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Frank O. Bowman III

University of Missouri School of Law, bowmanf@missouri.edu

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Good Enough to Be Getting on With? The State of Federal Sentencing Legislation, December 2015

In an era in which the federal legislative process has largely ceased to function, one flicker of hope in the Stygian gloom has been the emergence on Capitol Hill of an apparent bipartisan consensus that federal prisons hold too many people for too long, and that Congress ought to do something about that. Proposals to address over-incarceration have been bubbling up for some time—often bearing impressive lists of co-sponsors from both parties and endorsements from deep thinkers at both ends of the political spectrum—and 2015 looked to be the year in which Congress materially altered federal sentencing and corrections policy. In particular, Congress seemed on the brink of enacting significant limitations on the use of mandatory minimum sentences and of providing the beginnings of a more flexible, generous mechanism for back-end release of federal prisoners. But it now appears that legislation, if any, will be deferred until 2016.

In itself, delay until after the Christmas recess is no ground for despair. On the surface, all seems well. Both the Senate and House Judiciary Committees have approved bills with “Sentencing Reform Act” as part of their titles, with further work promised in the spring. Members are issuing statements extolling their handiwork and lauding bipartisanship. The White House is signaling its approval and pressing for passage.

And yet all is not quite as it seems. There remains real doubt that any sentencing reform, however broad its apparent support, can overcome the reflexive opposition of the modern congressman to any measure that could be labeled soft on crime. And even if some bill can pass, efforts to appease the ideologically entrenched or politically cautious have already restricted the scope of the bills most likely to succeed to such an extent that some observers are privately questioning whether they would accomplish enough to merit real enthusiasm.

This article traces the evolution of the sentencing reform debate in Congress in 2015. It summarizes and compares the six major pieces of sentencing legislation introduced in 2015. It describes the progression from conceptually simple, broadly applicable reforms of mandatory minimum sentences to the regime of complex and highly restrictive rules relaxing mandatory minimum sentences for a modest subset of federal defendants found in the bills that passed the Senate and House Judiciary Committees. The article summarizes some of the concerns voiced about

the sentencing provisions of the various bills. Finally, it discusses the three pending bills relating to back-end release: Senator Bernie Sanders’ proposed restoration of federal parole, the SAFE Justice Act introduced in the House, and the Corrections Act portion of the Senate’s Sentencing Reform and Corrections Act of 2015.

In the pages that follow this article are arranged a selection of comments on aspects of these bills from participants in and informed observers of the ongoing legislative process, as well as important primary materials, including summaries and excerpts from the various competing bills.

I. The Push to Reform Federal Mandatory Minimum Sentences

Critics of federal criminal justice policy have long focused particular ire on statutes imposing mandatory minimum sentences. The basic criticism of these statutes is that they are crude instruments, commonly triggered by facts like drug quantity or the mere possession of a weapon, which bar judicial consideration of the relative culpability or personal circumstances of individual offenders. In truth, however, the true ground of objection to many federal mandatory sentences is their sheer length in relation to the conduct for which they are imposed. A mandatory sentence of one or two or three years for a non-violent drug seller is one thing. Mandatory sentences of five, ten, fifteen, or twenty-five years—which are scattered liberally throughout portions of the federal code—are quite another. The combination of inflexibility and length has meant that a good many federal inmates who look little or nothing like the “drug kingpins” or “armed career criminals” for whom lawmakers imagined they were reserving these penalties are serving long mandatory sentences, at great expense to the public fisc and little obvious benefit to the common weal.

A. Justice Safety Valve Act of 2015

If one objects to mandatory minimum sentences on principle and for all crimes, the obvious solution is to erase them from the federal code. On February 3, 2015, Senators Patrick Leahy (D-VT) and Rand Paul (R-KY) introduced the Justice Safety Valve Act of 2015 (reproduced in its entirety later in this Issue¹). Representatives Bobby Scott (D-VA) and Thomas Massie (R-KY) introduced corresponding legislation in the House. If enacted, it would grant judges the



FRANK O. BOWMAN, III

Floyd R. Gibson
Missouri Endowed
Professor of Law,
University of
Missouri School of
Law

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unfettered authority to sentence defendants below any prescribed minimum sentence so long as the judge felt it necessary to accomplish the general objectives of punishment enumerated in 18 U.S.C. § 3553(a).

Unsurprisingly, the Leahy-Paul and Massie-Scott bills have gone nowhere. A Congress in which both houses are controlled by Republicans, even Republicans convinced that some reform is needed, was never going to pass a bill that ceded to judges absolute control over sentence length for every crime. Nor, in my own view at least, would reversion to the era of unfettered judicial discretion that preceded the enactment of the Sentencing Reform Act of 1984 be sound policy. Complete abandonment of legislatively prescribed minimum punishments is no more sensible than the present regime of rampant overuse of overlong minimums. Even if one agrees that punishment for crime should take some account of the particular circumstances of each offense and the personal attributes of each offender, it does not follow that society should be barred from requiring some minimum measure of atonement based solely on the gravity of the crime. It may be daft for a legislature to require a first-time non-violent dealer of a tiny quantity of crack to spend five years in prison, but it would be equally daft to bar the legislature from decreeing that one who commits premeditated murder must serve a set, and substantial, term of years for taking another life, or from setting a limit on the number of times a persistent recidivist may reoffend before being removed from society for a significant period.

Those categorically opposed to mandatory minimum sentences are prone to make a fetish of either the supposed imperative of individualization or the supposed inherent superiority of judges as sentencing decision makers. But even if one finds neither of these lines of theoretical argument compelling, there remains the undeniable practical fact that legislatures in the modern era have proven chronically unable to restrain themselves from passing mandatory minimum sentencing laws that sweep in too many offenders and that imprison them for too long. This being so, meaningful—and politically feasible—reform of mandatory minimum sentencing laws should embrace two objectives: (1) where such laws now sweep in defendants beyond their intended scope, narrow the categories of defendants eligible for minimum sentences, and (2) where such laws accurately define, but over-punish, the class of offender they were intended to reach, reduce the length of the mandatory sentence.

B. Smarter Sentencing Act of 2015

On February 12, 2015, Senators Mike Lee (R-UT) and Richard Durbin (D-IL), together with a group of co-sponsors including Ted Cruz (R-TX) and Cory Booker (D-NJ), introduced the Smarter Sentencing Act of 2015.² Representatives Raul Labrador (R-ID) and Bobby Scott (D-VA) introduced corresponding legislation in the House. The bill would both shorten drug mandatory minimums for many defendants and narrow the class of defendants to whom other mandatory minimums apply.

The Act's principal provisions are as follows:

- Section 2 would expand the class of defendants eligible for the statutory safety valve of 18 U.S.C. § 3553(f) from those who have no more than one Guidelines criminal history point to include those with two or three criminal history points in the Guidelines' Criminal History Category II.
- Section 3 would make the Fair Sentencing Act of 2010 (FSA), which reduced mandatory penalties for crack cocaine offenses, fully retroactive, with the exception that a defendant who had already sought and been either granted or denied a sentence reduction under the Act could not reapply for relief even if that motion had been denied on the basis that the FSA was not retroactive at that time.
- Section 4 would cut the mandatory minimum drug sentences now prescribed by 21 U.S.C. § 841(b) for domestic manufacture, distribution, dispensing, or possession with intent to manufacture, distribute, or dispense controlled substances, roughly in half. Five-year minimums would be reduced to two years. Ten-year minimums would drop to five years. Twenty-year minimums would be cut to ten years. And the life imprisonment minimum of § 841(b)(1)(viii) would fall to twenty-five years.
- Section 4 would leave the minimum sentences for importing or exporting controlled substances under 21 U.S.C. § 960(b) undiminished *except* for defendants defined as "couriers"—those defendants "whose role in the offense was limited to transporting or storing drugs or money." The mandatory sentences of couriers convicted of importation would be roughly halved.
- Importantly, Section 5 of the bill directs the U.S. Sentencing Commission to amend the Federal Sentencing Guidelines to accord with the changes in mandatory minimum sentences. This is critical because the Commission structured the drug guidelines around the fixed points set by the mandatory minimum sentences enacted in the Anti-Drug Abuse Act of 1986.³ The presumable effect of this directive would be a material downward shift in the severity of the drug guidelines, as well as the drug mandates.

The most striking aspects of the Smarter Sentencing Act are its conceptual simplicity and its practical workability. Its authors sought a solution for a single problem: mandatory minimum drug sentences are too long and apply to too many people. They solved the problem by cutting most of the troublesome sentences in half and making the Section 3553(f) safety valve available to a slightly wider slice of the defendant population. And they directed the Sentencing Commission to adjust the Guidelines to reflect the Act's new set of normative judgments about how much punishment is required for drug offenses.

The political weakness of the Smarter Sentencing Act is evident from its list of co-sponsors. Most of them are Democrats, and the Republicans notably shade to the

libertarian, rather than the traditional law-and-order, wing of the party. As we will see, an influential body of Republican legislators remains reluctant to reduce mandatory sentences. Prominent among this group is Senator Charles Grassley (R-IA), Chair of the Senate Judiciary Committee, without whose assent no sentencing bill can pass his committee. Accordingly, the Smarter Sentencing Act languished.

II. The Push for Sentencing Reform Beyond Mandatory Minimums

A. Safe, Accountable, Fair, and Effective (SAFE) Justice Act of 2015

Meanwhile, over in the House of Representatives, something quite remarkable was happening. Congressman Jim Sensenbrenner (R-WI), chair of the House Judiciary Committee's Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, and Congressman Bobby Scott (D-VA), ranking member and former chair of the same committee, had been working for over eighteen months with a bipartisan Over-Criminalization Task Force⁴ on comprehensive federal criminal justice legislation. On June 25, 2015, they introduced the Safe, Accountable, Fair, and Effective (SAFE) Justice Reinvestment Act of 2015.⁵

The SAFE Justice Act is remarkable for at least two reasons.

First, if you lived through the sentencing wars of the 1990s, when judicial departures from the guidelines were anathema to congressional Republicans and the Feeney Amendment clamping down on them flew through Congress, you remember Mr. Sensenbrenner as the sternest (or meanest) of the hard liners and Mr. Scott as a leading voice of the compassionate (or squishy) left. Seeing a sentencing reform bill co-authored by the two of them is rather like finding out that Dumbledore and Lord Voldemort have been chatting over tea and scones down at the Three Broomsticks about curricular reform at Hogwarts. Sensenbrenner and Scott have explained on several occasions that they were able to reach such sweeping agreement because they agreed to set aside politics to focus on criminal justice reform measures shown by evidence to work, and to require that every provision in their bill was supported by data and stakeholder input from the Task Force's findings. The spirit of constructive cooperation extended beyond the bill's congressional architects. The SAFE Justice Act was endorsed not only by liberal sentencing reformers,⁶ but also by the staunchest rock-ribbed conservatives, including Grover Norquist, Pat Nolan, Richard Vigueire, Newt Gingrich, David Keene (former president of the National Rifle Association and former chair of the American Conservative Union), and the American Legislative Exchange Council (ALEC). (The Norquist, et al. and ALEC letters are reproduced later in this Issue.⁷)

Second, the SAFE Justice Act is substantively impressive. It addresses not only the single issue of mandatory minimum drug sentences, but an entire range of concerns about the federal criminal justice system:

over-federalization of crime, prosecutorial overreach, excessive use of pre-trial detention, protection of the innocent, use of probationary sentences, mandatory minimum reform, compassionate release programs for elderly and sick inmates, encouraging recidivism-reduction programs in prison, improvements in supervision of defendants on probation and supervised release, and more. The bill is particularly noteworthy in its attention to prison programming aimed to lower the risk of reoffending and mechanisms for early release on the bases of compassionate release, good time credit reform, earned time credit, and expanded residential drug abuse treatment programs.

The Sensenbrenner-Scott SAFE Justice Act contains a number of provisions relating to mandatory minimum sentences. Unlike the Lee-Durbin Smarter Sentencing Act, it would not reduce the length of most existing drug mandatory minimums under 21 U.S.C. §§ 841(b) and 960(b).⁸ Rather, the SAFE Justice Act would restrict eligibility for those sentences to "managers, supervisors, organizers, and leaders" of drug trafficking organizations of five or more members.⁹ It would also expand the "safety valve" provision of 18 U.S.C. § 3553(f), which permits judges to sentence certain defendants below the otherwise applicable mandatory minimum, to include not only persons with one or fewer criminal history points, but also persons with up to three criminal history points and no prior federal convictions of violent, firearms-related, sex, terrorism, racketeering, or money laundering crimes.¹⁰ It also creates a safety valve for drug defendants who committed their offenses under the influence of mental illness, persistent drug abuse, or combat trauma, or who acted at the direction of another and were suffering physical, mental, psychological abuse, or domestic violence.¹¹ The Act would narrow the class of prior drug offenses that trigger mandatory sentencing enhancements for recidivists.¹² Finally, the Act would amend 18 U.S.C. § 924 to limit the applicability of twenty-five-year mandatory minimums for second or subsequent offenses.¹³

The SAFE Justice Act is not perfect, of course. It has a number of provisions that seem doubtful, and some that would probably not survive a full committee process or votes in the House and Senate. Still, taken as a whole, it is a heartening flashback to a time when legislators of differing views worked together, sought common ground, horse-traded on points of disagreement, and produced solid, sophisticated, comprehensive legislation on difficult subjects.

The reach of the Sensenbrenner-Scott production and the bipartisan character of its support is so impressive that we have included in this Issue of FSR a section-by-section summary of most of its provisions and a list of its fifty-eight co-sponsors.¹⁴ Sadly, this enumeration seems most likely to be a tribute to what might have been.

B. Sentencing Reform and Corrections Act (SRACA) of 2015

Despite the near universality of support for significant reform, there remains, as noted above, a small but

influential body of opinion holding that really significant relaxation of federal sentencing law will hobble prosecutors, release predators to the streets, and increase crime.¹⁵ This view carries considerable weight among some congressional Republicans, most notably Senator Charles Grassley (R-IA) and Congressman Bob Goodlatte (R-VA), chairmen of the Senate and House Judiciary Committees. Chairman Goodlatte did not share the broad enthusiasm for the SAFE Justice Act (even though that bill emerged from a bipartisan task force he authorized). Senator Grassley signaled early that he was unlikely to permit anything of similar scope to move through his committee and that he had substantial reservations about the simple across-the-board cuts to mandatory minimum sentences proposed in the Lee-Durbin Smarter Sentencing Act. Grassley was not, however, opposed to all reform. As a result, a bipartisan group of senators labored to produce a bill that, while far more modest than the SAFE Justice Act, has garnered Senator Grassley's approval and that of many, if not all, like-minded conservative senators.

The result of the senators' labors was the Sentencing Reform and Corrections Act of 2015 (SRACA),¹⁶ which was approved by the Senate Judiciary Committee on October 22, 2015.¹⁷ The SRACA is now the most likely vehicle for sentencing reform in the current congress, and thus merits particular scrutiny. A section-by-section description of the SRACA is included in this Issue.¹⁸

The bill has four notable structural features.

First, like the Sensenbrenner-Scott SAFE Justice Act, the SRACA addresses both front-end sentencing issues and recidivism-reducing prison programming qualifying prisoners for modest reduction in prison confinement. In that respect, the SRACA is broader in scope than either the Leahy-Paul Justice Safety Valve Act or the Lee-Durbin Smarter Sentencing Act. On the other hand, the SRACA sweeps far more narrowly than the Sensenbrenner-Scott product by omitting many of the SAFE Justice Act's provisions on subjects like over-criminalization, evidence-based sentencing alternatives, probation and supervised release reform, and government transparency and accountability. And, as will be discussed below, the prison programming and back-end release features of the SRACA are markedly less generous than the SAFE Justice Act.

Second, also like the SAFE Justice Act, the SRACA makes retroactive the reductions in crack cocaine sentences authorized by Fair Sentencing Act of 2010.¹⁹

Third, in its provisions on mandatory minimum sentences, the SRACA tries to meld the approach of the Lee-Durbin Smarter Sentencing Act, which simply cuts the length of most drug mandatories in half, with the approach of the Sensenbrenner-Scott SAFE Justice Act, which markedly narrows the class of defendants eligible for mandatory minimums, but largely leaves the length of such sentences alone. The SRACA cuts the length of some existing mandatory minimums, notably the enhanced sentences for repeat drug felons and so-called "armed career criminals."²⁰ On the other hand, it leaves unchanged the

length of the basic quantity-based drug mandatory minimums of 21 U.S.C. §§ 841 and 960, but attempts to ameliorate their effects by: (a) expanding eligibility for the so-called "safety valve" provision of 18 U.S.C. § 3553(f) (which exempts certain defendants from mandatory sentences) to defendants with slightly more severe criminal histories,²¹ and (b) creating a second "safety valve" that narrows eligibility for the ten-year minimums by making defendants who would otherwise receive ten-year minimums eligible for five-year minimums if they meet a series of detailed criteria.²²

Fourth, although the SRACA purports to narrow eligibility for some mandatory minimum sentences applicable to repeat drug offenders by limiting qualifying priors to newly defined "serious drug felonies," rather than the current "felony drug offense," the bill actually *expands* eligibility for some recidivist mandatories by adding a newly defined class of "serious violent felonies" to the list of qualifying priors. It also adds new mandatory minimum sentences for interstate domestic violence²³ and certain export control offenses.²⁴

C. Critiques of Sentencing Features of the SRACA

The public reception of the SRACA has been quite favorable. The Justice Department supports the bill.²⁵ A few law enforcement groups have opposed it. (See, for example, the statement of Steven C. Cook, president of the National Association of Assistant U.S. Attorneys, a rump faction of federal prosecutors unaffiliated with the Justice Department, to the Senate Judiciary Committee later in this Issue.²⁶) Most observers have described the SRACA as a groundbreaking departure from decades of unremitting federal stringency and have acclaimed its spirit of bipartisanship.²⁷ These encomiums are not without basis. A bill supported by both liberal Democrats and conservative Republicans and aimed at putting federal drug and firearm defendants into prison for shorter periods and letting them out of prison sooner seems nearly miraculous. However, the bill failed to garner the support of five Republican members of the Judiciary Committee (Senators Perdue, Hatch, Sessions, Cruz, and Vitter), and their opposition might yet prevent consideration by the full Senate.²⁸ At a minimum, modifications of the bill may be required to secure their backing. Accordingly, those who are eager for sentencing reform, but have doubts about the SRACA's particulars, have largely stayed silent or murmured only muted criticisms, fearing that too-pointed critique will break the spell and ruin a chance for even incremental reform.

In private, however, well-informed supporters of reform across the political spectrum are concerned about the particulars of the SRACA. On the sentencing side, they worry that the SRACA provides less relief from mandatory minimum sentences to fewer defendants than might be supposed, and that the complexity of the mechanisms employed to restrict the number of eligible defendants will generate protracted, unnecessary litigation. Progressive

reformers are particularly distressed that a bill advertised as limiting mandatory minimum sentences materially enlarges the class of defendants subject to several commonly employed recidivist minimum sentences by adding violent crimes to drug crimes as qualifying priors.²⁹

Space does not permit a detailed exegesis of all the technical concerns raised about the sentencing provisions of the SRACA. However, to illustrate some of the perceived difficulties, we reproduce in this Issue excerpts from my comments to Senate Judiciary Committee staff about the “second safety valve” provision in Section 103 and the alterations to the Armed Career Criminal Act in Section 105.³⁰ The projected net effect of the SRACA and its House of Representatives counterpart is addressed in Section III below.

D. Sentencing Reform Act of 2015—House of Representatives Version

As noted above, Congressman Bob Goodlatte (R-VA), Chairman of the House Judiciary Committee, has been unwilling to allow full committee consideration of the Sensenbrenner-Scott SAFE Sentencing Act. Instead, he appropriated the first half of Senator Grassley’s SRACA, modified it somewhat to further limit its remedial effect, and christened it the Sentencing Reform Act of 2015 (SRA). The Goodlatte SRA mirrors the sentencing portions of the Grassley SRACA section by section. The only material difference is that the House bill restricts the availability of mandatory minimum relief even more than the Senate version, and creates a new consecutive mandatory sentencing enhancement of up to five years for offenses involving fentanyl, a common cutting agent used in conjunction with heroin. Chairman Goodlatte’s bill went to full committee markup and was approved on November 18, 2015.³¹

III. *Cui bono?* The Shrinking Scope of Mandatory Minimum Reform

The first point to note about the sequence of sentencing reform bills recounted above is that in each chamber, each successive bill provides smaller front-end sentencing benefits to fewer defendants than the one that came before. The degree of benefit contraction cannot be calculated precisely because not every one of the bills was “scored” by the Sentencing Commission or other experts, and because any scoring effort relies on at least some unverifiable assumptions. (The Congressional Budget Office does not provide its score, nor a cost estimate on what a bill will cost or save, until after that bill has been voted out of committee and is on its way to the floor.) That said, the most recent bills have been evaluated (roughly) by the Sentencing Commission; Dr. Paul Hofer, formerly of the Sentencing Commission and now with the Federal Defenders’ Sentencing Resource Counsel, provides his analysis of the SRACA later in this Issue;³² and one can get a good idea of the scope of the earlier bills without detailed statistical analysis.

A. Justice Safety Valve Act

This bill would permit federal judges to override any mandatory minimum sentence, leaving the length of sentence imposed to the discretion of the judge. Of the 75,836 defendants sentenced in federal court in FY 2014, 23.6 percent, or 16,048, were convicted of an offense carrying a mandatory minimum sentence.³³ Just over 42 percent of this group received relief from the mandatory sentence through application of a substantial assistance motion under 18 U.S.C. § 3553(e), or the existing safety valve provision of 18 U.S.C. § 3553(f), leaving 9,212 defendants sentenced subject to a mandatory minimum. The Justice Safety Valve Act would have affected all of these defendants, even those who ultimately received substantial assistance motions. One cannot say *how much* any or all of these defendants might have benefitted, inasmuch as the absence of mandatory minimums would have affected some cases in which plea negotiations produced substantial assistance motions, and judicial reactions to individual cases would, by definition, have been variable.

B. Smarter Sentencing Act

The principal beneficiaries of this bill would be drug offenders (who account for about two-thirds of all cases carrying mandatory minimum sentences³⁴). The Smarter Sentencing Act cuts virtually all drug mandatories by roughly half.³⁵ In 2014, about 11,000 drug defendants were convicted of crimes carrying mandatory sentences, and about 5,000 remained subject to a mandatory at the time of sentencing.³⁶ One cannot say precisely how much these defendants might have benefitted had Lee-Durbin been in place. Since over half of them were sentenced without the constraint of a mandatory minimum, either through substantial assistance motions or the existing 3553(f) safety valve, one cannot know what effect halving the original mandatory sentence would have had. On the one hand, judges are likely to give a lower sentence if departing from a lower minimum. On the other hand, the absence of a mandatory floor does not require a judge to impose a lower sentence. That said, given the demonstrated propensity of judges to sentence at or near the minimums in cases where they apply, and to sentence below the minimum once it is removed,³⁷ it is reasonable to assume that the overwhelming majority of the 11,000 defendants subject to a minimum would have received some sentence reduction, and that the reduction in prison years served would be in the multiple thousands per annual cohort of sentenced defendants.

The Smarter Sentencing Act would also benefit a set of current federal inmates by making the crack penalty reductions of the Fair Sentencing Act of 2010 retroactive.

C. SAFE Justice Act

The number of persons potentially affected by the Sensenbrenner-Scott bill is harder to estimate because it does not apply to all offenders with mandatory minimums

(like the Justice Safety Valve Act) or virtually all drug offenders with minimums (like the Smarter Sentencing Act). Rather, it would affect only some persons subject to drug minimums and some persons subject to minimums for other offense types. That said, the reach of the SAFE Justice Act would be broad.

First, the bill's restriction of five and ten-year drug minimums to "managers, supervisors, organizers, and leaders" of drug trafficking organizations of five or members would benefit the vast majority of drug defendants sentenced subject to drug minimums. In FY 2014, fewer than 6 percent of all federal defendants received enhancements for being organizers, leaders, managers, or supervisors of criminal activity.³⁸ Even if the percentage of such persons is materially higher in drug cases (which by their nature tend to involve group criminality), this one provision would surely exempt 80–90 percent of drug defendants from mandatory minimums. SAFE Justice also expands the safety valve provision of 18 U.S.C. 3553(f) by increasing to three the number of criminal history points a defendant can have and still qualify, and adds a new safety valve for persons suffering from mental illness and other conditions. Conservatively, therefore, one can conclude that SAFE Justice would exempt from mandatory minimums some 9,000 of the roughly 11,000 drug defendants convicted annually of offenses carrying mandatory minimums, and that it would provide safety valve relief to some portion of the remaining 2,000.

The SAFE Justice Act also limits the reach of some mandatory minimum recidivist provisions relating to firearms crimes. Hence, the total number of SAFE Justice beneficiaries convicted of drug and non-drug crimes might reasonably be estimated in the neighborhood of 9,000–10,000 annually—comparable to, but perhaps somewhat fewer than, the Smarter Sentencing Act. As with the Smarter Sentencing Act, the *extent* of the benefit conferred by Sensenbrenner-Scott cannot be precisely estimated. And it bears emphasis that the hypothetical sentence that might be imposed on a given defendant relieved of a mandatory minimum sentence by the SAFE Justice Act might not be any lower than the actual sentence he or she received under current law, particularly if such a defendant received a substantial assistance motion or qualified under the existing safety valve. That said, it would be entirely reasonable to expect a reduction of multiple thousands of prison years imposed per annual cohort of sentenced defendants.

The SAFE Justice Act, like the Smarter Sentencing Act, would also benefit some current federal inmates by making the crack penalty reductions of the Fair Sentencing Act of 2010 retroactive.

D. Sentencing Reform and Corrections Act (S. 2123)

Estimating the effect of the SRACA is especially difficult because of its complexity. My best, though crude, estimate of the effects of its various provisions is as follows:

Section 101 reduces the length of life and twenty-year enhanced mandatory minimum sentences for certain prior drug felons under 21 U.S.C. §§ 841 and 960, narrows the scope of the prior drug felonies that trigger the enhanced minimums from any drug felony to the newly defined category of "serious drug felony," and expands the type of qualifying prior felony beyond drug crimes to include "serious violent felonies." This provision provides two potential benefits to the class of recidivist drug offenders who now qualify for quantity-based enhanced minimum penalties under §§ 841 and 960: first, it exempts some defendants who now qualify for an enhanced minimum, and second, it reduces the length of the minimums for defendants who remain subject to them. According to Sentencing Commission figures, in FY 2014, 436 drug defendants were theoretically subject to mandatory minimums of more than ten years.³⁹ However, it is impossible with the publicly available data to determine how many of these defendants would be affected by the SRACA. The Commission's figures do not say how many of the 436 defendants were subject to the quantity-based recidivist penalties of 21 U.S.C. §§ 841 and 960, and how many involved other triggering factors like causing death or serious bodily injury, 21 U.S.C. §§ 841(b)(1)(A) and 960(b)(1). More importantly, there is no data on how many of the 436 defendants lack qualifying priors that are "serious drug felonies" under the SRACA such that they would be exempted from an enhanced mandatory sentence.

The best one can say is that Section 101 would benefit some number of defendants, perhaps as few as some dozens or as many as a hundred or so annually, by entirely exempting them from the enhanced minimums of §§ 841 and 960. It would also benefit another group who would qualify for recidivist minimums under either current law or the SRACA by shortening those minimums. The Sentencing Commission estimates the number of this group at 84 per year.⁴⁰ But Section 101 would gravely disadvantage an unknown number of drug defendants with prior "serious violent felonies" by subjecting them to a previously inapplicable enhanced minimum. The size of that class is unknown, but potentially quite large, since the definition of "serious violent felonies" embraces virtually every state and federal felony with an element of use, attempted use, or threat of force. In short, it is quite likely that, under the SRACA, the *number* of persons subject to §§ 841 and 960 enhanced recidivist minimums would be equal to or greater than is now the case.

Section 102 of the SRACA broadens the existing safety valve provisions of 18 U.S.C. § 3553(f) by expanding the category of eligible defendants from those with only one criminal history point (as defined by the Sentencing Guidelines) to those who have as many as four points. The critical caveat is that a defendant may *not* have either a prior 3-point offense or a prior 2-point drug trafficking or violent offense. The Sentencing Commission has reported to the Senate that 3,314 defendants could benefit from this

provision annually,⁴¹ but I am advised that this figure is simply an estimate of the total annual number of defendants subject to mandatory minimum sentences who have 2–4 criminal history points. The Commission made no effort to determine how many of these defendants would be barred from safety valve relief because they have disqualifying 2-point or 3-point priors. Nor did it estimate how many of the 3,314 would be disqualified from safety valve relief by the other provisions of § 3553(f), such as the requirement that the defendant not use violence or threats or possess a firearm, cause death or serious bodily injury, and not be an organizer, leader, manager, or supervisor of others.

A 3-point prior is any conviction for which a sentence of more than 13 months was imposed, U.S.S.G. § 4A1.1(a). A 2-point prior requires only that a sentence of sixty or more days was imposed, U.S.S.G. § 4A1.1(b). Thus, Section 102 excludes from safety valve relief any defendant with a prior prison sentence of more than thirteen months and any defendant with a prior misdemeanor or felony sentence of sixty days or more for any drug or “violent crime,” a category that embraces any offense “that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.”⁴² Given that two-thirds of all defendants eligible for mandatory sentences committed a drug trafficking crime and another 15 percent committed firearms violations,⁴³ it is not unreasonable to suppose that a good many of the prior convictions of such defendants involved drugs or some sort of assaultive or threatening behavior. Section 102 also gives sentencing judges discretion to award safety valve relief in these cases if they determine that the defendant’s criminal score “substantially over-represents the seriousness of the defendant’s criminal history or the likelihood the defendant will commit other crimes.” Experience with the long-established guideline provision permitting downward departures on this same ground, U.S.S.G. § 4A1.3, suggests that federal judges rarely grant relief on this basis. Accordingly, the annual reach of Section 102, though not inconsequential, would likely be a good deal smaller than suggested by the Commission’s eligibility estimate of 3,314. Paul Hofer suggests that the number would be between 500 and 1,144 defendants annually.⁴⁴

Section 103 of the SRACA creates a “second safety valve” by reducing to five years a ten-year mandatory minimum imposed under 21 U.S.C. §§ 841, 846, 960, or 963, if the defendant meets a list of conditions. The Sentencing Commission estimates that this provision could affect 550 defendants annually,⁴⁵ while Paul Hofer gives an estimate of 556.⁴⁶ I have grave doubts about these figures. Many of the conditions imposed by Section 103 introduce terms for which the Commission has no data. Moreover, as I describe at length elsewhere in this Issue,⁴⁷ the conditions are so numerous and stringent that, if applied as written, precious few defendants who qualify for a ten-year drug mandatory can satisfy them.

To take the simplest of several examples, Section 103 excludes “wholesalers,” which it defines as those who “sell non-retail quantities of a controlled substance to other dealers or distributors.” But everyone eligible for a quantity-based ten-year mandatory minimum has, by definition, been engaged in manufacturing, distributing, dispensing, importing, or exporting a *non-retail quantity* of drugs, or conspiring to do so, and all of these activities either directly or indirectly involve the sale of the prohibited substance. Hence, conviction of the offense triggering the mandatory minimum automatically disqualifies most, and maybe all, defendants from relief under Section 103. Judges could give Section 103 wider scope by narrowly construing what it means to “sell” a drug, but there is no guarantee that they will.

Section 104 of the SRACA shortens one particularly lengthy firearm minimum and creates at least a partial solution of the so-called “§ 924(c) stacking problem.” Title 18 U.S.C. § 924(c) prohibits possessing, brandishing, or discharging a gun in the course of a drug trafficking or violent crime. Section 924(c)(1)(C) now imposes a twenty-five-year mandatory minimum on a defendant convicted of a second 924(c) violation, and that twenty-five-year sentence must be served consecutively to any other sentences imposed for the underlying crime. As the law is now interpreted, the first 924(c) conviction can result from the same case as the second violation, triggering the twenty-five years. Thus, a drug trafficker caught with two guns can be sentenced for the drugs, plus a term for the first 924(c) violation, plus twenty-five years for the second 924(c) violation. Section 104 requires that the first 924(c) conviction be final before the second offense triggering the twenty-five-year mandatory is committed.

Section 104 also reduces the length of the penalty for a second offense from twenty-five years to fifteen years. The Sentencing Commission estimates that this provision would impact 62 defendants annually. Paul Hofer puts the number at 170.⁴⁸ Neither provides an estimate of the number of defendants affected by the stacking fix.⁴⁹

The benefits conferred by the shortening of the minimum and the amelioration of the stacking problem are, however, offset by another provision of Section 103 that expands the class of defendants eligible for the fifteen-year second offense minimum from those with a previous federal 924(c) conviction to defendants convicted of 924(c) after being convicted of any state “crime of violence of that contains as an element . . . the carrying, brandishing, or use of a firearm.” The Sentencing Commission does not have data on how many offenders nationwide have these convictions.

Section 105 amends the Armed Career Criminal Act, 18 U.S.C. § 922(g), by reducing its mandatory minimum sentence from fifteen years to ten years. The Sentencing Commission estimates that this change would “reduce the sentence of 277 offenders each year by approximately 21.6 percent.”⁵⁰

FIGURE 1: Estimated Number of Beneficiaries of SRACA⁵²

	No. of Defendants Benefited Annually	Defendants Disadvantaged? Annual Estimate	No. of Current Inmates Benefited by Retroactivity
Section 101: Drug recidivists	Sentencing Commission: 84 Bowman: 200	Yes / Can't determine number	Sentencing Commission: Max. of 2,265 Hofer: Max. of 4,273 0
Section 102: Existing Safety Valve	Sentencing Commission: 3,314 Hofer: 500-1,144 Bowman: ≈1,200	No	0
Section 103: "Second Safety Valve"	Sentencing Commission: 550 Hofer: 556 Bowman: 0-150	No	0
Section 104: 924(c)	Sentencing Commission: 62 Hofer: 170	Yes / Can't determine number	Max. of 1,117 eligible
Section 105: ACCA	Sentencing Commission: 277	No	Max. of 2,317 eligible
Section 106: Crack retroactivity	0	0	Max. of 5,826 eligible

A key point about the SRACA is that the provisions of Sections 101 (reduction of mandatory minimums for drug recidivists), 104 (Section 924(c) reform), and 105 (Armed Career Criminal Act reform) are retroactive to some degree. Likewise, Section 106 of the SRACA makes the Fair Sentencing Act of 2010 reductions of crack sentences retroactive and allows defendants sentenced prior to its enactment to petition for resentencing. The number of inmates who would actually receive relief under these provisions is very difficult to determine because of the retroactivity restrictions in the bill and the fact that sentence reductions for serving prisoners are not automatic but require petitioning a court.

For example, the Sentencing Commission says that the Fair Sentencing Act retroactivity provisions of the House version of the SRACA would "allow approximately 5,826 offenders currently in federal prison to seek an approximate 20 percent reduction in their sentence."⁵¹ The kicker in this assessment is the phrase "allow . . . offenders . . . to seek . . . reduction." All the Commission is really saying is that there are 5,826 old-law crack offenders still in prison. It offers no estimate of how many of those offenders qualify for a reduction or of how many sentence reductions judges will award.

I estimate the total annual number of actual beneficiaries of the SRACA as, at most, 2,000, almost all of them from the expansion of the 3553(f) safety valve to defendants with 2-4 criminal history points. Even using the Sentencing Commission's numbers of potential beneficiaries, the bill could, at most, benefit about 4,000 defendants per year. Against these numbers must be offset an unknown number of persons not now subject to mandatory minimums, who would be subjected by Sections 101 and 104 of the SRACA to such minimums and would thus receive longer sentences than they now do. Finally, roughly 11,500 current inmates could, in theory, petition for sentence reductions, although far fewer than that number would receive such reductions.

E. The Sentencing Reform Act (H.R. 3713)

The impact of Congressman Goodlatte's Sentencing Reform Act would be roughly the same as its Senate counterpart, except that it would benefit slightly fewer defendants. Its provisions on recidivist drug offenders and

§ 924(c) relief track the Senate version, but exclude from relief any defendant with prior "serious violent felonies."⁵³

F. Are the Senate and House "Sentencing Reform Acts" Worthy of Support?

If one was hoping that the ongoing sea change in public and elite attitudes toward mass incarceration would produce congressional action of commensurate sweep, the tale of ever-shrinking legislative ambition in the preceding pages is discouraging. The version of sentencing reform palatable to Senator Grassley (S. 2123) and Congressman Goodlatte (H.R. 3713) is far more cramped than the vision embraced by the broad coalition supporting Sensenbrenner-Scott bill (H.R. 2944). Even in the single area of mandatory minimum sentences, if one's yardstick is the number of defendants benefited, the House and Senate "Sentencing Reform Acts" would affect roughly one-third as many newly sentenced defendants annually as either the Lee-Durbin Smarter Sentencing Act (S. 502) or the Sensenbrenner-Scott SAFE Justice Act. And the magnitude of the likely effects is probably smaller.⁵⁴

The prevailing mood in both chambers seems to be that the bills which have made it through committee are the best that can be achieved, and that to carp too loudly is to risk failure of the entire enterprise. This could be right. As detailed above, the SRACA would benefit an appreciable number of future defendants, might benefit some thousands of current inmates, and would surely save many millions of dollars over the long term. That is not to be sneezed at. And the Sentencing Reform Acts we have are doubtless better than no bill at all. Still, one can at least hope that the breadth and depth of support for a more comprehensive effort is so great that improvements in the current bills could be negotiated.

IV. Back-End Federal Corrections Reform in 2015

Federal prisons currently hold over 198,000 inmates.⁵⁵ Materially reducing that number requires not only shorter sentences at the front end, but sensible programs that release prisoners back to the community sooner while at the same time discouraging recidivism. The first half of this Issue is devoted to efforts by the states to accomplish these

ends by reforming their parole systems. The federal government abolished parole in 1984. Despite the current ferment for federal sentencing reform, the idea of resurrecting the federal parole system is not a part of the mainstream reform conversation. However, both the Sensenbrenner-Scott SAFE Justice Act and the Senate's Sentencing Reform and Corrections Act contain extensive provisions addressed to corrections programming, together with modest efforts to provide early release.

A. Senator Sanders Tilts at Some Windmills

On September 17, 2015, Senator Bernie Sanders (I-VT) and Congressman Raul Grijalva (D-AZ) introduced the Justice Is Not for Sale Act (S. 2054 / H.R. 3543).⁵⁶ The provisions that provoked the most headlines at the time were those that would ban federal funding for privately operated prisons. But the bulk of the bill is devoted to restoring the federal parole system almost exactly as it existed before the Sentencing Reform Act of 1984. The bill has sparked little interest outside academic circles and seems profoundly unlikely to gain any traction in the present Congress.

B. The Corrections Component of the SAFE Justice Act

The Sensenbrenner-Scott SAFE Justice Act contains a wide range of reforms to correctional programming and release protocols. The most significant of these are its mandate that the Bureau of Prisons create a post-sentencing risk and needs assessment system,⁵⁷ that it formulate an evidence-based case plan for each defendant, and that defendants would be eligible for ten days sentence reduction for each calendar month of successful compliance with the prisoner's case plan.⁵⁸ Under current law, a defendant must serve about 87 percent of the sentence initially imposed. These provisions of the SAFE Justice Act would provide compliant inmates an opportunity to earn roughly a 30 percent reduction in their sentences in addition to the good time credit presently available. Note that these reductions would accelerate an inmate's outright release, and would not merely allow substitution of community corrections for prison time.

The bill would also require that the Bureau of Prisons provide residential substance abuse treatment for all inmates with substance abuse problems,⁵⁹ provide a one-year sentence reduction credit for inmates who participate in cognitive behavioral therapy and/or federal prison industries, and expand access to compassionate release for elderly and sick inmates by permitting inmates and sentencing courts to initiate petitions for release (as opposed to the present system in which only the Director of the Bureau of Prisons may initiate such a petition).⁶⁰

C. The Corrections Component of the Senate's SRACA

The SRACA is a melding of two pieces of legislative work, the front-end Sentencing Reform Act and the back-end Corrections Act devoted primarily to prison programming and modest early-release mechanisms. The crux of the corrections section is a directive to the Bureau of Prisons to

create "recidivism reduction" programming, successful completion of which qualifies inmates for a modest reduction of the time they are obliged to serve *in prison*, substituting instead a period in a residential reentry program, home confinement, or community supervision.⁶¹ The novel component of the bill is that it requires the BOP to use risk assessment tools to determine which prisoners will be eligible for the prison programming, and thus who will be eligible upon completion of that programming for early release.⁶² The bill also includes provisions relating to juvenile parole, promoting successful reentry, and compassionate release of elderly or terminally ill inmates.

Portions of the corrections section of the SRACA, particularly the juvenile and compassionate release sections, are quite commendable. However, the back-end release provisions are problematic. The primary difficulties are two:

First, the back-end relief afforded to long-serving inmates is limited. As a threshold matter, it applies only to first-time federal offenders. And the SRACA does not actually shorten inmates' sentences. It merely changes the venue of the last segment of a sentence by releasing qualifying inmates into supervised community settings sooner than would previously have been the case. Moreover, the maximum period in prison an inmate can translate to community confinement by successful navigation of the program is a year. If the objective is to materially reduce the population of persons under federal correctional supervision, with concomitant reductions in human and financial cost, the approach of the SAFE Justice Act, which lets inmates who have complied with their case plans out of prison and all other forms of confinement sooner, seems preferable.

Second, the most widely voiced criticism of the SRACA corrections regime is its mandate that BOP create a risk assessment measurement that employs "dynamic" rather than "static" factors, and then employ this new tool to determine eligibility for recidivism reduction programs. So far as I can tell, this approach is unprecedented, advocated by no correctional expert, and unlikely to work as described in the bill. We reproduce in this Issue a portion of a critique by the Federal Defenders of this aspect of the bill.⁶³

D. Silence in the House

Congressman Goodlatte did not include a corrections section in the Sentencing Reform Act he moved through his committee. The future of such legislation in the House is uncertain. Some have suggested that a separate Goodlatte-approved House bill covering that subject will appear in 2016. Others speculate that the House might be moved to adopt the corrections section of the SRACA.

V. Conclusion

For myself, I hope that some corrections and back-end release reform can become law in 2016. However, I am far more skeptical of the corrections portion of the Senate's SRACA than of its sentencing portion. The SRACA's

sentencing measures may be much less expansive than some might wish, but they will afford some benefit to a substantial number of current and future federal inmates, and do so without injury to the federal government's anti-crime objectives. The corrections aspects of the SRACA, however, are very troublesome. The bill's directives to BOP may prove impossible to implement, and even if implemented, the potential benefit to inmates is so small and so grudgingly conferred that it seems doubtful that many inmates will participate. By far the best course for the House would be to craft its corrections proposal based on the Sensenbrenner-Scott SAFE Justice Act.

Notes

- ¹ S. 353, Justice Safety Valve Act of 2015, 28 Fed. Sent'g Rep. 127 (2015).
- ² S. 502, Smarter Sentencing Act of 2015, <https://www.congress.gov/bill/114th-congress/senate-bill/502/text>. See also S. 502, 28 Fed. Sent'g Rep. 128 (2015).
- ³ Frank O. Bowman, III, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 Iowa L. Rev. 1043, 1059-60 (2001).
- ⁴ For a list of the subjects addressed by the Over-Criminalization Task Force and links to its hearings and supporting documents, see <https://www.nacdl.org/overcrimtaskforce/>.
- ⁵ H.R. 2944, The Safe, Accountable, Fair, and Effective (SAFE) Justice Act, <https://www.congress.gov/bill/114th-congress/house-bill/2944/text>. See also the section-by-section summary in this Issue, 28 Fed. Sent'g Rep. 130 (2015).
- ⁶ See, e.g., the endorsements of the NAACP, <https://bobbyscott.house.gov/SAFEJusticeAct>, and the Legal Action Center, an advocacy group that fights discrimination against those with HIV/AIDS and histories of addiction or criminal justice involvement, <http://lac.org/what-we-do/criminal-justice/alternatives-to-incarceration-ati/pass-the-safe-justice-act/>.
- ⁷ Grover Norquist, et al., *Conservative Letters in Support of the SAFE Justice Act*, 28 Fed. Sent'g Rep. 135 (2015).
- ⁸ The sole exception is a provision that would reduce the mandatory life sentence for a third-time drug offender to 35 years. SAFE Justice Act, Section 403.
- ⁹ SAFE Justice Act, *supra* note 5, Section 401.
- ¹⁰ SAFE Justice Act, *supra* note 5, Section 402.
- ¹¹ *Id.*
- ¹² SAFE Justice Act, *supra* note 5, Section 403.
- ¹³ SAFE Justice Act, *supra* note 5, Section 421.
- ¹⁴ H.R. 2944, The SAFE Justice Act (section-by-section summary), 28 Fed. Sent'g Rep. 130 (2015).
- ¹⁵ See, e.g., statement of National District Attorney's Association opposing the Safe Justice Act, http://www.ndaa.org/ga_criminal_justice.html, and statement of Federal Law Enforcement Officers Association to the same effect, <https://www.fleoa.org/news-story.aspx?id=5524>.
- ¹⁶ S. 2123, Sentencing Reform and Correction Act of 2015 (SRACA), <https://www.congress.gov/bill/114th-congress/senate-bill/2123/text>.
- ¹⁷ For complete information, see S. 2123, Sentencing Reform and Corrections Act of 2015, <https://www.govtrack.us/congress/bills/114/s2123>.
- ¹⁸ S. 2123, SRACA (section-by-section summary), 28 Fed. Sent'g Rep. 137 (2015).
- ¹⁹ SRACA, *supra* note 16, Section 106.
- ²⁰ *Id.*, Sections 101 and 105.
- ²¹ *Id.*, Section 102.
- ²² *Id.*, Section 103.
- ²³ *Id.*, Section 107.

- ²⁴ *Id.*, Section 108.
- ²⁵ Statement of Sally Quillian Yates, Deputy Attorney General, Before the Committee on the Judiciary, United States Senate, at a Hearing Concerning S. 2123, the "Sentencing Reform and Corrections Act of 2015" (Oct. 19, 2015), <http://www.judiciary.senate.gov/imo/media/doc/10-19-15%20Yates%20Testimony.pdf>.
- ²⁶ Stephen H. Cook, *Statement of President of National Association of U.S. Attorneys on SRACA of 2015*, 28 Fed. Sent'g Rep. 146 (2015).
- ²⁷ See, e.g., Editorial, *Finally, A Bipartisan Bill in Congress*, Los Angeles Times (Oct. 7, 2015), <http://touch.latimes.com/#section/-1/article/p2p-84628524/>.
- ²⁸ Jonathan Keim, *The Sentencing Reform and Corrections Act of 2015: Post-Markup Reactions and Analysis*, National Review (Oct. 28, 2015), <http://www.nationalreview.com/bench-memos/426206/sentencing-reform-and-corrections-act-2015-post-markup-reactions-and-analysis>.
- ²⁹ See, e.g., Julie Stewart, *Sentencing Reforms in the 114th Congress: They Simply Aren't Good Enough* (Nov. 17, 2015), <http://fam.org/famm-president-julie-stewart-on-sentencing-reforms-in-the-114th-congress/>.
- ³⁰ Frank O. Bowman, III, *Observations on the Mandatory Minimum Sentencing Provisions of S. 2123, The Sentencing Reform and Corrections Act of 2015*, 28 Fed. Sent'g Rep. 140 (2015).
- ³¹ U.S. House of Representatives, Committee on the Judiciary, Markup of H.R. 3713, <http://judiciary.house.gov/index.cfm/hearings?ID=77BB9EB7-B607-4602-AC91-309269E8CF5A>.
- ³² Paul J. Hofer, *Impact of the Sentencing Reform and Corrections Act of 2015*, 28 Fed. Sent'g Rep. 116 (2015).
- ³³ U.S. Sentencing Commission, *Quick Facts: Mandatory Minimum Penalties* (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Mand_Mins_FY14.pdf.
- ³⁴ *Id.* (reporting that, in FY 2014, drug cases accounted for 67.8% of the offenses carrying a mandatory minimum sentence).
- ³⁵ One significant limitation on the potential reach of the Smarter Sentencing Act is that its reduction of mandatory minimum sentences does not extend to all defendants convicted of importation offenses under 21 U.S.C. § 960 et seq., or to any defendants convicted under the Maritime Drug Law Enforcement Act. Those convicted of importation offenses receive lower minimums only if classified as "couriers." It is impossible to predict the effect of this limitation, in part because we cannot know how many defendants would be classed as couriers, but also because the overwhelming majority of defendants charged under 21 U.S.C. § 960 or 963 could also be charged under 21 U.S.C. § 841 or 846, leaving the application of the harsher mandatory sentence of the importation statutes largely in the discretion of prosecutors.
- ³⁶ U.S. Sentencing Commission, 2014 Sourcebook of Federal Sentencing Statistics, tbl. 43 (2015) (reporting 10,996 drug defendants convicted of crimes subject to a mandatory minimum of at least five years); U.S. Sentencing Commission, *Quick Facts*, *supra* note 33 (reporting that 46.4% of drug defendants convicted of offenses carrying a mandatory minimum remained subject to a minimum at sentencing).
- ³⁷ U.S. Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, at 136-37 (Oct. 2011), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc.pdf/Chapter_07.pdf.
- ³⁸ U.S. Sentencing Commission, 2014 Sourcebook, *supra* note 36, at tbl. 18.
- ³⁹ *Id.* at tbl. 43, n. 3.
- ⁴⁰ Statement of Judge Patti B. Saris, Chair U.S. Sentencing Commission, for the Hearing on "H.R. 3713, Sentencing Reform Act of 2015" Before the U.S. House of Representative

Judiciary Committee, Nov. 18, 2015, at 9, http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20151117_HR3713.pdf.

⁴¹ *Id.*

⁴² Section 102 of the SRACA defines “violent offense” by reference to 18 U.S.C. § 16.

⁴³ U.S. Sentencing Commission, *Quick Facts*, *supra* note 33.

⁴⁴ Hofer, *supra* note 32.

⁴⁵ U.S. Sentencing Commission, *Quick Facts*, *supra* note 33.

⁴⁶ Hofer, *supra* note 32.

⁴⁷ Bowman, *Observations on the SRACA*, *supra* note 30, at 140–43.

⁴⁸ Hofer, *supra* note 32.

⁴⁹ See Saris Statement, *supra* note 40.

⁵⁰ *Id.*

⁵¹ U.S. Sentencing Commission, *News Release: Statement on Bipartisan Sentencing Reform Legislation* (Nov. 18, 2015), <http://www.uscc.gov/news/press-releases-and-news-advisories/november-18-2015>.

⁵² The figures in this chart attributed to the U.S. Sentencing Commission are from the Saris Statement to Judiciary Committee, *supra* note 40. The figures attributed to “Hofer” are from the estimates by Dr. Paul J. Hofer, in Hofer, *supra* note 32.

⁵³ SRA, Section 2.

⁵⁴ The fact that most of the relief in the SRACA comes in the form of increased eligibility for safety valve relief, rather than

elimination or reduction in length of quantity-based minimums, would have an under-appreciated effect. Judges sentence in relation to adjudicated guideline or statutory minimums, and even when legally allowed to depart they tend to cluster their sentences relatively close to those minimums. Therefore, either halving mandatory minimums, as Lee-Durbin would do, or eliminating them for a large swathe of defendants, as Sensenbrenner-Scott would do, would probably confer a larger average sentencing benefit than expanding access to a safety valve mechanism that proceeds from the premise that the defendant’s “legal” sentence is the statutory minimum.

⁵⁵ Federal Bureau of Prisons, Statistics (Nov. 26, 2015), https://www.bop.gov/about/statistics/population_statistics.jsp.

⁵⁶ Justice Is Not for Sale Act, <http://www.sanders.senate.gov/download/justice-is-not-for-sale-act?inline=file>.

⁵⁷ SAFE Justice Act, Section 502.

⁵⁸ SAFE Justice Act, Section 502.

⁵⁹ SAFE Justice Act, Section 501.

⁶⁰ SAFE Justice Act, Section 411.

⁶¹ SRACA, Sections 202–204.

⁶² SRACA, Section 203.

⁶³ Executive Summary, Federal Defender Analysis of Corrections Act (S. 467), 28 Fed. Sent’g Rep. 151 (2015) (analyzing the Corrections Act (S. 467) which was merged with the Sentencing Reform Act to form the Sentencing Reform and Corrections Act of 2015).