

# THE NEW REPUBLIC

## The Man Who Hates Criminal Justice Reform

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Bill Otis doesn't think too highly of the criminal justice reform movement in America today. Last year, the Georgetown University law professor told NPR that mandatory-minimum sentences were a "big success," citing the drop-off in crime since the 1980s. In blog posts, he's even more blunt: "Q: Where do the ideas behind sentencing reform lead?" he asked last February. "A: To the morgue."

And don't get him started on racial disparities in imprisonment.

"They are NOT caused by racism," he wrote in a 2013 blog post. "They are caused by making choices. Of course the question is then asked: Well, why do blacks make, proportionately speaking, more criminal choices than whites? Isn't that because of the damaging effects of white people's racial bigotry? And the answer, which we must not hesitate to give, is 'no.'"

These views, though increasingly unpopular with criminal justice policymakers, are not anathema to the current administration. In March, Otis was among four people President Donald Trump nominated to fill vacancies on the U.S. Sentencing Commission.

The commission isn't typically prone to partisan warfare. In fact, Congress created the seven-member body in 1984 precisely so it could avoid politicized battles when crafting federal sentencing guidelines. Otis's nomination could upset that balance.

"He's been the arch-nemesis of criminal justice reform at the federal level for a decade at least," Kevin Ring, the president of Families Against Mandatory Minimums (FAMM), told me. "He's opposed basically every legislative reform—every reform the Sentencing Commission has passed—and just seems to enjoy that curmudgeonly position of saying no."

FAMM, which advocates for sentencing reform through Congress and before the Sentencing Commission, has never endorsed or opposed a commission nominee before, preferring instead to work with those commissioners once they're in office. But Otis's nomination changed that. "He's an ideologue in a position that is supposed to be driven by evidence and data," Ring said.

The seven-member commission's main function is to draft and revise federal sentencing guidelines, which aim to impose a degree of uniformity on federal criminal sentences nationwide. In practice, it's been able to reduce thousands of sentences for non-violent federal

prisoners. The commission also functions as a clearinghouse of sorts for criminal justice data and statistical reports.

Thanks to a 2005 Supreme Court decision, the guidelines are no longer mandatory for federal sentencing. But they still carry plenty of weight within the judiciary. “Every sentence that isn’t governed by a mandatory minimum is governed by the guidelines,” Ring explained. “They have a gravitational pull on judges. Whoever is part of the team that makes those guidelines has influence.”

If confirmed by the Senate, Otis would bring firsthand experience with the federal criminal justice system under both Democratic and Republican presidents. Among the posts he held during three decades in the government are stints as a legal advisor to the Drug Enforcement Agency’s administrator, as a special counsel in the George W. Bush White House, and as a federal prosecutor in the eastern district of Virginia, where he led the office’s appellate division.

Otis’s nomination has raised alarm among pro-reform groups that see the commission as a key ally in reining in mass incarceration in America, and it’s at odds with the reformist zeitgeist that’s swept D.C. think tanks and advocacy groups on the left, right, and center. Organizations ranging from the American Civil Liberties Union to the Koch brothers’ political network have put muscle behind the effort to reduce over-incarceration in recent years. Lower crime rates also helped spur state and federal lawmakers to rethink harsh policies from a bygone era.

Not everyone is on board with the shift away from tough-on-crime politics, including Trump and Attorney General Jeff Sessions. But few are more vocal about it than Otis. “Although I am decidedly out-of-step with my learned colleagues inside the Beltway, and despite all the puff pieces in the press running in the other direction, I don’t feel lonely in opposing the more-crime-faster proposals marketing themselves as ‘sentencing reform,’” he wrote in 2014.

Otis declined to comment for this article, citing standard practices for pending judicial-branch nominees. Those who’ve worked with him say his appointment would bring a much-needed alternative perspective to the Sentencing Commission’s work. Kent Scheidegger, a California-based attorney and legal director of the Criminal Justice Legal Foundation, told me that he thinks it’s important to avoid a “uniformity of viewpoint” on the commission.

“[Otis] has a view that the rush to lessen sentences, particularly for serious crimes, is a mistake, that it’s going too far too fast, and that people who have the contrary view necessarily are opposed to that,” he said. Scheidegger shares that skepticism of reformers’ efforts, telling me, “I think they’re largely forgetting history and condemning us to repeat it.”

The two men are regular contributors to Crime and Consequences, a blog that discusses criminal justice issues from a conservative perspective. Otis’s posts there offer brief but illuminating glimpses into how he approaches the subject. His central theme is straightforward and often bluntly expressed: that tough-on-crime policies helped bring down crime over the past 25 years, and scaling them back will cause crime to surge upwards once more.

In an address to the Tea Party Patriots in 2016, Otis cast the push for sentencing reform as part of a national malaise.

I once thought the ideas behind sentencing reform took root merely in forgetfulness about our past blunders; complacency about our success in correcting them; and, more recently, a refusal to look honestly at the surge in murder and heroin use we see in cities from coast to coast.

But now I think there's something more ominous afoot: It's part of our country's recent pattern of decline and retreat, of settling for lower standards in the name of a toxic brand of equality. Increasingly, we have turned away from America's strength and resolve, and have discounted the interests of those who lead peaceable and productive lives in order to cut breaks to those who don't.

Reformers say the evidence doesn't support Otis's view. "We have reams and reams of data to show that that sort of thing is outdated and objectively wrong," Jonathan Blanks, a criminal justice researcher at the Cato Institute, told me. While Cato doesn't take positions on nominations, Blanks described Otis's record as "very concerning" on sentencing matters. "You want someone who is invested in the data, in shaping the best policy, not being a political actor who doesn't pay attention to what the data says," he said.

There is data, for example, indicating that black Americans are far more likely to be arrested for marijuana-related offenses (even though their usage rates are roughly equal to white Americans) and that they are twice as likely to be searched during traffic stops than other Americans. Prosecutors' offices are statistical voids compared to prisons and police departments, but what's available is troubling: A 2014 study of the Manhattan district attorney's office found significant racial gaps at virtually every step of the process there. How much of the incarceration gap can be attributed to these disparities is unclear, but it seems unlikely that it's minimal.

These questions often fall within the Sentencing Commission's purview. In 2017, for instance, it released a report that found that black men received roughly 20 percent longer sentences between 2012 and 2016 than white men who committed the same crimes, even when accounting for past criminal histories and the shrinking crack-cocaine disparity. Those findings not only echoed the commission's past surveys on the subject, but indicated that the gap between black and white men is increasing.

In his writings, Otis places far more weight on individual decisions than systemic factors like racism. "I don't care a whit about what the prison population looks like," he wrote last year when discussing racial disparities in incarceration. "I also don't care about whether they're young or old, and I don't care if they're male or female. I care about what their behavior is, period.... If blacks (or young people or men) want to appear less in the prison population, it's easy: Abide by the law. If you do, have a nice day. If you don't, you've assumed the risk."

His analyses don't reject systemic effects out of hand, though. A key social factor in predicting criminality is "a stable, disciplined, employed, two-parent family life," he argued in 2013, and that lower crime correlates with this factor "more than with anything else—race, religion, income, you name it."

"This is the reason that, for example, Orientals have less incidence of crime than whites," he went on. "Orientals were unquestionably the victims of long and rancid racial bigotry; coolie

labor was little more than slave labor. And *Yick Wo v. Hopkins* is one of the most famous civil rights cases of all time. The reason Orientals stay out of jail more than either whites or blacks is that family life, work, education and tradition are honored more in Oriental culture than in others.”

But Otis does sometimes see racial bias—against whites. In 2014, he took umbrage to a rhetorical comparison drawn by President Barack Obama at the United Nations between instability in Middle Eastern regimes and the abusive tactics of American police departments like that of Ferguson, Missouri. “The anti-white bigotry, and specifically the anti-white cop bigotry, of this administration is appalling, and the responsibility for it rests less with Eric Holder (although there too) than with his boss,” he wrote, referring to the first black attorney general and Obama.

Otis occasionally takes aim at perceived elites whom he casts as insulated from the consequences of their policy decisions. “When early release goes wrong, as it so often does, who pays the price?” he wrote in 2016. “The sentencing reform crowd at their posh, self-congratulatory, ‘we-are-so-humane’ parties in Manhattan and Hollywood, or the next unsuspecting victim they helped set up?”

But Otis’s views are also out of sync with a growing number of conservatives. Republican leaders in red states like Georgia and Texas have adopted measures aimed at reducing recidivism and lowering excessive prison populations. “Someone who doesn’t adapt to new ways of thinking that have actually proven to be a lot more effective than simply warehousing people for years on end—someone who can’t accept that reality—doesn’t really need to be on the Sentencing Commission,” Jason Pye, the vice president for legislative affairs at FreedomWorks, told me.

Scheidegger said the debate over Otis’s positions would be a net positive for the commission. “I think it’s a good nomination, and I think it’s important to keep it in the context of the whole panel, including representation on the other side of the aisle as well,” he told me. “That’s an important aspect of the nomination. Diversity of viewpoint on this subject is a good thing.”

Trump’s nominees to the commission are still awaiting Senate confirmation. The other three are William Pryor, a Sixth Circuit Court of Appeals judge, as well as Third Circuit judge Luis Restrepo and federal district-court judge Henry Hudson. Reform advocates told me they also had concerns about Hudson, who once went by the sobriquet “Hang ’em High Harry” as a prosecutor in the 1980s, but acknowledged he has plenty of practical experience as a sentencing jurist.

But Otis is still a bridge too far, they told me, even though many of them said they like him personally.

“Part of the commission’s job is to take some of the politics away from the politicians,” Ring said. “You want sentencing to be driven by this commission as some insulation from Congress. And that’s the worst place for an ideologue from either side.”