



May 5, 2016

Dear Chairman Grassley:

I write as one member of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole. I also write as a person who lives in a high-crime, predominantly African-American neighborhood. The purpose of this letter is to express my concerns about the Sentencing Reform Act of 2015, particularly the various provisions that reduce the length of prison sentences.

Three years ago, 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 in hiring.¹ 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, a concern about burgeoning prison populations, and a sense that as a society we should focus on rehabilitation, not retribution.

During our briefing, witnesses testified about the difficulty ex-convicts face in obtaining employment, a very real and troubling concern.² But one would have concluded from the briefing 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 approximately 6.6 percent of the population.³ These people have managed to be less law-abiding than the remaining 93.4 percent of the U.S. population – quite a feat. It is perhaps less of a feat when one considers that 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

¹ 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.

² See “Criminal Background Checks,” *supra* note 1, 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.

³ See “Criminal Background Checks,” *supra* note 1, Statement of Commissioner Peter Kirsanow [hereinafter “Kirsanow Statement”], at 291, citing EQUAL OPP’TY 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.



problems”⁴ Furthermore, as Dr. Matt DeLisi testified before the Senate Judiciary, “the prevalence of psychopathy in correctional populations is at least 25-fold higher than its prevalence in the general public. Psychopathy is one of the most pernicious and stable antisocial conditions, and among the strongest predictors of serious recidivism” (emphasis in original; citations omitted).⁵ Dr. DeLisi also testified that sexual sadism is far more prevalent among prison populations than among the general public, and not only among those incarcerated for homicide or sexual offenses.⁶

The Sentencing Reform Act is predicated on the belief that rehabilitation is not only possible, but *likely*. Yet scholarly literature indicates that a person who has been convicted of multiple offenses is *always* more likely to offend (again) than is a person who has never offended.⁷ Indeed, even a person who has been arrested only once is always more likely to be arrested than is a never-arrested person.⁸ It is 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.”⁹ 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.”¹⁰

It might be better for judges and parole officers closer to the offenders to make such determinations on a case-by-case basis. Congress should not, however, pressure judges to indiscriminately hand down more lenient sentences. The punishment should fit the crime. In

⁴ *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>.

⁵ 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 8, Nov. 6, 2013, available at <https://www.judiciary.senate.gov/imo/media/doc/11-6-13DeLisiTestimony.pdf>.

⁶ *Id.*

⁷ See Kirsanow Statement, *supra* note 3, at 292-93.

⁸ *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 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)

⁹ John H. Laub and Robert H. Sampson, *Understanding Desistance from Crime*, 28 *Crime and Justice* 1, 2 (2001).

¹⁰ *Id.* at 2.



federal cases, often a stiff punishment is deserved because the person committed a serious crime. Furthermore, Dr. DeLisi notes, the rehabilitation programs that are touted as success stories cannot be relied upon because they insufficiently control for selection bias.¹¹

Assuming, then, as we must, that some percentage of offenders will reoffend, what is likely to be the human toll of such recidivism? Dr. DeLisi testified, “releasing 1% of the current BOP population would result in approximately 37,230 additional murders rapes [sic], robberies, aggravated assaults, burglaries, thefts, auto thefts, and incidents of arson.” The Bureau of Justice Statistics has also studied recidivism.

In a three-year study of prisoners who were released in 1994 conducted by the Bureau of Justice Statistics, “67.5% of the prisoners were rearrested for a new offense (almost exclusively for a new felony or a serious misdemeanor), 46.9% were reconvicted for a new crime,” and 25.4% were resented to prison for a new crime.” Furthermore, these ex-offenders as a group had committed a substantial number of crimes: Following their release, the ex-prisoners “accounted for 8.4% of all the homicides in the 13 States [that were studied] in 1995,” as well as 5.4% of the arrests for motor vehicle theft and 12.4% of the arrests for burglary in 1994. The authors note:

Although these percentages may seem small, they are actually the product of high rates of criminality. For example, to account for the 8.4% of homicides, *the 234,358 released prisoners were arrested for homicide at a rate 53 times higher than the homicide arrest rate for the adult population.* Note also that the 8.4% arrest rate does not include homicides by

- (a) prisoners released in 1995;
- (b) prisoners released before 1994, or
- (c) released prisoners who had crossed state lines. The percentage of homicides attributable to released prisoners would be substantially greater if it included persons in categories *a*, *b*, and *c*.¹² (emphasis added)

We can rest assured, then, that a substantial number of released prisoners will re-offend. Who are their victims likely to be? It is likely, given the disproportionate presence of African-American men in the prison population, that any relaxation of sentencing or early release will disproportionately benefit African-American men. Indeed, the racial disparity in incarceration is widely acknowledged to be the primary motivation for sentencing reform on the Left, and perhaps in some corners of the Right as well. Those African-American men will then return to their communities, which are more likely to be predominantly African-American. It is therefore

¹¹ DeLisi, *supra* note 5, at 6.

¹² Kirsanow Statement, *supra* note 3, at 293 (citations omitted), quoting Patrick A. Langan and David J. Levin, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.



likely that the *victims* of those released early will also be disproportionately likely to be black. This is not surprising – people tend to live in communities predominantly comprised of members of their own racial or ethnic group. White ex-offenders are therefore likely to victimize other white people. But the drive for sentencing reform is motivated by concern over black offenders, and so it is worth noting that their future victims are also likely to be black.¹³ If we are going to play the disparate impact card, which is much of the impetus behind sentencing reform, we should note that the disparate impact works both ways. Yes, blacks are disproportionately likely to be incarcerated. But the lives not lost or damaged because of their incapacitation due to incarceration are also disproportionately likely to be black.

As I mentioned at the beginning of this letter, I live in a predominantly black area of inner-city Cleveland. For my neighbors and me, these concerns are not remote. When these men are released from prison earlier than they otherwise would have been, they are coming back to my neighborhood and neighborhoods like mine. You cannot wish away the deleterious consequences of releasing unreformed criminals when they are released into your own neighborhood.

This is not to say that there is not support among inner-city blacks for sentencing reform. Many law-abiding inner-city blacks have incarcerated relatives. In such cases, family ties will understandably sometimes outweigh public interests. But it is important that Congress act in the best interests of society as a whole, and it is not in the best interests of society as a whole to have more lenient sentencing. There are undoubtedly some people in prison who would be on the straight and narrow if released, and there are undoubtedly people who would resume their criminal careers when released from prison. When deciding where to draw the line, Congress should err on the side of protecting the interests of the law-abiding majority, not those who have violated the law.

A particular provision of proposed § 3621A (to be inserted in chapter 229 of title 18 of the United States Code) concerns me as well. Sec. 3621A directs the Attorney General to develop a post-sentencing needs and risk assessment system. Section 3621A(b)(1)(D) states that the Attorney General:

(D) ensure that the Assessment System does not result in unwarranted disparities, including by –

¹³ Erika Harrell, Ph.d, BUREAU OF JUSTICE STATISTICS, BLACK VICTIMS OF VIOLENT CRIME at 5 (2007) (“About four-fifths of black victims of nonfatal violence perceived the offenders to be black Blacks (78%) were more likely to be victims of intraracial violence than whites (70%)”), <http://www.bjs.gov/content/pub/pdf/bvvc.pdf>; FBI, *Crime in the United States 2013*, Expanded Homicide Data Table 6 (Of 3,0005 total white homicide victims, 2,509 were killed by a white offender, 409 by a black offender, 49 by an “other” offender, and 38 by an offender of unknown race; of 2,491 total black homicide victims, 2,245 were killed by a black offender, 189 by a white offender, 20 by an “other” offender, and 37 of an offender of unknown race), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded-homicide-data-table-6-murder-race-and-sex-of-victim-by-race-and-sex-of-offender-2013.xls>.



- (i) regularly evaluating rates of recidivism among similarly classified prisoners to identify any unwarranted disparities in such rates, including disparities among similarly classified prisoners of different racial groups; and
- (ii) adjusting the Assessment System to reduce such racial disparities to the greatest extent possible.¹⁴

Incorporating disparate impact into a recidivism assessment system is a mistake. Disparate impact was initially applied in the employment context. To see the competing priorities it creates in the employment context, one need look no further than the set of facts that gave rise to the Supreme Court case *Ricci v. DiStefano*.¹⁵ There is *no* policy or practice, in employment or elsewhere, that does not have a disparate impact on some group or other. In employment, this manifests in situations like that faced by Mr. Ricci, where the most qualified applicants for a job are affirmatively discriminated against because a neutral job qualification yielded too few qualified applicants of a particular race. When the Department of Education transplanted disparate impact into the school discipline context, the consequences were more serious.¹⁶ Teachers and school districts are discouraged from disciplining students on the basis of their behavior because more black and Hispanic students are disciplined than white and Asian students. In St. Paul, Minnesota, this has resulted in increasingly chaotic and dangerous schools.¹⁷ The inherent problem with disparate impact in any setting is that it creates an incentive to treat people differently based on their race in an effort to avoid racial disparities caused by a neutral policy. Alternatively, decision makers may simply lower standards to reduce disparate impact, but you then run the risk of getting unqualified employees or utterly undisciplined students. This is what is happening in St. Paul.

If incorporating disparate impact into school discipline was a bad idea, incorporating it into recidivism assessment is much more dangerous. I can almost guarantee that any meaningful recidivism assessment system will have racial disparities of some kind. Including disparate impact in the recidivism assessment system provides an easy way to for politicians and interest groups to pressure the Attorney General and prison officials to override their better judgment and either lower the standards in the recidivism assessment or classify some prisoners as being a lower-risk than they otherwise would. They will find themselves in an untenable position where racial disparities in recidivism assessments will expose them to public and political pressure, but any public admission that they are responding to that pressure will also expose them to a backlash. I believe this bill as a whole is misguided, but if it goes forward, I strongly urge you to remove the disparate impact provisions of § 3621A.

¹⁴ S.2123, §3621A, <https://www.congress.gov/bill/114th-congress/senate-bill/2123/text>.

¹⁵ *Ricci v. DiStefano*, 557 U.S. 557 (2009).

¹⁶ See U.S. COMMISSION ON CIVIL RIGHTS, SCHOOL DISCIPLINE AND DISPARATE IMPACT, Statement and Rebuttal of Commissioner Gail Heriot at 97—114; see also Statement of Commissioner Todd Gaziano at 87—96 (2012), available at http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf.

¹⁷ Katherine Kersten, *The school safety debate: Mollycoddle no more*, MINNEAPOLIS STAR-TRIBUNE, Mar. 18, 2016, <http://www.startribune.com/the-school-safety-debate-mollycoddle-no-more/372619741/>.



There is one other thing I would like to note. Everyone at least tacitly acknowledges that much of the political pressure behind this bill is animated by a sense of racial grievance – that African-American men are incarcerated at higher rates than their presence in the population. Yet one of the reasons why we have some of these stiff sentences is because when crime was rampant, African-Americans protested the violence visited upon their communities and asked the government to get tougher on crime. If we relax sentencing, there is a very good chance that crime will go up, it will disproportionately go up in African-American communities, and then some of the same people who are presently supporting sentencing leniency will be demanding harsher penalties because of the increasing crime in their communities; and, if recent history is a guide, they will claim the increase is due to racially discriminatory policies. In fact, this is already happening – when demoralized police departments are instructed to engage in less proactive policing, violence spikes, and those same Black Lives Matter activists cry foul.¹⁸ In five or ten years, Congress will be back to codify stiffer sentences because “the system is broken,” “poor and minority children are hurt most,” and “lenient judges let violent criminals out on the street with a slap on the wrist.”

Thank you for considering my concerns. Please feel free to contact my special assistant, Carissa Mulder, at cmulder@usccr.gov if I can be of any assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter Kirsanow', with a stylized flourish at the end.

Peter Kirsanow
Commissioner

Cc: Senator Orrin Hatch, Senator Jeff Sessions, Senator Lindsey Graham, Senator John Cornyn, Senator Mike Lee, Senator Ted Cruz, Senator Jeff Flake, Senator David Vitter, Senator David Perdue, Senator Thom Tillis

¹⁸ Heather MacDonald, *The Ferguson effect in Los Angeles – more crime*, L.A. TIMES, Jan. 13, 2016, <http://www.latimes.com/opinion/op-ed/la-oe-mac-donald-ferguson-effect-in-los-angeles-20160113-story.html>; Shaun King, *People are dying in Chicago and Baltimore because of incompetent police and a broken system*, N.Y. DAILY NEWS, Apr. 12, 2016, <http://www.nydailynews.com/news/national/king-incompetent-police-costing-lives-chicago-baltimore-article-1.2597721>.