee Introduces Smarter Sentencing Act,” Oct. 5, 2017, <https://www.lee.senate.gov/public/index.cfm/press-releases?ID=95C42A54-3365-471F-8D43-6CFEFFF1C3E5>.

³ Id.

⁴ Smarter Sentencing Act, Sec. 4(a).

⁵ Id. at Sec. 4(b).

⁶ Id. at Sec. 3(b).



in hiring.⁷ The guidance was motivated by many of the same concerns that seem to underlie the Sentencing Reform Act – primarily that minority men, particularly African-American men, are disproportionately likely to be incarcerated and have criminal records, concern about burgeoning prison populations, and a sense that as a society we should focus on rehabilitation, not retribution.

During that briefing, witnesses testified about the difficulty ex-convicts face in obtaining employment.⁸ One would have thought that rehabilitation was the norm for ex-offenders, stymied only by a callous society that refused to give them a second chance. One also would have thought that ex-offenders were essentially indistinguishable from non-offenders. Further research revealed this to be far from the truth.

People who are convicted of a crime and imprisoned are a very small minority of the U.S. population – according to the EEOC, they comprise possibly 6.6 percent of the population.⁹ Many offenders have serious additional problems that likely incline them toward criminality. “Steven Raphael writes, ‘Those who serve time in U.S. prisons are hardly a random sample of the U.S. population. Individuals who pass through the nation’s prisons tend to come from poverty, [and] suffer disproportionately from physical and mental health problems as well as substance abuse problems’”.¹⁰

FIRST STEP and the Smarter Sentencing Act are predicated on the belief that rehabilitation is not merely possible, but probable. FIRST STEP relies on the assumption that authorities can accurately assess which offenders are likely to desist from crime.¹¹ Yet scholarly literature indicates that a person who has been convicted of multiple offenses is *always* more likely to re-offend than is a person who has never offended.¹² Indeed, even a person who has been arrested only once is always more likely to be arrested than is a never-arrested person.¹³ Furthermore, it is

⁷ U.S. COMMISSION ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S CONVICTION RECORDS POLICY [hereinafter “Criminal Background Checks”], December 2013, available at http://www.eusccr.com/EEOC_final_2013.pdf.

⁸ See “Criminal Background Checks,” Written Statement of Alfred Blumstein and Kiminori Nakamura at 109; Written Statement of Glenn E. Martin at 194; Written Statement of Roberta Myers at 216.

⁹ See “Criminal Background Checks,” Statement of Commissioner Peter Kirsanow [hereinafter “Kirsanow Statement”], at 291, citing Equal Opp’y Comm., Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, at note 9.

¹⁰ *Id.* at 291, citing Steven Raphael, *Improving Employment Prospects for Former Prison Inmates: Challenges and Policy* 5 (Nat’l Bureau of Econ. Research, Working Paper No. 15874, 2010), available at <http://www.nber.org/papers/w15874>.

¹¹ FIRST STEP Act, § 3632 (“Not later than 180 days after the date of the enactment of the FIRST STEP Act, the Attorney General shall develop a risk and needs assessment system . . . , which shall be used to (1) determine the recidivism risk of each prisoner as part of the intake process, and classify each prisoner as having minimum, low, medium, or high risk for recidivism”).

¹² See Kirsanow Statement at 292-93.

¹³ *Id.* at 293.

Furthermore, ex-offenders, even when that is defined as people who were arrested once, are always at a higher risk of re-arrest than are people who have never offended. As Dr. Blumstein’s



difficult to predict which ex-offenders will desist from crime. John Laub and Robert Sampson write, “[T]he characteristics that distinguish persistence in a life of crime from desistance within any group of high-risk offenders are generally unknown.”¹⁴ They also write:

Elements such as family formation and gaining employment, for example, appear to predict desistance from crime in adulthood. But the research evidence is not strong or convincing. To cite but one example, Wright and Wright (1992, p. 54) concluded that “no clearly confirming set of findings has emerged from research to date that demonstrates that getting married and having children reduces the likelihood of criminal offense.”¹⁵

This pessimism about the likelihood of recidivism is supported by a recently-released Bureau of Justice Statistics (BJS) study that tracked the recidivism of state prisoners for 9 years.¹⁶ These prisoners came from 30 states that collectively accounted for 77% of the state prisoners released in 2005. “[BJS] analyzed the offending patterns of 67,966 prisoners who were randomly sampled to represent the 401,288 state prisoners released in 2005 in 30 states.”¹⁷ The recidivism figures are astonishing: by the end of the 9-year period, 83 percent of the released prisoners had been arrested. “The 401,299 state prisoners released in 2005 had an estimated 1,994,000 arrests during the 9-year period, an average of 5 arrests per released prisoner. Sixty percent of these arrests occurred during years 4 through 9.”¹⁸ Interestingly, “More than three-quarters (77%) of released drug offenders were arrested for a non-drug crime within 9 years.”¹⁹ This suggests that the popular narrative that prisons are filled with otherwise law-abiding individuals who had the misfortune to be caught carrying a joint is largely inaccurate.

BJS recently noted in an annual report entitled “Prisoners in 2016,” that “For sentenced prisoners, the imprisonment rates at year-end 2016 were the lowest since 1997, with 450 prisoners per 100,000 U.S. residents of all ages”.²⁰ But the FBI reported that in the very same year, 2016, “[t]he estimated number of violent crimes in the nation increased for the second

work shows, if the ex-offender avoids re-arrest for several years, his risk of re-arrest declines until it is roughly the same as the risk that someone in the general population (which includes both non-offenders and repeat offenders) will be arrested. If the person stays clean long enough, eventually their risk of offending drops *below* that of the general population, but not below the risk level of non-offenders. (citations omitted)

¹⁴ John H. Laub and Robert H. Sampson, *Understanding Desistance from Crime*, 28 *Crime and Justice* 1, 2 (2001).

¹⁵ *Id.* at 2.

¹⁶ Mariel Alper, Matthew R. Durose, and Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, Bureau of Justice Statistics, May 2018, <https://www.bjs.gov/content/pub/pdf/18supr9yfup0514.pdf>.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 1.

²⁰ E. Ann Carson, *Prisoners in 2016*, Bureau of Justice Statistics, January 2018, <https://www.bjs.gov/content/pub/pdf/p16.pdf>.



straight year, rising 4.1 percent in 2016 when compared with 2015 data”.²¹ Correlation is not causation. But if we have fewer people incarcerated, and yet crime is increasing, it seems that at the very least we do not have an under-incarceration problem.

Rehabilitation is important, but it is only one purpose of incarceration. Incapacitation – that is, the inability to commit additional crimes – is another purpose of incarceration. Incapacitation is more effective than rehabilitation, because it works on everyone. Rehabilitation, at best, works on those who are motivated by wanting to change their lives. For example, a 2013 study compared New York inmates who obtained a college degree in prison against inmates with similar profiles who had not obtained a college degree.²² Without matching the treatment group and control group based on their backgrounds, the study showed that offenders who did not obtain a college degree while in prison had a re-arrest rate 3.8 times higher than those who obtained a college degree. Once researchers controlled for self-selection bias, the re-arrest rate for the non-college offenders was only 1.8 times higher than for those who pursued a college degree. The college degree program certainly was worthwhile, but its results were not as dramatic as when those who obtained a degree were compared to the prison population as a whole. Once there is the prospect of getting out early in return for participating in these programs, prisoners who have no particular interest in the programs will have an incentive to sign up for them, and that will likely further lower the programs’ effectiveness. The programs will likely still be beneficial for those who participate out of a desire to better their lives, and they should be continued. But does a reduced likelihood of recidivism for those prisoners outweigh the danger of releasing other prisoners who had no interest in reform, but a great deal of interest in getting out of prison early?

It is a sad fact that we do not know how to transform an individual from a criminal into a law-abiding member of society. Dr. Matt DeLisi testified at a Judiciary Committee hearing in 2013:

The greatly expanded use of incarceration since 1980 is among the best explanations for the dramatic declines in crime from its peak in 1993 to 2011. There is compelling evidence that **prison is the only sanction that reduces criminal offending because of incapacitation**. A recent large-scale analysis of over 100,000 offenders from seven birth cohorts found that the offending behavior of criminals is assumed to remain the same throughout their active careers, and is only reduced when offenders cease offending after repeated confinement. Declines in offending reflect the proportion that have ceased offending, and do not reflect intrinsic reductions in the predilection towards offending. *Put another way, prison wears down offenders to the point where they*

²¹ *FBI Releases 2016 Crime Statistics*, FBI, September 25, 2017, <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2016-crime-statistics>.

²² Ryang Hui Kim and David Clark, *The effect of prison-based college education programs on recidivism: Propensity Score Matching approach*, *Journal of Criminal Justice* (4) 196-204 (2013), <https://economix.fr/uploads/source/membres/536/matching-prisoneducation.pdf>.



ultimately desist from crime – they do not necessarily transform their antisocial mindset. [emphasis in original, citations omitted]²³

It is true that black men are more likely to be incarcerated than white men, and that many advocacy organizations that purport to represent the interests of black people favor reduced sentences and early release. But given the likelihood of recidivism, reducing incarceration means that black criminals will return to black neighborhoods like mine and resume their criminal careers. The government should favor the interests of the innocent over the interests of the guilty. If there were a solution other than incarceration that I thought would persuade criminals to desist from crime, I would wholeheartedly support it. But until such solution is found, I urge you to oppose these two bills.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter Kirsanow', with a long horizontal stroke extending to the right.

Peter Kirsanow
Commissioner

Cc: Republican Members of Senate Committee on the Judiciary

²³ Matt DeLisi, Ph.d, “Testimony to the United States Senate Committee on the Judiciary Hearing ‘Oversight of the Bureau of Prisons and Cost-Effective Strategies for Reducing Recidivism,’” at 9, Nov. 6, 2013, available at <https://www.judiciary.senate.gov/imo/media/doc/11-6-13DeLisiTestimony.pdf>.