

A STEP IN THE RIGHT DIRECTION ON CRIMINAL JUSTICE REFORM

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On the eve of the longest government shutdown in U.S. history—and days before Christmas 2018—an unlikely scene played out in the Oval Office. Surrounded by Republican and Democratic members of Congress, President Donald Trump aired his frustration with Senate Democrats who were holding up funding for one of his central campaign promises: the construction of a southern border wall that he asserted would stop the flow of illegal drugs into the United States and curb gang activity.¹ Moments later, he signed bipartisan criminal justice reform legislation that would expand prison rehabilitation programs and reduce sentences for federal drug offenses.² The praise and congratulations that swept the room were emotional and universal.³

That Trump, who campaigned as a tough on crime candidate,⁴ was now endorsing a significant reduction in penalties, including for people convicted of repeat offenses, was surprising and noteworthy. Jared Kushner, the President's son-in-law and the White House's chief proponent of the First Step Act, acknowledged the unlikely circumstance:

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1. See Press Release, White House, Remarks by President Trump at Signing Ceremony for S. 756, the “FIRST STEP Act of 2018” and H.R. 6964, the “Juvenile Justice Reform Act of 2018” (Dec. 21, 2018), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-ceremony-s-756-first-step-act-2018-h-r-6964-juvenile-justice-reform-act-2018/> [<https://perma.cc/MC7U-F2E9>] [hereinafter Remarks].

2. See Remarks, *supra* note 1.

3. Both Republicans—Senator Ted Cruz and Vice President Mike Pence—and Democrats—Senate Minority Leader Chuck Schumer—thanked the President. See Remarks, *supra* note 1. Senator Mike Lee thanked Donald Trump and added that it was “almost hard for [him] to speak about this without being emotional.” *Id.*

4. Ayesha Rascoe, *How Trump Went From ‘Tough On Crime’ To ‘Second Chance’ For Felons*, NPR (Dec. 17, 2018), <https://www.npr.org/2018/12/17/676771335/how-trump-went-from-tough-on-crime-to-second-chance-for-felons> [<https://perma.cc/Q5G2-9D3S>] (noting that Trump made “‘tough on crime’ one of his calling cards,” and had, for instance, previously called for the death penalty for drug smugglers).

[E]veryone kept asking me, “Will the President be on board? Will the President be on board?” And I said, “Look, I don’t know.” I mean, this was not an issue that, you know, you’d spent time with. It was not relevant to the real estate industry that you were in before.⁵

Trump’s decision to support the First Step Act does not represent an evolution in his thinking about crime and punishment. Indeed, less than two months after the signing ceremony where he urged second chances for people in prison and lamented the excesses of decades in prison for nonviolent offenses, Trump praised China for its willingness to execute its citizens for drug trafficking offenses.⁶ Trump claimed Chinese President Xi Jinping credited the extreme penalty for the apparent low incidence of drug use in China.⁷ Trump admonished the U.S. response to drug selling, suggesting that those who committed drug offenses here were simply “fined.”⁸

Understanding the origins and the passage of the First Step Act requires more than simply parsing the complicated ideology of the Trump administration. Complex bipartisan legislation—particularly on criminal justice reform—does not evolve quickly. It requires years of building pressure from the grassroots, developing models of reform, negotiation, and compromise.

This essay will provide an overview of the politics that led to adoption of the First Step Act, along with an assessment of its accomplishments and challenges. It concludes with a discussion of lessons learned from the Act’s passage and implications for the movement challenging mass incarceration.

I.

THE CONTEXT FOR CRIMINAL JUSTICE REFORM

After forty years of unrelenting growth in U.S. incarceration levels, the country has finally seen a reduction in the prison population. Nationally, between 2009 and 2017, the number of people in prison fell 7% to 1.4 million.⁹ This modest outcome is the result of

5. Remarks, *supra* note 1.

6. See *NBC News, Trump ‘Most Excited’ About Death Penalty for Drug Dealers in China Trade Deal* (NBC television broadcast Feb. 15, 2019), <https://www.nbcnews.com/video/trump-most-excited-about-death-penalty-for-drug-dealers-in-china-trade-deal-1443276355542> [<https://perma.cc/4PJQ-F3U9>].

7. See *id.*

8. *Id.*

9. See Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?*, SENTENCING PROJECT 1 (Mar. 8, 2018), <https://www.sentencingproject.org/>

nationwide changes at the state, local, and federal level to sentencing, corrections, and reentry policies, as well as law enforcement and prosecutorial decision making.¹⁰ As of 2017, five states had achieved prison population reductions of at least 30% of their peak population.¹¹ Even several states that have historically claimed the country's highest rates of incarceration have achieved double-digit percentage reductions in their prison populations since reaching their peak levels.¹² As this criminal justice reform has occurred, overall crime rates have continued to decline and are at historic lows.¹³

The Federal Bureau of Prisons population, the largest in the country, peaked in 2013 at 219,000.¹⁴ As of November 2019, the population was just over 176,000 people.¹⁵

A combination of reforms contributed to this decline. Most significant were a series of actions taken by the U.S. Sentencing Commission to reduce the sentencing guidelines—first for crack cocaine offenses and later for all drug offenses. Each drug guideline amendment was made retroactive so that tens of thousands of

publications/can-wait-75-years-cut-prison-population-half/ [https://perma.cc/E9ND-ZGYX]; Nazgol Ghandnoosh, *U.S. Prison Population Trends: Massive Buildup and Modest Decline*, SENTENCING PROJECT 1 (Sept. 17, 2019), https://www.sentencingproject.org/publications/u-s-prison-population-trends-massive-buildup-and-modest-decline/ [https://perma.cc/59ZF-YMME] [hereinafter Ghandnoosh, *U.S. Prison Population Trends*].

10. Dennis Schrantz et al., *Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions*, SENTENCING PROJECT 5–8 (Sept. 5, 2018) https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions/ [https://perma.cc/EPP9-EMAQ]; *Diversion and Alternatives to Prosecution*, FAIR & JUST PROSECUTION https://fairandjustprosecution.org/issues/diversion-and-alternatives-to-incarceration/ [https://perma.cc/C3GS-N92W].

11. Ghandnoosh, *U.S. Prison Population Trends*, *supra* note 9, at 1.

12. *Id.* (noting that Mississippi and South Carolina have seen declines in their prison populations).

13. *See, e.g.*, Press Release, Brennan Center for Justice, Crime Remains at Historic Lows in America (June 12, 2018), https://www.brennancenter.org/our-work/analysis-opinion/crime-remains-historic-lows-america [https://perma.cc/VQ87-RKYN] (reporting “consistently low” crime rates in the 30 largest American cities); John Gramlich, *5 Facts About Crime in the U.S.*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewresearch.org/fact-tank/2019/10/17/facts-about-crime-in-the-u-s/ [https://perma.cc/G568-8L8T] (“The two most commonly cited sources of crime statistics in the U.S. both show a substantial decline in the violent crime rate since it peaked in the early 1990s.”).

14. *Statistics*, FEDERAL BUREAU OF PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops (last visited Nov. 15, 2019) [https://perma.cc/WU5R-J5KL].

15. *Id.*

people in prison had their sentences reduced by several years.¹⁶ The passage of the Fair Sentencing Act, which Congress enacted in 2010, also played an important role in spurring a reduction in the prison population.¹⁷

The Fair Sentencing Act addressed a very specific issue: the 100-to-1 sentencing disparity between crack and powder cocaine. The penalties for crack cocaine offenses were established by the Anti-Drug Abuse Acts of 1986 and 1988. Under the 1980s bills, convictions for simple possession or possession with intent to distribute as little as five grams of crack cocaine—the equivalent of two sugar packets—were subject to a five-year mandatory minimum.¹⁸ Fifty grams of crack cocaine—the weight of an average candy bar—would trigger a ten-year mandatory minimum for a first-time offense.¹⁹ Distribution of powder cocaine, a substance pharmacologically identical to crack, required 100 times the quantity of crack to trigger similar mandatory minimum penalties.²⁰

This 100-to-1 drug quantity disparity galvanized racial justice advocates for decades because of the profound racial disparity associated with the sentencing scheme. African Americans comprised the overwhelming majority of people convicted of crack cocaine offenses in federal court, while whites and Latinos accounted for the bulk of powder cocaine convictions.²¹ Research and recommendations by the U.S. Sentencing Commission criticized the disparity, noting in 2002 that crack cocaine penalties “apply most often to offenders who perform low-level trafficking functions, wield little decisionmaking [sic] authority, and have limited responsibility.”²²

16. See Amendments to the Sentencing Guidelines, U.S. SENTENCING COMM’N (2014); Sari Horwitz, *Justice Department Set To Free 6,000 Prisoners, Largest One-time Release*, WASH. POST (Oct. 6, 2015), http://www.washingtonpost.com/world/national-security/justice-department-about-to-free-6000-prisoners-largest-one-time-release/2015/10/06/961f4c9a-6ba2-11e5-aa5b-f78a98956699_story.html [https://perma.cc/S2TF-CYLZ].

17. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

18. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-2 § 1002 (1986); Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of 21 U.S.C.).

19. *Id.*

20. See 21 U.S.C. § 841(b) (2000).

21. See U.S. SENTENCING COMM’N, SPEC. REP. TO CONG.: COCAINE AND FED. SENTENCING POLICY 93, 152 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006).

22. U.S. SENTENCING COMM’N, REP. TO CONG.: COCAINE AND FED. SENTENCING POLICY 99-100 (2002).

A robust advocacy campaign to dismantle the crack cocaine disparity began in 2006 and eventually secured the lead sponsorship of Senator Joseph Biden on a bill to eliminate the quantity-based penalty differences between the two forms of cocaine.²³ While the bill never passed, Biden continued to prioritize reform after he assumed the Vice Presidency, eventually encouraging President Barack Obama to take the issue on as a central feature of his civil rights agenda.²⁴

Senator Richard Durbin took over Biden's bill in the Senate and, with support from the White House, moved aggressively to advance the bill.²⁵ Unable to find unanimous support among Democratic members on the Senate Judiciary Committee, Durbin began negotiations with Republicans on a compromise proposal that ultimately reduced the quantity disparity between crack and powder cocaine to 18-to-1.²⁶ Republicans and Democrats agreed that the disproportionate harm caused to African Americans and the distrust it perpetuated in the criminal justice system made change essential.²⁷ The Fair Sentencing Act passed overwhelmingly in Congress and was signed into law in August of 2010. However, its provisions did not have retroactive effect.²⁸

23. See *Federal Cocaine Sentencing Laws: Reforming The 100-To-1 Crack/Powder Disparity: Hearing Before the S. Subcomm. on Crime & Drugs*, 110th Cong. (2008) (statement of Sen. Joe Biden, Chairman, S. Comm. on Crime & Drugs) ("After 21 years of study and review, these facts have convinced me that the 100-to-1 disparity cannot be supported and that the penalties for crack and powder cocaine trafficking merit similar treatment under the law.").

24. See Ian S. Thompson, *Now is the Time to Crack the Disparity Once and For All!*, ACLU (Nov. 13, 2008, 6:52 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/now-time-crack-disparity-once-and-all> [<https://perma.cc/LTY4-4A4Q>] (noting that the Barack Obama and Joe Biden's "transition agenda" included support for ending the disparity).

25. See Press Release, Senator Dick Durbin, *Durbin's Fair Sentencing Act Passed By House, Sent To President For Signature* (July 28, 2010), <https://www.durbin.senate.gov/newsroom/press-releases/durbins-fair-sentencing-act-passed-by-house-sent-to-president-for-signature> [<https://perma.cc/NV67-W98J>].

26. *Id.*

27. See *Obama signs bill reducing cocaine sentencing gap*, CNN (Aug. 3, 2010, 4:45 PM), <https://www.cnn.com/2010/POLITICS/08/03/fair.sentencing/index.html> [<https://perma.cc/D48C-DK25>] (noting that "several key Republicans . . . pushed for the change").

28. See Press Release, Senator Dick Durbin, *supra* note 25.

II. THE LONG ROAD TO THE FIRST STEP ACT

The bipartisan nature of the crack cocaine compromise made passage a significant milestone and inspired additional federal bipartisan proposals. In the years that followed, Senator Durbin teamed up with Republican Senator Mike Lee to introduce the Smarter Sentencing Act, which would cut mandatory minimum sentences for all drugs in half.²⁹ That bill passed out of the Senate Judiciary Committee but failed to advance further in the Democratic Senate for fear of the political consequences for Democrats running for reelection in 2014.³⁰ At the time, the House of Representatives had already flipped to Republican control.³¹

Despite the precaution, Democrats lost control of the Senate and a new tough on crime chairman, Charles Grassley, took over the Senate Judiciary Committee.³² Grassley was not a fan of the Smarter Sentencing Act and spent the first few months of 2015 blasting the “leniency industrial complex” in several Senate floor speeches.³³ By April of that year, however, increasing mobilization of faith leaders in Grassley’s home state of Iowa would help shift his thinking. He was presented with a letter signed by 130 faith leaders from across the state urging him to allow sentencing reform legislation to progress.³⁴ Three Bishops—a Roman Catholic, a United Methodist, and a Lutheran—published an op-ed in the *Des Moines Register* highlighting the letter and calling for change. They wrote:

As Iowans, we are privileged to have Senator Grassley hold unique influence in the trajectory of America’s sentencing policy. We hope he will use this authority to enact drug sentencing reforms that are more appropriate, will reduce the prison pop-

29. See Smarter Sentencing Act of 2014, S.1410, 113th Cong. (2013–2014).

30. *Id.*

31. See Dan Robert et al., *Republicans win majority in US Senate, giving party full control of Congress*, GUARDIAN (Nov. 5, 2014), <https://www.theguardian.com/us-news/2014/nov/04/us-midterm-elections-republican-wins-senate-takeover> [https://perma.cc/V2VR-GSG6].

32. See *Committee Assignments*, SEN. CHUCK GRASSLEY, <https://www.grassley.senate.gov/about/committee-assignments> [https://perma.cc/V86S-SGF9] (last visited Oct. 17, 2020).

33. Kara Gotsch, *Faith Leaders Influencing the Debate on Drug Sentencing*, JUSTICE UNBOUND (June 5, 2015), <https://justiceunbound.org/faith-leaders-influencing-the-debate-on-drug-sentencing/> [https://perma.cc/PRE5-9B4Z].

34. See Julius Trimble et al., *Bishops call on Grassley to reform sentencing*, DES MOINES REGISTER (Apr. 30, 2015, 11:07 PM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2015/05/01/bishops-call-grassley-reform-sentencing/26682887/> [https://perma.cc/Z2CG-AG4N].

ulation and take into account the complicated factors that lead people to sell drugs. . . . [W]e pray for the thousands of Iowans still behind bars, their families and the many thousands more who will be subject to extreme sentencing policies in years to come if lawmakers choose not to act.³⁵

The continued coverage of the controversy by Iowan news outlets undoubtedly influenced Grassley's next steps on criminal justice reform. Within weeks, Grassley convened a bipartisan group of senators who had previously signaled their interest in advancing criminal justice reform legislation during the 114th Congress.³⁶ Most prominent in the negotiations were Senators Durbin and Lee—who sought significant changes to drug mandatory minimum sentences—and Senators John Cornyn and Sheldon Whitehouse—who had introduced a bipartisan bill, the CORRECTIONS Act, to expand rehabilitative programming in federal prisons.³⁷ The bill also created a system for awarding earned time credits to individuals who completed prison programming. These credits would allow beneficiaries to transition from prison to a halfway house or home confinement earlier than otherwise contemplated at sentencing.³⁸

After months of negotiation, Grassley introduced the Sentencing Reform and Corrections Act, a modified combination of the Smarter Sentencing Act and the CORRECTIONS Act. The bill quickly passed out of the Senate Judiciary Committee on a bipartisan vote, though five Republican committee members opposed the measure.³⁹ Despite repeated acknowledgements at the time by Majority Leader Mitch McConnell regarding the consensus on Capitol Hill for criminal justice reform, and regular urgings by his number two (Cornyn), the Sentencing Reform and Corrections Act never advanced to a floor vote.⁴⁰ Similar bipartisan legislation in the

35. *Id.*

36. See Lauren Fox & National Journal, *The Story Behind a Breakthrough: How a Team of Senators Convinced Chuck Grassley on Justice Reform*, ATLANTIC (Oct. 1, 2015), <https://www.theatlantic.com/politics/archive/2015/10/the-story-behind-a-breakthrough-how-a-team-of-senators-convinced-chuck-grassley-on-justice-reform/446253/> [https://perma.cc/94EU-2HY9].

37. See Corrections Act, S. 467, 114th Cong. (2015–2016).

38. *Id.*

39. Authors' observation at Senate vote.

40. See Carl Hulse, Why the Senate Couldn't Pass a Crime Bill Both Parties Backed, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html> [https://perma.cc/D3J6-FFWE].

House also failed to gain sufficient traction to move beyond committee approval.⁴¹

When Trump took office the hopes for passing criminal justice reform legislation diminished.⁴² Even among some initial Senate champions of the Sentencing Reform and Corrections Act, the belief was that the best hope to pass reform was confined to legislation that covered only prison programming, rather than programming *and* sentencing reform. Indeed, Cornyn choose not to cosponsor the Sentencing Reform and Corrections Act in the 115th Congress, keeping instead to his CORRECTIONS Act, despite his strong advocacy for the broader bill in 2016.⁴³ Grassley, on the other hand, remained steadfast. Despite initial signals from his Republican colleagues and the White House that the President was not willing to support sentencing reform, Grassley repeatedly insisted that criminal justice legislation that failed to address sentencing would not move through his committee.⁴⁴

Meanwhile, in the House of Representatives, Republican Representative Doug Collins of Georgia and Democratic Representative Hakeem Jeffries of New York joined together to update and introduce prison reform legislation previously sponsored by Jason Chafetz, who retired from the House of Representatives in 2017. The bill was renamed the Prison Reform and Redemption Act but would eventually be reintroduced as the FIRST STEP Act, or the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act.⁴⁵ Despite previous bipartisan agreements that

41. See Sentencing Reform Act of 2015, H.R. 3713, 114th Cong. (2015–2016); Corrections and Recidivism Reduction Act of 2016, H.R. 759, 114th Cong. (2015–2016).

42. See, e.g., Jamiles Lartey, *Obama Made Progress on Criminal Justice Reform. Will It Survive the Next President?*, GUARDIAN (Nov. 14, 2016, 6:15 PM), <https://www.theguardian.com/us-news/2016/nov/14/barack-obama-criminal-justice-reform-prison-sentencing-police> [https://perma.cc/EY69-WRDY] (“And now, as the nation prepares for President Donald Trump, who ran a campaign openly hostile to the prospect of progressive criminal justice reform, there’s ample reason to fear that whatever progress has been made could be lost in the blink of an eye.”).

43. See Sentencing Reform and Corrections Act of 2015, S.2123, 114th Cong. (2015–2016) (listing cosponsors, Cornyn not among them).

44. See, e.g., Press Release, Senator Chuck Grassley, Sentencing Reform Means More Resources for Law Enforcement, Less Burdens on Taxpayers (Apr. 30, 2018), <https://www.grassley.senate.gov/news/news-releases/grassley-sentencing-reform-means-more-resources-law-enforcement-less-burdens-0> [https://perma.cc/2L4Y-2RFJ].

45. See Prison Reform and Redemption Act of 2017, H.R. 3356, 115th Cong., 1st Sess. (2017–2018); FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

prison and sentencing reform would move together, the House bill did not include the latter.⁴⁶ Under the proposed House legislation, each person in federal custody would be assessed and assigned a risk level, either minimal, low, medium, or high. One's risk level determined how much earned time could be accrued for participation in prison programming and when those credits could be redeemed to allow for earlier transition to community corrections (i.e., halfway houses or home confinement).⁴⁷

Progressive advocates, including the ACLU, Leadership Conference for Civil and Human Rights, and Human Rights Watch, expressed their frustrations with the House strategy in letters and meetings.⁴⁸ Progressive advocates raised concerns about the potential racial disparity associated with the legislation's risk assessment tool,⁴⁹ and objected to the long list of categories of people disqualified from earned time credits because of their offense type, including those convicted of immigration and violent offenses.⁵⁰ Without the promise of also moving *sentencing reform* proposals through the House, most progressive organizations opposed or did not endorse passage of the First Step Act.⁵¹

Despite the strong objections to the First Step Act from traditional proponents of criminal justice reform, the bill was able to advance because of the support of the White House and the strong engagement of Jared Kushner. Kushner, who had been marked by his father's incarceration years earlier, was dogged in lining up bi-

46. H.R. 3356.

47. *See Vote No on the First Step Act*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (May 21, 2018), <https://civilrights.org/resource/vote-no-first-step-act-2/> (arguing that the earned time credits system risks [https://perma.cc/F9JS-73K6] (“embedding deep racial and class bias into decisions that heavily impact the lives and futures of federal prisoners and their families”).

48. *See id.* (including the omission of sentencing reform among its concerns with the First Step Act).

49. For an explanation of the potential for racial disparity, *see* Risk Assessment Issues, *infra* pp. 12–13.

50. *See* LEADERSHIP CONF. ON CIV. & HUM. RTS., *supra* note 47 (stressing that “[c]ategorically excluding entire groups of people from receiving early-release credits will undermine efforts to reduce prison overcrowding and improve public safety . . .”).

51. *See, e.g., id.*; Eugene Robinson, *In Prison Reform, a Little of Something is Better Than a Lot of Nothing*, WASH. POST (May 28, 2018, 5:21 PM), https://www.washingtonpost.com/opinions/in-prison-reform-a-little-of-something-is-better-than-a-lot-of-nothing/2018/05/28/d3862c6e-605c-11e8-9ee3-49d6d4814c4c_story.html [https://perma.cc/8HSV-JX8J] (noting that “[p]rogressives are sharply divided on the measure, mostly because of what it doesn't do [i.e. reforming sentencing laws]).

partisan supporters for prison reform.⁵² He connected with Van Jones, a CNN political personality and cofounder of #Cut50, who was likewise committed to securing bipartisan passage of the bill.⁵³ The early coalition of supporters for the First Step Act also included conservatively aligned groups, such as Prison Fellowship and Right on Crime, as well as Mark Holden, the General Counsel for Koch Industries.⁵⁴ With all of this support, the bill passed the House resoundingly, 360 to 59.⁵⁵

With House passage, and increasing White House engagement, the pressure on Grassley to move forward with the prison reform bill was intense. A meeting between one of the authors and Senator Durbin revealed that while Grassley began dialogue with the White House, he simultaneously recommitted his intentions to only move forward a bill that incorporated the sentencing reforms he and Durbin had negotiated years earlier. In November, Trump finally announced his support for the inclusion of limited sentencing reforms as part of the First Step Act package.⁵⁶ The changes to the bill, including tweaks to the prison reform provisions, were enough to win over most advocates participating in the Justice Roundtable, a progressive coalition that includes the ACLU and The Sentencing

52. See Annie Karni, *The Senate Passed the Criminal Justice Bill. For Jared Kushner, It's a Personal Issue and a Rare Victory*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html> [https://perma.cc/8KTS-DYAX] (discussing Kushner's role in passing the bill).

53. See Brian Bennett, *How Unlikely Allies Got Prison Reform Done—With an Assist From Kim Kardashian West*, TIME (Dec. 21, 2018), <https://time.com/5486560/prison-reform-jared-kushner-kim-kardashian-west/> [https://perma.cc/FCJ5-3WV3] (reporting on the key role Van Jones played in the fight to pass the bill).

54. See, e.g., Emily Greene, *What is the First Step Act?*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/2019/01/what-is-the-first-step-act/> [https://perma.cc/374X-TDCX]; Press Release, Senator Chuck Grassley, Diverse Group of Organizations Endorse Bipartisan First Step Act (Nov. 21, 2018), <https://www.grassley.senate.gov/news/releases/diverse-group-organizations-endorse-bipartisan-first-step-act> [https://perma.cc/TL6Y-MXF8] (listing Right on Crime among the bill's supporters); *Koch-Backed Criminal Justice Reform Bill To Reach Senate*, NPR (Dec. 16, 2018, 5:37 PM), <https://www.npr.org/2018/12/16/677252467/koch-backed-criminal-justice-reform-bill-to-reach-senate> [https://perma.cc/RP2E-DJJ6].

55. See FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

56. See Jamiles Lartey, *Trump Endorses Bipartisan Criminal Justice Reform Bill*, GUARDIAN (Nov. 14, 2018, 5:42 PM), <https://www.theguardian.com/us-news/2018/nov/14/trump-endorses-criminal-justice-reform-bill-first-step-act> [https://perma.cc/D2UG-VC5D].

Project.⁵⁷ Notable exceptions included organizations led and founded by formerly incarcerated people, JustLeadership USA and the National Council of Incarcerated and Formerly Incarcerated Women and Girls.⁵⁸

Despite the president's support, a month of contentious political debate ensued over the legislation. Ultimately, the bill passed the Senate 87 to 12 and two days later the House adopted the Senate-passed version of the bill 358 to 36.⁵⁹ On December 21, 2018, Trump signed the bill into law, securing a rare bipartisan victory.⁶⁰

III. THE ACCOMPLISHMENTS

The First Step Act received its new name shortly before its passage by the House in May 2018 as a signal to opponents who criticized the bill for its lack of sentencing reforms and limited scope.⁶¹ It was a shrewd marketing tactic because proponents could agree with opponents that more criminal justice reform was necessary while also supporting some progress over none at all. As noted, several progressive opponents of the bill came on board following the inclusion of the sentencing reform provisions, while others contended that the potential for racial disparity in the risk assessment instrument, the expansion of electronic monitoring, and an anticipated increase in for-profit monitoring contracts, along with the

57. See Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018 4:00 PM), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward> [<https://perma.cc/W5T7-WTYD>]; MARG MAUER, THE SENTENCING PROJECT CALLS ON CONGRESS TO PASS FIRST STEP ACT (2018), <https://www.sentencingproject.org/publications/letter-support-first-step-act/> [<https://perma.cc/3X3B-Y3QZ>].

58. See Press Release, JustLeadership USA, JustLeadershipUSA joins with National Partner Organizations In Opposing Revised First Step Act Legislation (Nov. 20, 2018), <https://jlusa.org/media-release/justleadershipusa-joins-with-national-partner-organizations-in-opposing-revised-first-step-act-legislation/> [<https://perma.cc/N359-DKAT>] (stating that both organizations opposed the legislation).

59. See *Senate Passes Landmark Criminal Justice Reform*, COMM. ON THE JUDICIARY (Dec. 18, 2018), <https://www.judiciary.senate.gov/press/rep/releases/senate-passes-landmark-criminal-justice-reform> [<https://perma.cc/JU77-JQCS>]; Katherine Tully-McManus, *House Approves Criminal Justice Overhaul, Sends to President*, ROLL CALL (Dec. 20, 2018, 2:13 PM), <https://www.rollcall.com/news/politics/house-approves-criminal-justice-overhaul-sends-president> [<https://perma.cc/A8XQ-ZCQB>].

60. See Remarks, *supra* note 1.

61. See FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018) (noting that the Act was formerly known as the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act).

modest impact of the legislation were too problematic to earn their support.⁶²

The positive consensus centered on four sentencing reform components added in the Senate after intense negotiations between Grassley and the White House. All of these provisions had previously been components of Grassley's Sentencing Reform and Corrections Act⁶³:

- **Fair Sentencing Act Retroactivity:** The 2010 law to increase the quantity of crack cocaine necessary to trigger a five- or ten-year mandatory minimum sentence did not apply to people previously sentenced under the old 100-to-1 crack cocaine sentencing disparity.⁶⁴ Eight years after enactment of the Fair Sentencing Act, thousands of people in federal custody were still serving sentences under the outdated law.⁶⁵ One year after the retroactive provision in the First Step Act took effect, the Federal Bureau of Prisons reported that 2,612 people were granted sentence reductions.⁶⁶ About 90% of the beneficiaries were African American.⁶⁷
- **Safety Valve Expansion:** In 1994, as part of a massive crime bill, Congress allowed judges to sentence a person below the prescribed mandatory minimum for a drug offense if the individual met five requirements, including that the person's offense was low-level and non-violent, and that the person had fully cooperated with prosecutors.⁶⁸ In 2018, approximately 21% of the people convicted of a federal drug trafficking offense carrying a mandatory minimum penalty qualified for this safety valve.⁶⁹ The updated safety valve, as enacted in the First Step Act, will extend the pool of eligible recipients by permitting individuals with more

62. See, e.g., Marie Gottschalk, *Did You Really Think Trump Was Going to Help End the Carceral State?* JACOBIN (Mar. 2019), <https://www.jacobinmag.com/2019/03/first-step-act-criminal-justice-reform> [<https://perma.cc/Q9J9-8N4H>].

63. See Sentencing Reform and Corrections Act of 2015, S.2123, 114th Cong. (2015–2016).

64. See Fair Sentencing Act §§ 21, 28.

65. U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY, S. 756, THE FIRST STEP ACT OF 2018 (2019).

66. *First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/> [<https://perma.cc/N9KK-DRJS>] (last visited Oct. 17, 2020).

67. U.S. SENTENCING COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS RETROACTIVITY DATA REP. (Aug. 2019).

68. See *Safety Valves in a Nutshell*, FAMILIES AGAINST MANDATORY MINIMUMS (FAMM) (July 7, 2012), <https://famm.org/wp-content/uploads/FS-Safety-valves-in-a-nutshell.pdf> [<https://perma.cc/E2RP-SS9H>].

69. U.S. SENTENCING COMM'N, ANNUAL REPORT 121 tbl. D-13 (2018).

extensive criminal histories to qualify.⁷⁰ The U.S. Sentencing Commission estimates that this expansion will impact 2,045 people annually with an average sentence reduction of one year. The sentence reductions will result in a decrease of 1,072 federal prison beds in five years.⁷¹

- **Reduced Enhancements for Prior Drug Offenses:** The mandatory minimum sentences for people subject to a sentencing enhancement for a drug offense because of one or two prior felony drug convictions were reduced from twenty to fifteen years for one prior and from life without parole to twenty-five years for two or more priors. The Commission estimates that fifty-six people will be impacted by the sentencing change annually, with an average sentence reduction of four years and eight months.⁷²
- **Ending Stacking in “Gun Bump” Cases:** Individuals charged with a drug or violent offense who possess, brandish, or use a firearm during the commission of their offense are subject to an additional mandatory minimum sentence of five to ten years on top of their underlying penalty.⁷³ The imposition of these additional mandatory minimums was governed by § 924(c). Previously, “a second or subsequent count of conviction under § 924(c) triggered a higher mandatory minimum penalty, as well as mandatory ‘stacking’ of these sentences for each count of conviction.”⁷⁴ This was true even if these subsequent counts pertained to the same set of underlying events and existed within the same indictment.⁷⁵

The extreme nature of § 924(c) sentencing is well-illustrated by the case of Weldon Angelos, a young music producer in Utah. On three occasions, Angelos sold a total of approximately \$1,000 of marijuana to an undercover agent. During the transactions, Angelos possessed a gun, which he

70. Criminal history points measure the prior criminal record of defendants. A significant criminal history will normally be evidenced by three or more criminal history points. Under the 1994 legislation, individuals with more than a single criminal history point became ineligible for safety valve release. Under the First Step Act that ceiling was raised to four criminal history points. *See* U.S. SENTENCING COMM’N, REP.: FIRST STEP ACT (Feb. 2019).

71. U.S. SENTENCING COMM’N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY S. 756, THE FIRST STEP ACT OF 2018, at 1 (2019).

72. *See id.*

73. *See* 18 U.S.C. § 924(c)(1)(A) (2011).

74. U.S. SENTENCING COMM’N, REPORT: FIRST STEP ACT 4 (Feb. 2019).

75. *Id.*

did not use or threaten to use. Because Angelos was charged with three separate offenses and convicted on the same day in court, under the § 924(c) provisions the judge was obligated to impose a combined mandatory penalty of fifty-five years in prison.

By contrast, under the First Step Act, the twenty-five-year mandatory minimum for prior gun involvement in a drug offense can only be imposed if the initial gun involvement was finalized *prior* to the new case.⁷⁶ The change is expected to impact fifty-seven people annually with an average sentence reduction of twenty-seven years and four months.⁷⁷

- **Expanded Good Time Credits:** While an often-overlooked component of the bill, this provision will likely have an outsized impact on the prison population. The expansion of good time credit is estimated to impact 142,448 people currently serving sentences other than life without parole in federal prisons, as well as those who will be incarcerated in the future. Each eligible individual can receive up to fifty-four days of good time credit, an increase of seven additional days a year off their sentences for good behavior.⁷⁸ The change is retroactive and therefore applies to time already served. The Commission estimates its overall impact will save 27,126 “bed years” of incarceration over the next twenty years.⁷⁹ The benefits of the First Step Act’s sentencing reform provisions became visible in 2019. One year after the bill’s passage almost 2,500 people received a sentence reduction because of retroactive application of the Fair Sentencing Act.⁸⁰

Most notable among those who have been released is Matthew Charles. Charles had first gained notoriety when he was erroneously released in 2016 as a consequence of the U.S. Sentencing Commission’s earlier Sentencing Guideline amendments. Once the error was discovered, despite

76. *Id.*

77. U.S. SENTENCING COMM’N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY, S. 756, THE FIRST STEP ACT OF 2018, at 1 (2019).

78. *See id.*; *see also An Overview of the First Step Act*, BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp#incentives_for_success [<https://perma.cc/M4VK-4PKU>].

79. *Id.* “Bed years” is a measure of the overall impact on the prison population, derived from cumulative estimates of the reduced time served in prison for the prison population over time.

80. *First Step Act*, FED. BUREAU OF PRISONS, *supra* note 66.

living an exemplary two years in the community, Charles was returned to prison in 2018.⁸¹ After his ultimate release from prison in January 2019, President Trump introduced him at the 2019 State of the Union and welcomed him home.⁸² (As a sad commentary on the wide-ranging effects of mass incarceration, even following this high-level of attention, Charles had great difficulty finding a landlord who would rent to him because of his felony conviction.⁸³) In Rhode Island, federal judges proactively sought out qualified individuals and began the process of sentence reductions.⁸⁴ U.S. District Chief Judge William E. Smith in Rhode Island told the Providence Journal, “[i]f people have already served their sentences under the Fair Sentencing Act, they deserve to be released.”⁸⁵

IV. THE LIMITATIONS

While the sentencing reform provisions of the First Step Act will modestly reduce individual sentences and the federal prison population, the practical challenges of implementing the prison reform components may compromise the impact of those provisions. Following is a discussion of some of these issues.

A. *Federal Bureaucratic Challenges*

The long list of civil rights, faith-based, and criminal justice reform organizations that cautioned against advancing a bill that was

81. See *Tennessee Man Sent Back to Prison After Release “Worthy of a Second Chance,”* CBS (June 7, 2018, 7:37 AM), <https://www.cbsnews.com/news/matthew-charles-sent-back-to-prison-after-release-friend-advocates-grossly-unfair/> [https://perma.cc/L77G-GTJ9].

82. Mariah Timms, *President Trump: ‘Welcome Home’ to Matthew Charles, Man Released from Nashville Prison under First Step Act*, TENNESSEAN (Feb. 5, 2019, 8:43 PM), <https://www.tennessean.com/story/news/2019/02/05/donald-trump-state-of-the-union-matthew-charles-alice-johnson-first-step-act-free/2783545002/> [https://perma.cc/7L6Q-5VDJ].

83. Kayla Epstein, *Why This Former Inmate is Struggling to Rent a Home, Even with Kim Kardashian’s Help*, WASH. POST (Mar. 28, 2019, 6:13 PM), <https://www.washingtonpost.com/arts-entertainment/2019/03/18/why-this-former-inmate-is-struggling-rent-home-even-with-kim-kardashians-help/> [https://perma.cc/9YYK-EKG9].

84. See, e.g., Katie Mulvaney, *‘First Step’ Toward Freedom for R.I. Drug Offenders*, PROVIDENCE JOURNAL (Mar. 2, 2019), <https://www.providencejournal.com/news/20190302/first-step-toward-freedom-for-ri-drug-offenders> [https://perma.cc/9YMP-D7SJ].

85. *Id.*

solely focused on prison programming often pointed to the challenges of implementation under a Department of Justice led by officials who were not supportive of the premise of the legislation. Former Attorney General Jeff Sessions had been a fierce opponent of sentencing reform in Congress, and specifically of the First Step Act.⁸⁶ His replacement, William Barr, pledged during his confirmation hearing before the Senate Judiciary Committee to faithfully implement the law, but critics raised concerns about Barr's historical endorsement of mass incarceration.⁸⁷ Indeed, while thousands of sentence reductions for people with convictions involving crack cocaine have been approved by federal judges, the Department of Justice ("DOJ") has attempted to block hundreds of eligible beneficiaries. The DOJ has been largely unsuccessful in its opposition but has appealed several approved cases and is seeking to reincarcerate these individuals.⁸⁸

In other areas of the bill the Department of Justice interpreted that waiting periods required for earned time credit implementation, which were contingent on the creation of a risk and needs assessment tool to determine programming, also applied to the good time credit expansion. Good time credits have been awarded in federal prisons for decades based on good behavior. This delay contradicted Congress's intention and subjected thousands of people whose cumulative good time credits warranted immediate release to serve extended stays in prison, beyond what was necessary.⁸⁹ When this provision was finally implemented, almost

86. See Tony Pugh, *Trump, Sessions Feud Spills over into Dispute over Policy on Criminal Justice Reform*, McCLATCHY DC: IMPACT2020 (Aug. 21, 2018, 3:14 PM), <https://www.mcclatchydc.com/news/politics-government/white-house/article217065005.html> [<https://perma.cc/CHR9-ZFQF>].

87. See Tim Lau, *Barr Pledges to Implement FIRST STEP Act*, BRENNAN CTR. FOR JUSTICE (Jan. 15, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/barr-pledges-implement-first-step-act> [<https://perma.cc/AQY3-6FQ6>]; U.S. DEP'T JUSTICE, *THE CASE FOR MORE INCARCERATION* (1992).

88. See Neena Satija et al., *Trump Boasts That His Landmark Law Is Freeing These Inmates. His Justice Department Wants Them to Stay in Prison*, WASH. POST (Nov. 7, 2019, 12:45 PM), https://www.washingtonpost.com/investigations/trump-brags-that-his-landmark-law-freed-these-inmates-his-justice-department-wants-them-to-stay-in-prison/2019/11/07/5f075456-f5db-11e9-a285-882a8e386a96_story.html [<https://perma.cc/B243-S8RG>]; see also Joe Atmonavage, *Judge Released 4 N.J. Men After Nearly 20 Years in Prison. Now, the Feds Want to Send Them Back*, NJ.COM (Jan. 26, 2020), <https://www.nj.com/news/2020/01/judge-released-4-nj-men-after-nearly-20-years-in-prison-now-the-feds-want-to-send-them-back.html> [<https://perma.cc/J2RU-GV7V>].

89. See Stephen R. Sady & Elizabeth G. Daily, *Delayed Implementation of the First Step Act's Good Time Credit Fix Violates the Rules of Statutory Construction and Due Process*

seven months after the bill's enactment, approximately 3,000 people who had accrued enough credits to exceed their sentences were released from federal prisons.⁹⁰

Another serious concern pertains to the Bureau of Prisons' ("BOP") reluctance to take full advantage of community corrections placements. Despite press reports of limited space in federal halfway houses in recent years, many such facilities are underutilized—partly as a consequence of BOP's failure to allot funds and enable placements to these programs.⁹¹ Given that a major component of the First Step Act involves program completion incentives for placements in community corrections,⁹² this track record raises serious questions about the extent to which this provision will be fully enacted.

B. Limited Funding

The First Step Act authorized just \$75 million per year to carry out the bill's programming mandates to create a risk assessment tool that determines earned time credit eligibility and to expand programming and community corrections capacity.⁹³ If that sum were applied equally to all prisoners it would equate to spending about \$400 per year on each individual.⁹⁴ In October, 2019, BOP Director Kathleen Hawk Sawyer told lawmakers at a House Judiciary Committee hearing that the agency would need additional money to appropriately implement the law.⁹⁵ At the same hearing, John Walters of the Hudson Institute, a member of the First Step Act's

of Law, LISA LEGAL INFO (Feb. 2019), <http://www.lisa-legalinfo.com/wp-content/uploads/2019/02/Oregon-memo.pdf> [https://perma.cc/VQL5-B84Q].

90. Sarah N. Lynch, *About 3,100 Federal Inmates to be Released Early Under New U.S. Law*, REUTERS (July 19, 2019, 1:42 PM), <https://www.reuters.com/article/us-usa-justice-prisons/about-3100-federal-inmates-to-be-released-early-under-new-us-law-idUSKCN1UE25G> [https://perma.cc/QU2B-ZUVU].

91. See Eli Watkins, *Bureau of Prisons Ending Contracts with 16 Halfway Houses*, CNN (Nov. 20, 2017, 5:04 PM), <https://www.cnn.com/2017/11/20/politics/bureau-of-prisons-mark-inch-jeff-sessions/index.html> [https://perma.cc/AK2T-P3Q7].

92. See FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

93. *Id.*

94. See Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, SENTENCING PROJECT (Dec. 17, 2019), <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/> [https://perma.cc/LU26-PBU9].

95. See Kanya Bennett, *The First Step Act Was Exactly That, a First Step. What Comes Next?*, ACLU (Oct. 25, 2019), <https://www.aclu.org/news/smart-justice/the-first-step-act-was-exactly-that-a-first-step-what-comes-next/> [https://perma.cc/W2C7-PSLS].

Independent Review Committee, reiterated the comment and said it would take hundreds of millions of dollars to meet the law's requirements.⁹⁶

Even aside from the challenges of implementing change within a large bureaucratic institution that rejects it, the bill's underfunded prison reforms are unlikely to address the genuine crisis plaguing the Bureau of Prisons. Indeed, as of 2018, the federal prison system was operating at 14% above capacity, with higher rates at high and medium security institutions, 24% and 18% percent respectively.⁹⁷ Moreover, prison safety concerns are at critical levels. The federal system's current "inmate to correctional officer" ratio of 8.9-to-1 is among the highest in the country.⁹⁸ Meanwhile, the rate for some types of assaults in federal prisons has steadily increased since 2014.⁹⁹ The First Step Act's reforms do nothing to alleviate these issues.

There is also an immense programming deficit to overcome at the BOP. The waiting list for the BOP's literacy program alone is 16,000.¹⁰⁰ And, because of overcrowding and staff shortages, many programming staff are regularly required to augment correctional officer duties, resulting in fewer programming opportunities.¹⁰¹ This staffing shortage may partly explain why the number of people completing their GED dropped by 59% between fiscal year 2016 and fiscal year 2017.¹⁰²

C. Exclusions from Program Incentives

Negotiations between the White House and some Republican lawmakers led to legislative compromises that weakened the impact of the bill. A case in point relates to the provision whereby individuals who complete programming can gain earned time credits that allow them earlier access to community corrections, including half-way houses, home confinement, and supervised release (though

96. *See id.*

97. FED. BUREAU OF PRISONS, PROGRAM FACT SHEET 1 (2018).

98. *Id.*

99. *See, e.g.*, FED. BUREAU OF PRISONS, ADJUDICATED ASSAULTS RECORDED IN SENTRY CHRONOLOGICAL DISCIPLINARY RECORDS (2018).

100. U.S. DEP'T OF JUSTICE, FY 2019 PERFORMANCE BUDGET: CONGR. SUBMISSION 27 (2018).

101. *See* Kevin Johnson, *As Federal Prisons Run Low on Guards, Nurses and Cooks Are Filling In*, USA TODAY (Feb. 13, 2018; 2:21 PM), <https://www.usatoday.com/story/news/politics/2018/02/13/ill-equipped-and-inexperienced-hundred-civilian-staffers-assigned-guard-duties-federal-prison-secur/316616002/> [<https://perma.cc/QST6-K9BS>].

102. FED. BUREAU OF PRISONS, PROGRAM FACT SHEET, *supra* note 98, at 1.

not earlier release from a sentence, as has often been erroneously reported). But a long list of exclusions incorporated into the legislation will bar about 40% of the federal prison population from earning these credits.¹⁰³ These exclusions are generally based on the offense of conviction, but also exclude people due to their immigration status. Namely, individuals—whether undocumented immigrants or legal permanent residents—who are subject to removal as a consequence of a felony conviction are excluded from participation in the earned time provisions. Many of these individuals were convicted only of immigration offenses and would not score as “high risk” for public safety considerations.¹⁰⁴

Other exclusions will target individuals convicted of sex offenses, murder, violent firearms offenses, or those who are organizers, leaders, managers, or supervisors in the fentanyl and heroin drug trade. This cohort could likely score as “high risk” on the assessment measure to be developed. Their exclusion conflicts with research that demonstrates that prison programming and associated incentives are most cost-effective when provided to the highest risk groups.¹⁰⁵ Since about 95% of federal prisoners will eventually be released, it is counterproductive to expend disproportionate resources on lower risk populations—after all, by definition, they are “lower risk.”

D. Risk Assessment Issues

The First Step Act requires the creation of a risk and needs assessment system by the Department of Justice, in conjunction with an Independent Review Committee, to determine eligibility for the pre-release custody and supervised release program mandated by the law. In July 2019, the DOJ released a preliminary report regarding the new tool designed for determining risk levels among the federal prison population.¹⁰⁶ Advocates and stakeholders were invited to present statements to DOJ officials providing feedback on the new tool. Organizations like The Sentencing Project, Leader-

103. See FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

104. Nazgol Ghandnoosh & Josh Rovner, *Immigration and Public Safety*, SENTENCING PROJECT (Mar. 16, 2017), <https://www.sentencingproject.org/publications/immigration-public-safety/#V.%20Immigrants%20are%20Under-Represented%20in%20U.S.%20Prisons> [<https://perma.cc/2TQL-2X8P>].

105. See, e.g., NATHAN JAMES, RISK AND NEEDS ASSESSMENT IN THE FEDERAL PRISON SYSTEM 15 (2018), <https://fas.org/sgp/crs/misc/R44087.pdf> [<https://perma.cc/78KG-92W4>].

106. See U.S. DEP’T OF JUSTICE, THE FIRST STEP ACT OF 2018: RISK AND NEEDS ASSESSMENT SYSTEM (2019).

ship Conference for Civil and Human Rights, and the Brennan Center for Justice all highlighted concerns.¹⁰⁷

For example, static factors that cannot be changed, such as age and criminal history, comprised the bulk of an individual's risk score in the tool. Dynamic factors that can be changed, such as prison programming participation, were underweighted. As a result, a majority of the prison population was expected to be classified as medium or high risk.¹⁰⁸ Moreover, because of extreme shortages in prison programming, the likelihood of high and medium risk individuals completing prescribed programming, and thereby reducing their risk levels and transitioning earlier to community corrections, appeared limited.

Another major concern relates to the incorporation of factors into the tool that are racially biased and therefore contribute to higher risk scores for people of color. For example, because criminal history is often a significant factor in a risk assessment tool, we see significant racial disparity in score outcomes.¹⁰⁹ People who reside in heavily policed low-income communities of color will have higher arrest rates that may in part be a function of higher involvement in certain crimes, but also result from the greater presence of law enforcement.¹¹⁰ The use of an assessment that does not mitigate for these factors could lead to racial disparities in early transfers to community corrections.

107. See, e.g., Statement of Kara Gotsch, Director of Strategic Initiatives, SENTENCING PROJECT (Sept. 10, 2019), <https://www.sentencingproject.org/wp-content/uploads/2020/01/FSA-Prisoner-Assessment-Tool.pdf> [<https://perma.cc/6KK4-L4U3>]; Letter from American Civil Liberties Union et al. to David B. Muhlhausen, Dir. of the Nat'l Inst. of Justice (Sept. 3, 2019), <http://civilrightsdocs.info/pdf/policy/letters/2019/The%20Leadership%20Conference%20et%20al%20Comment%20Letter%20to%20Department%20of%20Justice%20on%20PATTERN%20%20First%20Step%20Act%209%203%202019.pdf> [<https://perma.cc/64VW-MHRB>]; Letter from Brennan Center to David B. Muhlhausen, Dir. of the Nat'l Inst. for Justice (Sept. 3, 2019), https://www.brennancenter.org/sites/default/files/2019-09/Brennan%20Center_RNAS%20Comment%20Letter.pdf [<https://perma.cc/Y4W8-4KUX>].

108. See Emily Tiry & Julie Samuels, *How Can the First Step Act's Risk Assessment Tool Lead to Early Release from Federal Prison?*, URBAN WIRE (Sept. 5, 2019), <https://www.urban.org/urban-wire/how-can-first-step-acts-risk-assessment-tool-lead-early-release-federal-prison> [<https://perma.cc/7Y26-BRKL>] (“About half of the population described in the DOJ report scored at high or medium risk.”).

109. See Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (June 2019).

110. See *id.*

E. People Left Behind

The earlier legislation that the First Step Act's sentencing provisions were based upon contained elements of retroactivity that were not incorporated in the enacted legislation. Specifically, the reduced enhancements for prior drug offenses and the un-stacking of mandatory minimums in so-called "gun bump" cases will not benefit people sentenced prior to enactment of the First Step Act. As a result, anyone sentenced for a "third strike" drug offense the day before the legislation was signed is now serving a sentence of life without parole, while those sentenced the day after the bill was enacted are subject to a twenty-five-year minimum sentence.¹¹¹ By failing to apply these changes to people currently serving such lengthy prison terms, the bill's impact is dramatically reduced. Excluding retroactivity of these two key sentencing provisions of the First Step Acts leaves an estimated 4,000 people in prison behind.¹¹²

V.
NEXT STEPS

Since passage of the First Step Act, joy and frustration stemming from the legislation's accomplishments and challenges continue to play out. In March 2019, presidential candidate and New Jersey Senator Cory Booker introduced a criminal justice reform bill titled the Next Step Act. In an op-ed published in *The Washington Post* announcing the bill, Senator Booker stressed the impact that criminal justice reform has on affected individuals and cited this impact as the inspiration for his bill. He told the story of Edward Douglas, a beneficiary of Fair Sentencing Act retroactivity, who was released from a life without parole sentence:

After that life-changing phone call, Douglas returned to his [prison] pod, where he lived with roughly 130 other guys in the same area of the prison. He jumped onto a table and shouted the good news: "I'm getting immediate release!" His podmates—many of whom had come to view Douglas as a mentor figure—joined him at the table. Dozens of others—grown men behind bars—began

111. See FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, 115th Cong. (2017–2018).

112. See U.S. SENTENCING COMM'N, SENTENCE AND PRISON IMPACT ESTIMATE SUMMARY, S. 1917, THE SENTENCING REFORM AND CORRECTIONS ACT OF 2017 (Aug. 2018).

crying, hugging and jumping for joy. They just had one sobering message for Douglas amidst all the celebration: “Don’t forget us.”¹¹³

The sentiment of this reminder is what fuels the federal criminal justice reform movement. While progress over the years—best demonstrated by the nearly 40,000 person drop in the federal prison population since 2013—is undeniable, sentences remain extreme and disproportionately impact people convicted of drug offenses, as well as Black and Latinx people.¹¹⁴ Moreover, the federal prison system is the largest in the country,¹¹⁵ and its underfunded process for rehabilitation has exacerbated the burdens plaguing people entangled within it. More work remains.

The Justice Roundtable, a broad coalition of more than 100 organizations¹¹⁶ working to reform federal criminal justice laws, called for a much more ambitious next step in criminal justice reform in a letter to Senate and House Judiciary Committee leaders. Its policy recommendations include:

- Ending mandatory minimum sentences in drug cases;
- Instituting a judicial review of sentences or “second look” ten years into a prison term to assess the continued appropriateness of a lengthy sentence;
- Eliminating life without parole sentences for youth and adults;
- Setting fines and fees of a criminal sanction to levels that do not exacerbate poverty and account for a person’s ability to pay; and
- Better review of the impact of technical violations and public registries.¹¹⁷

113. Cory Booker, *It’s Time for the Next Step in Criminal Justice Reform*, WASH. POST (Mar. 10, 2019, 8:00 AM), <https://www.washingtonpost.com/opinions/2019/03/10/cory-booker-its-time-next-step-criminal-justice-reform/> [https://perma.cc/4ZG4-TLNS].

114. *See, e.g., Statistics*, FED. BUREAU OF PRISONS (2020); U.S. SENTENCING COMM’N, QUICK FACTS (2018).

115. *See* Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, U.S. DEP’T OF JUSTICE 4–5 (Apr. 2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [https://perma.cc/EC3G-XWVG].

116. JUSTICE ROUNDTABLE, <https://justiceroundtable.org/about/> [https://perma.cc/XWQ9-ZT3U].

117. *See* Letter from Justice Roundtable to Sens. Lindsey Graham and Dianne Feinstein (Mar. 29, 2019), <https://justiceroundtable.org/wp-content/uploads/2019/03/Sentencing-Reform-Coalition-Priorities-Letter-SENATE-1-1.pdf> [https://perma.cc/V4PC-N6FC].

VI. LESSONS LEARNED

The bipartisan celebration lauding the First Step Act's passage may be setting unrealistic expectations of its impact among lawmakers. Indeed, the White House hailed the legislation as a "groundbreaking reform" that promised reductions in recidivism related to the programming enhancements.¹¹⁸

The problem in this regard is that while effective programming in prison can reduce recidivism rates, the magnitude of that decline is relatively modest. Several factors account for this: the high level of social, educational, and therapeutic needs of the prison population; the fact that incarceration itself may be "criminogenic" as a result of negative peer influences and separation from the community; and the scale of resources necessary to provide high-quality programming.

These challenges do not suggest that policymakers should not support rehabilitative programming in prison. But they do tell us that we should be realistic in our expectations of success, particularly when operating the largest corrections system in the country, and that individual gains will in large part depend on the scale of resources devoted to such programming. This situation should also serve as a reminder that prison should only be used as a sentencing option if no other set of conditions can meet the needs of sentencing in an individual case.

Another key lesson we can draw from this experience is to remind ourselves how mass incarceration developed and what it will take to undo it. Critics of the First Step Act who argued that the legislation would not end mass incarceration are, of course, right. The bill only applies to the federal prison population (about 12% of all people in prison) and its sentencing reforms are relatively modest.¹¹⁹ But even a more wide-ranging bill would not in itself end mass incarceration.

Mass incarceration developed in a political environment that extolled "individual responsibility" and demonized people of color as a criminal class. The policies and practices that produced the massive expansion of prisons and jails resulted from decisions made at every level of government, both in legislative change and practi-

118. *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, THE WHITE HOUSE (Apr. 1, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/> [<https://perma.cc/72CU-WZQ2>].

119. See Bronson & Carson, *supra* note 116, at 3.

tioner decision-making. Important as incremental victories are, no single step in itself will resolve this crisis. Rather, as we work to achieve substantial reductions in corrections populations, we will need to continue to transform the political environment into one that is not driven by racism and political slogans, but rather by problem-solving and compassion.

Among those states that have achieved substantial reductions in their prison populations, we can see the effects of practitioner changes in driving reform. In New York state, for example, the 17% decline in the state's prison population between 2000 and 2009 was driven in large part by law enforcement decisions in New York City (the main contributor to the state's prison population) to reduce the number of felony arrests.¹²⁰ In part this was an outgrowth of the city's shift toward "quality of life" arrests, which generally resulted in misdemeanor charges, and in part it reflected the discretion available in charging drug cases as either felonies or misdemeanors.¹²¹ The end result is that felony arrests can result in prison time, whereas misdemeanor arrests only produce jail time of generally far less duration than prison terms. New York state has continued to experience downsizing of its prison population, alongside ongoing declines in crime.¹²²

At the federal level, Attorney General Eric Holder's charge to federal prosecutors to use their discretion to avoid bringing drug charges that would trigger a mandatory minimum sentence was credited with a 25% reduction of such cases within two years of its implementation.¹²³ Despite the fact that there were no identified problems resulting from this policy, Attorney General Jeff Sessions reversed this initiative shortly after taking office in 2017, calling on federal prosecutors to bring the most serious charge available in every criminal case.¹²⁴

Ending mass incarceration involves undoing the vast web of policies and practices that led to the incarceration of more than 2

120. See James Austin & Michael Jacobson, *How New York City Reduced Mass Incarceration: A Model For Change?*, Vera Inst. of Justice 6 (2012), https://www.brennancenter.org/sites/default/files/publications/How_NYC_Reduced_Mass_Incarceration.pdf [<https://perma.cc/Z4MT-X564>].

121. *Id.*

122. See, e.g., Ghandnoosh, *U.S. Prison Population Trends*, *supra* note 9, at 1–2.

123. See Alan Vinegrad, *DOJ Charging and Sentences Policies: From Civiletti to Sessions*, 30 FED. SENT'G REP. 3, 4 (2017).

124. See Kara Gotsch & Marc Mauer, *Jeff Sessions Decision to Re-Up in the Drug War Won't Work*, HILL (May 14, 2017, 1:00 PM), <https://thehill.com/blogs/pundits-blog/crime/333333-jeff-sessions-decision-to-re-up-in-the-drug-war-wont-work> [<https://perma.cc/95L4-ZAFM>].

million people and the community supervision of more than 4.5 million.¹²⁵ Further, the criminal justice “system” is in fact not a single system, but rather the combined impact of the fifty states, the District of Columbia, and the federal government.

To point this out is not to suggest that the challenge before us is too overwhelming to take on, but rather to employ a sophisticated understanding of the mechanisms of reform. It has also become clear that substantial downsizing of institutional populations is in fact possible, such as the 40,000 population decline in the federal prison system and the reductions of at least 30% in five states over the past two decades.¹²⁶ While these reforms have come about through the focused attention of policymakers and practitioners, they resulted from the decades-long critique of the “wars” on drugs and crime that helped to develop the emerging consensus around the need to challenge mass incarceration.¹²⁷ The First Step Act represents one more step along that road, but its full impact will only be known once the “next steps” are taken.

125. See *State-by-State Data*, SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map> [<https://perma.cc/9YEX-9QP4>].

126. Ghandnoosh, *U.S. Prison Population Trends*, *supra* note 9, at 1.

127. See, e.g., MARC MAUER & ASHLEY NELLIS, *THE MEANING OF LIFE: THE CASE FOR ABOLISHING LIFE SENTENCES* 175–80 (2018); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); *SMART DECARCERATION: ACHIEVING CRIMINAL JUSTICE TRANSFORMATION IN THE 21ST CENTURY* (Matthew Epperson & Carrie Pettus-Davis eds. 2017).

