

The Effort to Reform the Federal Criminal Justice System

Shon Hopwood

ABSTRACT. The federal criminal justice reform community scored an important victory with the passage of the First Step Act, a federal sentencing and prison reform bill that President Trump signed into law in late 2018. First Step's passage broke many years of congressional gridlock around criminal justice reform bills, marking Congress's departure from forty years of policies advancing the carceral state. First Step's passage didn't happen by accident. The federal reform community is now better funded, more prolific, and more politically diverse than ever before, and it successfully provided the political cover necessary for congressional members to vote for reform. This Essay describes the difficult movement for federal criminal justice reform and how the reform community's efforts led to passage of the First Step Act. It also explains what risks could stall future federal reforms, while providing a normative analysis of the criteria the federal justice reform community should use in deciding whether to support particular reforms.

INTRODUCTION

The federal criminal justice system is unique in both its punitiveness and its resistance to political reform. Since the 1980s, Congress has consistently made federal criminal justice significantly more punitive.¹ With a Republican majority in the Senate and a Democratic majority in the House, the 98th Congress enacted the Sentencing Reform Act of 1984. The Act comprehensively changed federal sentencing practices by abolishing federal parole and creating the United

1. There are a few notable exceptions where Congress tried to make the federal criminal justice system more effective and less punitive. See Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (providing resources for reentry); Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (establishing provisions to deter the sexual assault of prisoners).

States Sentencing Commission,² ultimately leading to the widely criticized federal sentencing guidelines.³ Two years later, after the death of professional basketball star Len Bias from a cocaine overdose,⁴ a Democrat-led House and a Republican-led Senate passed a slew of mandatory minimum sentences for drug crimes.⁵ A Democrat-led Congress passed the infamous 1994 Crime Bill, creating new crimes, increasing mandatory minimum penalties, and ending Pell grants for those in federal prison.⁶ Towards the end of the 1990s, a Republican-majority Congress passed two more criminal justice bills, one curtailing federal habeas corpus remedies and the other limiting prisoners' ability to bring civil rights lawsuits in federal court.⁷ And in the twenty-first century, Congress limited the discretion of federal judges to impose less onerous sentences.⁸

As a result of these policy changes, federal sentences are now remarkably harsh by international standards, and even compared to most state systems in

-
2. Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1837, 1987.
 3. See, e.g., Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315 (2005) (arguing that “the federal guidelines have failed due to structural flaws that cannot be mended without fundamental reform”); Paul Hofer, *After Ten Years of Advisory Guidelines, and Thirty Years of Mandatory Minimums, Federal Sentencing Still Needs Reform*, 47 U. TOL. L. REV. 649, 657 (2016) (critiquing the Sentencing Guidelines because, taken together with mandatory minimums and congressional directives, they encourage judges to “impose sentences far greater than necessary to achieve the purposes of sentencing”); Michael Tonry, *Federal Sentencing “Reform” Since 1984: The Awful as Enemy of the Good*, 44 CRIME & JUST. 99, 100 (2015) (“What began as a modest, technocratic reform proposal . . . resulted in the most radical, controversial, and disliked sentencing system in American history.”); Brian Barnett Duff, Book Review, 47 FED. LAW. 52, 52 (2000) (reviewing KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998)) (“The U.S. Sentencing Guidelines represent one [of] the most fallow and arcane failures of intended reform in the history of Congress.”).
 4. See Radley Balko, *America’s Drug War: 30 Years of Rampaging Wildebeest*, WASH. POST (Oct. 28, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/10/28/americas-drug-war-30-years-of-rampaging-wildebeest> [<https://perma.cc/4LXH-8S4K>].
 5. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.
 6. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.
 7. See Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. I, 110 Stat. 1214, 1217-26; Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (1996) (codified at 42 U.S.C. § 1997e).
 8. See, e.g., Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act, Pub. L. No. 108-21, § 401, 117 Stat. 650, 667 (2003) (limiting downward departures from sentencing guidelines for child exploitation offenses). The U.S. Sentencing Guidelines are no longer mandatory due to the Supreme Court’s finding that binding application of the guidelines to federal sentencing judges was unconstitutional. See *Booker v. United States*, 543 U.S. 220 (2005).

the United States⁹ – no small feat in the most incarceration-heavy country in the world.¹⁰ The federal prison population increased from 24,640 in 1980 to 185,617 in 2017.¹¹ Those in prison are serving even longer sentences than before the abolition of federal parole. While the budget of the Federal Bureau of Prisons (BOP) has grown, “crowding out” other Department of Justice (DOJ) priorities,¹² the federal prison system has still largely failed to implement evidence-based rehabilitation programs.¹³

Despite the recent bipartisan agreement that this system desperately needs reform,¹⁴ Congress has been slow to act. Eight years ago, Congress passed incredibly modest sentencing reform with the Fair Sentencing Reform Act of 2010

-
9. Shon Hopwood, *Improving Federal Sentencing*, 87 UMKC L. REV. 79, 83-84 (2018); Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, 21 CRIM. JUST., Summer 2006, at 16, 16-18 (“Roughly speaking, federal sentences are tougher than state sentences for most overlapping crimes.”). For some of those harsh sentences, see, for example, *United States v. Okafor*, 602 F. App’x 108, 109 (4th Cir. 2015), which rejected an Eighth Amendment challenge to Okafor’s 360-month sentence for eleven charges of possessing a firearm in furtherance of a drug trafficking crime under 18 U.S.C. § 924(c), and Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 707 (2017), which describes Adam Clausen’s 213-year sentence for Hobbs Act robbery and the use of firearms in committing the robberies.
 10. See Amanda Petteruti & Jason Fenster, *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, JUST. POL’Y INST. 3 (Apr. 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/finding_direction-full_report.pdf [<https://perma.cc/V8MU-38C7>]; Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/TP23-QT9P>].
 11. *Statistics: Past Inmate Population Totals*, FED. BUREAU PRISONS (Oct. 18, 2018), https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops [<https://perma.cc/SEN5-S4D3>].
 12. Sally Q. Yates, Deputy Att’y Gen., U.S. Dep’t of Justice, McNamara Memorial Lecture at Fordham University (Nov. 14, 2016), <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-mcnamara-memorial-lecture-fordham> [<https://perma.cc/BA8U-7Y99>] (“The Justice Department’s prison and detention costs have increased by almost three billion dollars in the past decade alone and now account for roughly one third of the department’s budget. This comes with significant public safety consequences because the growing [Bureau of Prisons] budget is crowding out everything else we do at the department.”).
 13. The BOP’s one evidence-based rehabilitation program, called the Resident Drug Abuse Program, is the only current program to incentivize participation with earned-time credits that reduce a federal prisoner’s sentence. See *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections*, CHARLES COLSON TASK FORCE ON FED. CORRECTIONS 46 (Jan. 2016), <https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf> [<https://perma.cc/47AT-WTQD>].
 14. Groups as diverse as the American Civil Liberties Union, the Heritage Foundation, the Brennan Center for Justice, and the American Conservative Union Foundation all support federal

and applied those changes prospectively only.¹⁵ Between 2015 and 2018, Congress could not pass the Sentencing Reform and Corrections Act, which stalled in the Senate.¹⁶ And many other reforms died on the vine after being introduced in Senate and House committees.¹⁷

criminal justice reform. The push for federal criminal justice reform is one of the few bipartisan issues left in the Congress. See Ed Chung & Jason Pye, *Congress Has a “Second Chance” for Bipartisan Criminal Justice Reform*, HILL (Apr. 12, 2018, 6:00 AM), <https://thehill.com/opinion/criminal-justice/382706-congress-has-a-second-chance-for-bipartisan-criminal-justice-reform> [<https://perma.cc/V3SA-EYAX>] (noting that Republican Senators Chuck Grassley and Mike Lee and Democrat Senators Dick Durbin and Cory Booker “have stood united in their desire to address our ballooning prison population—and they still do”). The same bipartisan approach has worked for state-level criminal justice reform. See *Promising Beginnings: Bipartisan Criminal Justice Reform in Key States*, AM. C.L. UNION 5-6 (2012), https://www.aclu.org/sites/default/files/field_document/promising_beginnings_-_bipartisan_criminal_justice_reform_in_key_states.pdf [<https://perma.cc/QPP7-BYPM>]. While there might be bipartisan agreement that the criminal justice system needs reforming, that does not mean both sides of the political divide agree on why reform is needed or how to carry it out. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 101, 105 (2018) (describing the bipartisan consensus and arguing that it is more myth than fact).

15. 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.) (reducing the crack-to-powder cocaine disparity needed to trigger mandatory minimum sentencing provisions, but applying those changes prospectively only). The Act was a modest reform because it did not reduce other mandatory minimum penalties, and the changes it made to the federal sentencing system were not made retroactively applicable to those who had already been sentenced. See Kara Gotsch, Opinion, *Thousands Are Stuck in Prison—Just Because of the Date They Were Sentenced*, WASH. POST (Jan. 31, 2018), https://www.washingtonpost.com/opinions/thousands-are-stuck-in-prison--just-because-of-the-date-they-were-sentenced/2018/01/31/oc1629e2-fd68-11e7-ad8c-ecbb62019393_story.html [<https://perma.cc/8GAN-8A4Y>].
16. See Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. (2017); Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015); 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/TE22-ECGL>]. While Congress has gridlocked in passing sentencing reform, the states have taken the lead on criminal justice reform. See Rebecca Silber et al., *Justice in Review: New Trends in State Sentencing and Corrections 2014-2015*, VERA INST. JUST. 3 (2016) https://storage.googleapis.com/vera-web-assets/downloads/Publications/justice-in-review-new-trends-in-state-sentencing-and-corrections-2014-2015/legacy_downloads/state-sentencing-and-corrections-trends-2014-2015-updated.pdf [<https://perma.cc/QLÉ9-7E49>] (“In 2014 and 2015, 46 states enacted at least 201 bills, executive orders and ballot initiatives to reform at least one aspect of their sentencing and corrections systems.”).
17. See, e.g., Reverse Mass Incarceration Act of 2017, S. 1458, 115th Cong. (2017). Part of the reason federal reform is so difficult is that for too long Congress has listened to only one stakeholder in creating federal criminal justice legislation: DOJ. But DOJ’s policy positions are often intended to only maintain or further prosecutorial power, as if that were the only legitimate goal

But then, almost miraculously, Congress passed a federal prison and sentencing reform bill called the First Step Act in December 2018.¹⁸ The First Step Act requires the BOP to provide meaningful rehabilitation programs for federal prisoners and ties those programs to earned credit time that federal prisoners can use to serve out some of their prison sentence in a halfway house or in home confinement.¹⁹ The Act also includes a number of provisions aimed at reforming the BOP: placing prisoners within 500 driving miles of their families;²⁰ increasing federal good-time²¹ by seven days, and thereby reducing every sentence for those persons with a release date; allocating \$50 million dollars each year for five years to create rehabilitative programming;²² improving accountability in the BOP's use of compassionate release;²³ and prohibiting the shackling of pregnant women,²⁴ among several other reforms. While the bill was pending in the Senate, sentencing reform was also added,²⁵ including retroactive application of the Fair Sentencing Act, thereby reducing the statutory punishments for those convicted of crack cocaine offenses,²⁶ reducing the statutory maximums for certain drug offenses committed by those with prior drug convictions,²⁷ fixing the onerous stacking of 18 U.S.C. § 924(c) charges on those who carry a firearm during

of the criminal justice system. See Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 392 (2017) ("The Department [of Justice] is the agency charged with prosecuting federal criminal laws, and its views on reform are inevitably colored by its prosecutorial functions and a bureaucratic preference for maintaining a status quo that favors the interests of prosecutors. In many areas, reform would require the Department to second-guess its own prior actions.").

18. See First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.
19. *Id.* § 101.
20. *Id.* § 601.
21. Good time credits are earned for good behavior and they shorten the sentence a person in federal prison must serve. See 18 U.S.C. § 3624(b) (2018).
22. First Step Act § 104(a).
23. *Id.* § 403(b). "Compassionate release allows prisoners facing imminent death, advancing age, or debilitating medical conditions to secure early release when those developments diminish the need for or morality of continued imprisonment." Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMM 6 (2018), <https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf> [<https://perma.cc/JM9T-S9ME>].
24. First Step Act § 301. Shackling is still permitted in the event of flight risk or dangerousness, if an appropriate medical professional determines it is safe. *Id.*
25. Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next> [<https://perma.cc/26US-ZARU>].
26. First Step Act § 404.
27. *Id.* § 401.

a drug or violent offense,²⁸ and expanding on the safety valve provision, which allows federal judges to sentence below the statutory mandatory minimum punishment for certain eligible offenders.²⁹ Yet as this Essay will show, First Step Act was an unanticipated breakthrough in federal criminal justice reform.

In this Essay, I explain how the First Step Act came about, and consider what this breakthrough could mean for the future of federal reform – as well as what risks could stall additional reforms.³⁰ Because federal legislation is complicated and often includes uneasy compromises, I also sketch criteria that the criminal justice reform community should use in deciding whether to support a particular reform bill going forward.

Overall, I am optimistic that Congress will continue to pass meaningful but incremental federal criminal justice reform. Criminal justice reform organizations are better funded, more prolific, and more politically diverse than ever before. Because this community has kept criminal justice reform in the public eye, Congress has more political cover to pass reforms. More Americans are becoming aware that the U.S. criminal justice system currently incarcerates more than two million people, that it's fundamentally unfair and ineffective, and that its social costs are unsustainable.³¹ There is every reason to think that more bipartisan incremental reform can be accomplished while the reform community builds national consensus for more structural and equitable reform.

28. *Id.* § 403.

29. *Id.* § 402.

30. My first experience with the federal criminal justice system was serving ten years in federal custody because I had committed several armed bank robberies. While serving my prison sentence, I assisted other prisoners in challenging their convictions and sentences, filed lawsuits challenging the lack of constitutionally adequate medical care, and urged prison staff to help incarcerated men with their reentry back into society. See generally SHON HOPWOOD, *LAW MAN: MEMOIR OF A JAILHOUSE LAWYER* (2017). As a licensed attorney, I've litigated cases on behalf of criminal defendants and civil rights plaintiffs in all levels of the federal judiciary. As a legal scholar, I write about federal criminal law issues, including criminal procedure, sentencing, and prison reform. As an advocate, I've represented those seeking executive clemency. See Shon Hopwood, *Why Matthew Charles Should Be Granted Clemency*, PRISON PROFESSORS (June 7, 2018), <https://prisonprofessors.com/why-matthew-charles-should-be-granted-clemency> [<https://perma.cc/3ZXX-2XZ8>]. In the past year, I've been blessed to work on federal reform legislation as a board member with FAMM and, informally, as an advisor to the White House's Office of American Innovation and to Members of Congress. But the views espoused here are solely my own. During my time on Capitol Hill, I've spoken with representatives from most every major organization involved with federal criminal justice reform. My views in this Essay have been shaped by all of these experiences.

31. See, e.g., Barack Obama, Commentary, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017) (noting that the United States has "an estimated 2.2 million incarcerated people, more than any other country on Earth").

**I. CONGRESSIONAL GRIDLOCK ON CRIMINAL JUSTICE REFORM
AND THE PASSAGE OF THE FIRST STEP ACT**

After the 2016 election and the appointment of Senator Jeff Sessions as Attorney General, most in the federal reform community believed we would spend the next four years playing defense against the DOJ's bad policy preferences and a Congress that frequently treats criminal law and punishment as the only way to fix national social problems. And the reform community had legitimate reason to hold this belief. For the past three decades, federal criminal justice legislation has mostly been a one-way ratchet towards overcriminalization, longer sentences, and mostly expanding federal prison populations.³² Although the stances of political parties can be overgeneralized when it comes to criminal justice issues,³³ Republicans controlled all levels of federal policy making in 2016, and

32. See *supra* notes 1-8 and accompanying text.

33. See Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, GUARDIAN (Aug. 5, 2018), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform> [<https://perma.cc/6QSB-QZKU>] (noting that “[c]onservatism is not a “monolith” and that while many Republicans have long claimed to be for “law and order” and “tough on crime” policies, this has changed with the rise of the American Conservative Union Foundation and Freedom Works, both right-of-center groups that are fighting for criminal justice reform).

reformers generally view Republicans as worse on these issues than Democrats.³⁴ Given that Attorney General Sessions had been a vocal opponent of criminal justice reform³⁵ and in light of some of President Trump's campaign statements,³⁶ it would have been hard to convince anyone in late 2016 or early 2017 that any federal criminal justice reform was possible.

But then in May 2018, the White House began ramping up its surprising efforts to move forward with criminal justice reform generally and the First Step Act specifically.³⁷ The Republican-led House overwhelmingly passed federal

-
34. Republicans politicians are generally considered pro-law enforcement and have run political campaigns as being “tough on crime.” See DAVID DAGAN & STEVEN M. TELES, *PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION* 18–29 (2016). And the most recent platform by the Republican Party in the 2016 presidential election was less reform-friendly than the Democratic plank. See Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016, 9:51 PM), <https://www.themarshallproject.org/2016/07/18/two-parties-two-platforms-on-criminal-justice> [<https://perma.cc/56BZ-PVHH>]. But both parties bear responsibility for some of the worst policies on federal criminal justice issues. Neither Republicans nor Democrats have had much success in creating effective and fair federal criminal justice policy. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 819 (2015) (“Elected officials responded to this public fear and dissatisfaction [with a ‘too lenient’ justice system] by taking ever-tougher stances on crime. Republicans embraced the strategy first, but Democrats quickly followed. Key interests have also pushed for more expansive and tougher criminal laws, including prosecutors, victims’ rights organizations, rural communities that may depend on prisons for jobs, private prison companies, and corrections unions.”). The root of the problem is the politics of crime. See generally William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).
35. See Ames C. Grawert, *Analysis: Sen. Jeff Sessions’s Record on Criminal Justice*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/sites/default/files/analysis/SenatorJeffSessionsRecordonCriminalJustice.pdf> [<https://perma.cc/L5R8-WKRB>].
36. See Josh Zeitz, *How Trump Is Recycling Nixon’s ‘Law and Order’ Playbook*, POLITICO (July 18, 2016), <https://www.politico.com/magazine/story/2016/07/donald-trump-law-and-order-richard-nixon-crime-race-214066> [<https://perma.cc/MW63-DF4V>]; see also German Lopez, *Donald Trump Wants to Bring Back the ‘Tough on Crime’ Policies that Helped Cause Mass Incarceration*, VOX (Sept. 21, 2016, 3:25 PM), <https://www.vox.com/2016/5/25/11737264/donald-trump-criminal-justice-republican-president> [<https://perma.cc/K3CV-8TNS>].
37. In May 2018, President Trump held a prison reform summit in the East Wing of the White House with many formerly incarcerated advocates of all political stripes, myself included. See Gregory Korte, *Trump Pushes for Prison Reform at White House Summit. Will Some Reform Lead to More?*, USA TODAY (May 18, 2018, 12:20 AM), <https://www.usatoday.com/story/news/politics/2018/05/18/prison-reform-trump-pushes-bipartisan-solution/621534002> [<https://perma.cc/3HWC-J9TJ>]. And the President commuted the sentence of Alice Marie Johnson, a woman who had served over twenty-one years of a life-without-parole-sentence for a federal drug offense. See Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html> [<https://perma.cc/H67V-M6AA>].

prison reform,³⁸ while Republican Senator Chuck Grassley and Democrat Senator Dick Durbin championed the addition of several federal sentencing reform provisions to the First Step Act.³⁹ Sentencing reform was ultimately included in the First Step Act, which passed with eighty-seven votes in the U.S. Senate, before moving through the House and to the President's desk in December 2018, where it was signed into law.⁴⁰

That Congress passed this meaningful reform can be traced to several factors. Recent political developments made space for reform, the necessity of which became apparent due to decades of consistent and powerful advocacy. Rarely has the reform community had someone in the White House who works so closely with the President and is dedicated to justice reform like Jared Kushner, whose father was incarcerated in federal prison in 2002 and who has thus been directly affected by the system.⁴¹ Kushner and Brooke Rollins from the Office of American Innovation pushed within the White House for meaningful federal criminal justice reform even with DOJ fighting against it.⁴² Conservative

-
38. H.R. 5682, 115th Cong. (as passed by House, May 22, 2018); *supra* note 25 (noting that this initial version of the First Step Act lacked sentencing reform “passed the House of Representatives by a wide margin of 360 to 59”).
39. See Jordain Carney, *Grassley: Sessions Should ‘Stay out of’ Criminal Justice Debate After I Helped Him Keep His Job*, HILL (Aug. 2, 2018, 1:39 PM), <https://thehill.com/homenews/senate/400114-grassley-sessions-should-stay-out-of-criminal-justice-debate-after-i-helped> [<https://perma.cc/U5XX-XQMN>]; Carl Hulse, *Why Some Senators Who Want a Criminal Justice Overhaul Oppose a Prisons Bill*, N.Y. TIMES (May 26, 2018), <https://www.nytimes.com/2018/05/26/us/politics/criminal-justice-overhaul-prison-bill.html> [<https://perma.cc/M7QC-WRHA>]. At one time, Senator Grassley was opposed to sentencing reform, but he changed his views after watching reform occur in the states. See Nick Pinto, *Why Can’t We End Mass Incarceration?*, ROLLING STONE (Oct. 26, 2015, 3:03 PM), <https://www.rollingstone.com/politics/politics-news/why-cant-we-end-mass-incarceration-166420> [<https://perma.cc/3BAZ-Q3MU>].
40. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; see Grawert & Lau, *supra* note 25. The First Step Act is still incredibly modest reform that hardly scratches the surface of mass incarceration in the federal system. And yet, no prior federal criminal justice reform has tackled some of the unique problems faced by those confined in the BOP system. The Act does not go nearly far enough, but it is also the best federal reform bill of my lifetime. See Shon Hopwood, *Why I Support the First Step Act*, PRISON PROFESSORS (May 22, 2018), <https://prisonprofessors.com/why-i-support-the-first-step-act> [<https://perma.cc/DR8B-7Y9L>].
41. See Jordyn Phelps, *Inside Jared Kushner’s Personal Crusade to Reform America’s Prisons*, ABC NEWS (Apr. 8, 2018, 6:29 AM). In my interactions with Jared Kushner, he has been knowledgeable about criminal justice policy and passionate about creating reform. And I’ve heard several members of Congress, from both parties, say that Jared Kushner was the single most important person in the fight for the Act’s passage (besides, of course, the politicians that voted for the Act).
42. See Andrea Drusch, *Fort Worth’s Rollins Joins Kushner-Run White House Post*, FORT WORTH STAR-TELEGRAM (Feb. 16, 2018, 12:05 PM), <https://www.star-telegram.com/news/politics>

members of Congress were also vocal about supporting criminal justice reform,⁴³ while Democrats continued to vote in lockstep on the need for federal justice reform.⁴⁴ The movement for reform within this Administration and Congress, however, was and is bigger than just one person, one office, or a few congressional members.

The progress towards meaningful federal reform is the result of several decades of advocacy by those in the federal criminal justice reform community. Legal scholarship focused on mass incarceration and criminal justice reform exploded after Michelle Alexander's book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*,⁴⁵ was published in 2012.⁴⁶ The term "mass incarceration" is now ubiquitous. Popular presses routinely publish books on criminal justice reform,⁴⁷ and there are now entire media organizations dedicated to covering the criminal justice system.⁴⁸

-government/article200525239.html [https://perma.cc/RT3T-7C4V]; Glenn Thrush & Danielle Ivory, *Turf War Between Kushner and Sessions Drove Federal Prisons Director to Quit*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/2018/05/24/us/politics/mark-inch-kushner-sessions-federal-prisons.html> [https://perma.cc/GBE6-YX8Z].

43. See, e.g., Doug Collins, *05 22 18 Collins Advocates for FIRST STEP Act*, YOUTUBE (May 22, 2018), <https://www.youtube.com/watch?v=qjeWCo4dSCk> (showing Rep. Doug Collins, a Republican from Georgia, speaking on the House floor in favor of the First Step Act); see also Obama, *supra* note 31, at 822 ("[U]nlike so many issues that divide Washington, D.C., criminal justice is an area in which there is increasing bipartisan agreement. A number of Republicans have been vocal and sincere advocates for reform efforts even as they were otherwise frequent critics of my Administration.").
44. See, e.g., John Wagner & Karoun Demirjian, *Senate Overwhelmingly Backs Overhaul of Criminal Justice System*, WASH. POST (Dec. 18, 2018), https://www.washingtonpost.com/politics/senate-overwhelmingly-backs-overhaul-of-criminal-justice-system/2018/12/18/89efffb6-02e7-11e9-9122-82e98f91ee6f_story.html [https://perma.cc/Y9ER-PJJZ] (noting that all forty-nine Democratic Senators voted for the First Step Act).
45. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* (2012).
46. See Levin, *supra* note 14, at 117 (noting a "spike in criminal justice reform literature following the release of *The New Jim Crow*").
47. See, for example, PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017), which won the 2018 Pulitzer Prize for nonfiction; and JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).
48. Former *New York Times* executive editor Bill Keller became editor-in-chief of The Marshall Project, and several prominent conservatives started the Right on Crime network. See Bill Keller, *Prison Revolt: A Former Law-and-Order Conservative Takes a Lead on Criminal-Justice Reform*, NEW YORKER (June 29, 2015), <https://www.newyorker.com/magazine/2015/06/29/prison-revolt> [https://perma.cc/M7RZ-WEDH]; Ravi Somaiya, *Bill Keller, Former Editor of the Times, Is Leaving for News Nonprofit*, N.Y. TIMES (Feb. 9, 2014), <https://www.nytimes.com/2014/02/10/business/media/bill-keller-former-editor-of-the-times-is-leaving-for-news-nonprofit.html> [https://perma.cc/T3AY-CWE5].

For years, national organizations such as the American Civil Liberties Union, the Brennan Center for Justice, and National Association for the Advancement of Colored People have used the political left to fight for reform. Upstart criminal justice reform groups like Famm and the Sentencing Project led the opposition to more punitive federal sentencing measures through grassroots organizing, local lobbying, and the publishing of policy proposals.⁴⁹ Practitioners have also played a role; the National Association of Criminal Defense Lawyers and the Federal Public and Community Defenders have advocated for federal reform.⁵⁰

There are now more national reform organizations,⁵¹ more justice reform campaigns,⁵² and more donor money⁵³ to spread around to both new and established reform organizations. Consequently, more Americans are aware that the United States incarcerates its citizens at a higher rate than any other country on

-
49. See, e.g., *Famm Launches Groundbreaking Campaign to Organize Families of the Incarcerated in Pennsylvania*, Famm (Sept. 25, 2018), <https://famm.org/famm-launches-groundbreaking-campaign-to-organize-families-of-the-incarcerated-in-pennsylvania> [<https://perma.cc/QZ75-D5H2>]; *About Us*, SENT'G PROJECT, <https://www.sentencingproject.org/about-us> [<https://perma.cc/B46P-LS92>]. Famm once stood for Families Against Mandatory Minimums, and the Sentencing Project is a small reform shop started by Executive Director Marc Mauer. Both organizations advocate for sentencing reform and alternatives to incarceration.
50. See *Victims' Rights Amendment: Hearing on H.J. Res. 45 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. 101-22 (2015) (written statement of Amy Baron-Evans on behalf of Federal Public and Community Defenders); *Mission & Vision*, NAT'L ASS'N CRIM. DEF. LAW., <https://www.nacdl.org/about/mission-and-values> [<https://perma.cc/V7CE-H3ZU>].
51. Just Leadership USA, #cut50, and Civil Rights Corps are examples of new organizations dedicated to criminal justice reform. See *About Us*, JUST LEADERSHIP USA, <https://www.justleadershipusa.org/about-us> [<https://perma.cc/UZ2T-2GD4>]; *Our Mission & Work*, #CUT50, https://www.cut50.org/our_mission [<https://perma.cc/DX24-S4JD>]; *Our Work*, C.R. CORPS, <https://www.civilrightscorps.org/work> [<https://perma.cc/S3ZD-KSJT>].
52. See, e.g., *Smart Justice*, ACLU, <https://www.aclu.org/issues/smart-justice/campaign-smart-justice> [<https://perma.cc/EZ6Z-Y3FQ>].
53. See, e.g., Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> [<https://perma.cc/ZB3E-LVW8>]; Jackie Borchardt, *Facebook Founders Among Backers of Ohio Criminal Justice Reform Amendment*, CLEVELAND.COM (Aug. 23, 2018), https://www.cleveland.com/metro/index.ssf/2018/08/facebook_founders_among_backer.html [<https://perma.cc/7XSR-KCVH>]; Camila Domonoske, *Art Collector Sells a Lichtenstein for \$165 Million to Fund Criminal Justice Reform*, NPR (June 12, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/12/532597956/art-collector-sells-lichtenstein-for-165-million-to-fund-criminal-justice-reform> [<https://perma.cc/2ENU-JVV2>]; Drew Lindsay, *Fusion of Old and New Supporters Drives Record \$60 Million Campaign for Group Seeking Criminal-Justice Reform*, CHRON. PHILANTHROPY (Apr. 12, 2018), <https://www.philanthropy.com/article/Fusion-of-OldNew/243083> [<https://perma.cc/3VJ3-DLUS>]; Jim Trotter & Jason Reid, *Players Debating NFL's Proposed Donation to Social Justice Organizations*, ESPN (Nov. 29, 2017), http://www.espn.com/nfl/story/_/id/21606390/nfl-offers-100-million-plan-social-justice-organizations-partnership-players [<https://perma.cc/797V-LYSM>].

the planet,⁵⁴ and that criminal justice reform has already been successful in several states.⁵⁵ Any federal criminal justice reform that takes place in the current moment – the First Step Act included – owes its existence to the organizations and people who have been fighting for reform for decades.

More recently, federal criminal justice reform is no longer just a left-of-center or centrist movement. Conservative groups such as Right on Crime, the American Conservative Union Foundation’s Center for Criminal Justice Reform, the Texas Public Policy Foundation, and the Charles Koch Foundation have increased their presence in the federal reform arena.⁵⁶ In the last two years, many of these organizations have pushed back against DOJ, its practices, and its false claims,⁵⁷ whereas in the past, only left-of-center groups would have done so.

54. See sources cited *supra* note 10.

55. See, e.g., Maura Ewing, *Philadelphia’s New Top Prosecutor Is Rolling Out Wild, Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018, 5:47 PM), <https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html> [<https://perma.cc/V85K-RGS6>]; Michelle Mark, *Texas Is Shedding Its Lock-Up Image Thanks to a 37-Year-Old Tattooed Lawyer and an Unlikely Political Alliance*, BUS. INSIDER (July 29, 2017, 4:03 PM), <https://www.businessinsider.com/texas-criminal-justice-reform-conservatives-liberals-bipartisan-alliance-2017-7> [<https://perma.cc/DR3M-J5CQ>]; *Reform in the States: A Survey for Success*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/blog/reform-states-survey-success> [<https://perma.cc/MNH7-35TK>]; Silber et al., *supra* note 16 (discussing trends in state-level criminal justice reform). Recent polling has consistently shown that Americans’ attitudes about criminal justice reform are changing. See C.J. Ciaramella, *Poll Shows Wide Support for Criminal Justice Reform Bill in Congress*, REASON (Oct. 18, 2018), <https://reason.com/blog/2018/10/18/poll-shows-wide-support-for-criminal-jus> [<https://perma.cc/7BDQ-GK8S>]; Lydia Wheeler, *Poll: ¾ of Americans Support Criminal Justice Reform*, HILL (Jan. 25, 2018) <https://thehill.com/regulation/370692-poll-3-4-of-americans-support-criminal-justice-reform> [<https://perma.cc/D7NB-YK2T>].

56. See, e.g., Andrea Drusch, *Koch Network, Texas Think Tank Team up on Criminal Justice Reform*, FORT WORTH STAR-TELEGRAM (Jan. 24, 2018), <https://www.star-telegram.com/news/politics-government/article196455774.html> [<https://perma.cc/EA6P-RB2U>]; Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, NEW YORKER (June 6, 2017), <https://www.newyorker.com/news/news-desk/can-bipartisan-criminal-justice-reform-survive-in-the-trump-era> [<https://perma.cc/HD38-824E>]; Emma Loop, *Conservative Criminal Justice Advocates Try to Change the System—Even in the Trump Era*, BUZZFEED NEWS (Feb. 24, 2017), <https://www.buzzfeednews.com/article/emmaloop/conservative-criminal-justice-advocates-try-to-change-the-sy> [<https://perma.cc/E6Z5-7EWH>].

57. See, e.g., Sarah Anderson, *DOJ Overtly Attempts to Undermine President Trump’s Prison Reform Agenda*, FREEDOMWORKS (Aug. 1, 2018), <https://www.freedomworks.org/content/doj-overtly-attempts-undermine-president-trumps-prison-reform-agenda> [<https://perma.cc/8MPB-F7PA>]; *Statement from Mark Holden on DOJ Charging and Sentencing Policy*, FREEDOM PARTNERS (May 12, 2017), <https://freedompartners.org/latest-news/statement-mark-holden-doj-charging-sentencing-policy/> [<http://perma.cc/56NT-BNZH>]; Jon Meadows, *Freedom-Works on Attorney General Jeff Sessions’ Sentencing Memo*, FREEDOMWORKS (May 12, 2017),

And in the past year, right-of-center groups have pressed the White House and Members of Congress to pass meaningful federal prison, sentencing, and executive clemency reform.⁵⁸

The advocacy for the First Step Act differed from the past in another important respect. Many of the advocates who fought for the bill on Capitol Hill, in the White House, on panel discussions, at rallies, and in op-eds were formerly incarcerated. Those advocates brought their stories to bear before policymakers about the unique challenges faced by those entering and leaving the federal prison system. #cut50's Topeka Sam's explained from her personal experience, during a prison reform summit at the White House, how providing feminine hygiene products for free would provide some dignity for women in prison⁵⁹ — a provision that made it into the First Step Act.⁶⁰ FAMM President Kevin Ring engaged lawmakers on the difficulties with maintaining family ties for those in federal prison, as he explained his own struggle with being separated from his children during his incarceration.⁶¹ Pat Nolan of the American Conservative Union Foundation often remarked in White House meetings about the morality of providing people with a second chance.⁶² This was the first time that formerly incarcerated advocates had a seat at the reform table, and one could make the

<https://www.freedomworks.org/content/freedomworks-attorney-general-jeff-sessions-sentencing-memo> [<https://perma.cc/W46F-5DB6>].

58. See Gregory Korte, *Kardashian Effect: Trump White House Tries to Tame a Chaotic, Celebrity-Driven Approach to Pardons*, USA TODAY (Sept. 10, 2018, 2:19 PM), <https://www.usatoday.com/story/news/nation/2018/09/09/kardashian-effect-white-house-looks-beyond-celebrity-clemency-pleas/1076355002> [<https://perma.cc/L9VU-4E3A>] (noting that the Koch Institute has coordinated the compilation of a list of candidates for pardons or commutations, and that Paul Larkin from the Heritage Foundation and Leonard Leo from the Federalist Society attended a White House meeting on executive clemency reform); Elana Schor, *Criminal Justice Deal Faces Steep Senate Hurdles Despite Trump's Push*, POLITICO (Aug. 17, 2018), <https://www.politico.com/story/2018/08/17/senate-criminal-justice-deal-trump-781876> [<https://perma.cc/V559-XU87>] (noting that FreedomWorks and Koch Industries were advocating for a prison and sentencing reform bill in the Senate).
59. See *Dignity for Incarcerated Women at the White House Prison Reform Summit*, C-SPAN (May 18, 2018), <https://www.c-span.org/video/?c4754995/dignity-incarcerated-women-white-house-prison-reform-summit>.
60. First Step Act of 2018, Pub. L. No. 115-391, § 611, 132 Stat. 5194
61. See Kevin Ring, *I Once Wrote Mandatory Minimum Laws. After Ties to Abramoff Landed Me in Prison, I Know They Must End.*, USA TODAY (Oct. 16, 2018, 8:17 PM ET), <https://www.usatoday.com/story/opinion/policing/spotlight/2018/10/16/abramoff-lobbyist-mandatory-minimums-prison-reform-policing-usa/1652192002> [<https://perma.cc/B6DU-8MVJ>].
62. I was present for many of those meetings in which Pat rather forcefully reminded everyone of the moral imperative to pass reform and give those coming out of prison a second chance. Pat has long been a leader in moving conservatives to support criminal justice reform for decades.

case that including those closest to the problem of the federal prison system moved the needle in passing a bill designed to end those problems.⁶³

It takes a mountain of energy from all sides of the political spectrum to push a piece of legislation through a gridlocked and divided Congress. Yet, overall, there are many reasons to believe that the fight for federal criminal justice reform will be better organized and sustainable than ever before. And public opinion is also moving towards reform,⁶⁴ even among conservatives.⁶⁵ All of this has led to a momentous first step in the form of modest but meaningful federal prison and sentencing reform.

II. POTENTIAL RISKS TO FURTHER FEDERAL CRIMINAL JUSTICE REFORM

Although there now seems to be some forward momentum on federal criminal justice reform for the first time in decades, there are two issues that could derail this progress. One concern is that the groups within the federal criminal justice reform community will make decisions based more on party politics than on good policy. On balance, I think this is unlikely to occur.⁶⁶ Many of the reform

63. See Glenn E. Martin, *Those Closest to the Problem Are Closest to the Solution*, APPEAL (Sept. 22, 2017), <https://theappeal.org/those-closest-to-the-problem-are-closest-to-the-solution-555e04317b79> [<https://perma.cc/Q9NS-G5P4>]. Glenn Martin coined the phrase that “those closest to the problem are closest to the solution.”

64. See *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/32YP-XM2Q>]; Wheeler, *supra* note 55.

65. See Kindred Motes, *Conservatives – and Trump Voters – Overwhelmingly Support Criminal Justice Reform, New Poll Says*, VERA INST. JUST. (Apr. 29, 2017), <https://www.vera.org/blog/conservatives-trump-voters-overwhelmingly-support-criminal-justice-reform-new-poll-says> [<https://perma.cc/8RYN-DFGQ>].

66. I am thankful for groups that pressed for sentencing reform to be included in the bill. Ultimately, sentencing reform was added to the First Step Act. See Alexander Bolton, *GOP Loads Up Lame-Duck Agenda as House Control Teeters*, HILL (Oct. 11, 2018, 6:00 AM), <https://thehill.com/homenews/senate/410882-gop-lame-duck-agenda-grows-as-house-control-teeters> [<https://perma.cc/P38Z-CHYR>] (explaining that bipartisan sentencing reform provisions would be added to the First Step Act in the Senate). But I don’t think the addition of sentencing reform resulted from the stance of advocacy groups. Unfortunately, the criminal justice reform lobby does not have the same power with politicians that groups such as the insurance and big pharma lobby possess. The decision to add sentencing reform to the First Step Act was a White House decision, and the fact that many left-leaning groups took a stance of “sentencing reform or nothing” likely had little impact on that decision. The person who most effected that decision was Senator Chuck Grassley, who held out for sentencing reform as Chairman of the Senate Judiciary Committee. Senator Grassley had success in moving President Trump’s judicial nominees through the confirmation process, and in the summer of 2018, Grassley had ample political capital to burn with the White House. It was his influence that

groups desire the same changes, even as they disagree on what is politically feasible at a given moment. From my experience, most of the people in these organizations genuinely believe in the morality of criminal justice reform and would be content with passing meaningful legislation no matter which party or president received the credit. Many groups, in fact, started supporting the First Step Act once sentencing reform was added, even though it was a bill hailed by President Trump and led by Senate Republicans.⁶⁷ And there are several bipartisan players – groups like FAMM and #cut50⁶⁸ – that will work with whichever party controls the White House.

There are, however, reasons to be concerned. One way that hyperpoliticization can create discord is when reform groups, because of party politics, start revering individuals who do not deserve their reverence. To take one example, there has recently been a national movement among criminal justice reformers

led to the White House to include sentencing reform in the Act despite then-Attorney General Jeff Sessions's opposition to sentencing reform. In addition, some in the White House had always planned for sentencing reform to be added to the bill once it advanced out of the House of Representatives in May 2018. All of the reform groups that advocated for the First Step Act's passage should share in the credit, but it is important for the advocacy community to know what strategies were successful and why. Yes, the strategy of holding out for sentencing reform was successful, but it was only successful because the Republican leader of the Senate Judiciary Committee backed that play. One could also make the argument that it was bad strategy to secure the initial First Step Act vote in the House before sentencing reform was added. See Letter from The Leadership Conference on Civil and Human Rights to Representatives 4 (May 21, 2018), http://civilrightsdocs.info/pdf/policy/letters/2018/Short_Oppose%20FIRST%20STEP%20Act_5.21.18_FINAL.pdf [<https://perma.cc/V2U8-TLJ6>]. But if a bill had not advanced out of the House and provided the White House some forward momentum, I don't think the compromise adding sentencing reform (as happened in the Senate) would have occurred, and the Act would have likely failed to pass.

67. See Phillip M. Bailey, *ACLU: McConnell is the 'One Person' Blocking Criminal Justice Reform*, COURIER J. (Nov. 27, 2018), <https://www.courier-journal.com/story/news/politics/2018/11/27/aclu-tells-mcconnell-stop-obstructing-criminal-justice/2117816002/> [<https://perma.cc/D46Z-G2RX>]; Ed Chung, *The Dilemma of Endorsing the FIRST STEP Act During the Trump Administration*, CTR. AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/issues/criminal-justice/news/2018/11/20/461279/dilemma-endorsing-first-step-act-trump-administration> [<https://perma.cc/9HFC-8S4C>]; Tim Lau, *Congress Is Poised for a Major Step on Sentencing Reform*, BRENNAN CTR. JUST. (Nov. 14, 2018), <https://www.brennancenter.org/blog/congress-poised-major-step-sentencing-reform> [<https://perma.cc/6U5H-3BNN>].
68. #cut50 is a bipartisan criminal justice advocacy group dedicated to reducing the prison population while making communities safer; Van Jones and Jessica Jackson Sloan lead the organization. See *Our Mission & Work*, #CUT50, https://www.cut50.org/our_mission [<https://perma.cc/NBT8-DLA5>].

to target prosecutors.⁶⁹ Reformers are currently studying the ways to hold punitive prosecutors accountable for our country's mass incarceration of its citizens.⁷⁰ But unlike many state and local prosecutors, federal prosecutors cannot be voted out of office. Thus, the only real check on bad DOJ policymaking officials comes from the career consequences that person experiences after leaving the DOJ. Holding these officials accountable through such consequences is appropriate. If a reform organization disagrees with former Attorney General Jeff Sessions's policy decisions, then those reform groups should naturally not provide him with awards once he is out of office.

Despite the movement to hold prosecutors accountable, a top DOJ prosecutor who used her power to deny meaningful criminal justice reform has been celebrated merely because she opposed the Trump Administration on an issue separate from criminal justice reform. Sally Yates spent most of her career as a federal prosecutor in Georgia until she was promoted to Deputy Attorney General by President Obama. While in that position, Yates's record on criminal justice reform was appalling. As Deputy Attorney General, she was responsible for making final recommendations on clemency petitions during President Obama's clemency initiative.⁷¹ Pardon Attorney Deborah Leff resigned in protest, in part

69. See, e.g., Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 *FORDHAM L. REV. ONLINE* 3 (2018); Paige St. John & Abbie Vansickle, *Prosecutor Elections Now a Front Line in the Justice Wars*, *MARSHALL PROJECT* (May 23, 2018), <https://www.themarshallproject.org/2018/05/23/prosecutor-elections-now-a-front-line-in-the-justice-wars> [https://perma.cc/WEL8-FQT7].

70. See, e.g., Maura Ewing, *New York's Prosecutorial Misconduct Review Panel Could Be Groundbreaking*, *SLATE* (Aug. 28, 2018), <https://slate.com/news-and-politics/2018/08/new-yorks-prosecutorial-misconduct-review-panel-could-be-groundbreaking.html> [https://perma.cc/FYY9-QEFU]; St. John & Vansickle, *supra* note 69; *UNC School of Law Launches Prosecutors and Politics Project*, *UNC SCH. L.* (Feb. 27, 2018), <http://www.law.unc.edu/news/2018/02/27/school-launches-prosecutors-and-politics-project> [https://perma.cc/F4F8-WRLK].

71. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T JUSTICE, *REVIEW OF THE DEPARTMENT'S CLEMENCY INITIATIVE* (Aug. 2018), <https://oig.justice.gov/reports/2018/e1804.pdf> [https://perma.cc/N84S-BJW2] ("Once [the Office of Pardon Attorney ('OPA')] completes its investigation and prepares a proposed recommendation to the White House, staff in the Office of the Deputy Attorney General assess the petition and provide it to the Deputy Attorney General. If the Deputy Attorney General disagrees with OPA's proposed recommendation, the Deputy Attorney General can either request OPA to provide a different recommendation based upon the Deputy Attorney General's assessment or submit to the White House both the Deputy Attorney General's position and the Pardon Attorney's position on the petition. Thereafter, the Deputy Attorney General signs and presents the recommendation to the White House Counsel, who reviews it prior to presenting it to the President.")

because Yates had specifically overridden many of her clemency recommendations.⁷² Not only had Yates changed positive clemency recommendations to negative, her office at DOJ also denied Leff access to the White House.⁷³ As a result, President Obama was unaware of the differing opinions regarding the merits of clemency petitions.⁷⁴ In her resignation letter, Leff said, “I believe that prior to making the serious and complex decisions underlying clemency, it is important for the president to have a full set of views.”⁷⁵ It seems that Yates was more concerned with protecting DOJ’s policy prerogatives than advancing favorable recommendations for clemency petitions.

Yates chose to prioritize DOJ prerogatives over reform again when she testified against broad retroactive application of the U.S. Sentencing Commission’s Amendment 728 “drugs minus two” provision⁷⁶ because of “public safety concerns that arise from the release of dangerous drug offenders, and from the diversion of resources necessary to process over 50,000 inmates” – even though retroactive application would simply have brought these prisoners’ sentences in

-
72. See Mark Osler, *Obama’s Clemency Problem*, N.Y. TIMES (Apr. 1, 2016), <https://www.nytimes.com/2016/04/01/opinion/obamas-clemency-problem.html> [https://perma.cc/S5GA-GHX8] (“When the pardon attorney, Deborah Leff, resigned in January, she complained in her letter of resignation that meritorious clemency cases had been thwarted by those above her. She noted in particular that some of her own recommendations had been overruled by the deputy attorney general, Sally Quillian Yates.”). Ms. Yates’s negative recommendations might have included Alice Marie Johnson’s clemency petition. Ms. Johnson had a life sentence for a federal drug offense and she applied three times during the Obama Administration for a commutation of her sentence, with her last attempt on January 6, 2017. See Jeremy Diamond & Caitlan Collins, *Trump Commutes Sentence of Alice Marie Johnson*, CNN (June 6, 2018), <https://www.cnn.com/2018/06/06/politics/alice-marie-johnson-commuted-sentence/index.html> [https://perma.cc/AFA2-AYSV]. She was denied three times. President Trump commuted her sentence to time served. See Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), <https://www.nytimes.com/2018/06/06/us/politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html> [https://perma.cc/JFY9-F4MF].
73. See Gregory Korte, *Former Administration Pardon Attorney Suggests Broken System in Resignation Letter*, USA TODAY (Mar. 28, 2016, 2:48 PM EST), <https://www.usatoday.com/story/news/politics/2016/03/28/former-administration-pardon-attorney-suggests-broken-system-resignation-letter-obama/82168254/> [https://perma.cc/G2SZ-BW4C].
74. *Id.*
75. *Id.*
76. See Christopher Zoukis, *Drugs Minus Two FAQ: Everything You Need to Know About Amendment 728*, HUFFPOST (Sept. 16, 2014), https://www.huffingtonpost.com/christopher-zoukis/drugs-minus-two-faq-every_b_5831876.html [https://perma.cc/E5Q4-S6SZ] (explaining that the U.S. Sentencing Commission adjusted its Drug Quantity Table downward by two levels under Amendment 728).

line with current law.⁷⁷ She further testified that the amendment should “be limited to lower-level non-violent drug offenders without significant criminal histories” because otherwise DOJ would have to use too many resources to release people from federal prison.⁷⁸ Fortunately, the U.S. Sentencing Commission made Amendment 728 broadly applicable,⁷⁹ and Yates’s fears about releasing, in her words, “dangerous drug offenders,” proved to be wrong. The U.S. Sentencing Commission recently issued a report stating that those released under Amendment 728 recidivated at the same rate as those who had served their full sentences before Amendment 728 was made retroactively applicable.⁸⁰

Despite this clear history of *opposing* criminal justice reform, Sally Yates was recently honored with a Champion of Justice Award by the National Association of Criminal Defense Lawyers.⁸¹ But her actual record raises the question why. If Yates is given awards by the reform community, they should be based on her criminal justice reform record and not simply her party affiliation; otherwise, accountability for former federal prosecutors and DOJ policy officials becomes impossible.⁸² Even beyond accountability, when directly impacted prisoners and

77. *Public Hearing on Retroactivity of 2014 Drug Amendment*, U.S. SENTENCING COMM’N 110-11 (June 10, 2014), https://www.usc.gov/sites/default/files/transcript_1.pdf [<https://perma.cc/D92V-DX9T>].

78. *Id.*

79. See U.S. SENTENCING GUIDELINES MANUAL app. C supp., amend. 782 (U.S. SENTENCING COMM’N 2014).

80. See U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 1 (2018), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/20180328_Recidivism_FSA-Retroactivity.pdf [<https://perma.cc/8TTN-VGJM>] (“The Commission finds no difference between the recidivism rates for offenders who were released early due to retroactive application of the FSA Guideline Amendment and offenders who had served their full sentences before the FSA Guideline Amendment reduction retroactively took effect.”).

81. See *Champion of Justice Awards*, NAT’L ASS’N CRIM. DEF. LAW., <https://www.nacdl.org/awards/championofjustice> [<https://perma.cc/PU28-CQAE>]. I am a proud member of the National Association of Criminal Defense Lawyers (NACDL) and have tremendous respect for the organization and the people who operate it; and my disagreement with giving Sally Yates an award does not in any way diminish that respect for NACDL or its role on criminal justice reform matters.

82. Sally Yates was my colleague at the Georgetown University Law Center, and we met while receiving awards from the Bar of the District of Columbia. I wish her nothing but success in her new career. I simply disagree with the notion that her DOJ record should be venerated with awards. My guiding principle is to work with anyone who will meaningfully reform the criminal justice system. Needless to say, if Ms. Yates’s views have evolved, this certainly includes her. See Sally Q. Yates, Opinion, *Don’t Let Trump’s Use of Celebrities Distract You from His Criminal-Justice Failures*, WASH. POST (Oct. 16, 2018), <https://www.washingtonpost.com/opinions/dont-let-trumps-use-of-celebrities-distract-you-from-his-criminal-justice>

their families see criminal defense lawyers honor the same prosecutors who opposed reform, they think the criminal justice system is a rigged game by elites, thereby undermining their faith in the criminal justice system and ultimately their lawyers.⁸³

The second way federal reform progress could be stymied is by criminal justice reform organizations holding out for comprehensive reform, or the perfect bill, when the politics of the moment will only allow for incremental reform.⁸⁴ While there have been many reforms at the state and local level in the past few years,⁸⁵ people incarcerated in the federal prison system have not experienced the same relief. As noted above, the very modest Sentencing Reform and Corrections Act was stalled in Congress for years,⁸⁶ and until the First Step Act, the last time Congress passed a federal prison-reform bill was in 2007—with the even more modest Second Chance Act.⁸⁷ In my lifetime, federal criminal justice reform has moved only incrementally, because it is exceedingly difficult to obtain broad consensus on criminal justice issues in Congress.⁸⁸ When Congress has

-failures/2018/10/16/2bfd7b14-d096-11e8-a275-81c671a50422_story.html?utm_term=.1aode1c614e6 [https://perma.cc/Z9EK-NC7P] (criticizing the Trump Administration’s record on criminal justice and advocating reforms including “restor[ing] proportionality to drug sentencing”).

83. The reform community, and especially the progressive reform community, will be pressed quickly to decide whether to provide political support to former prosecutors with troubling records who are now running for office. See Lara Bazelon, Opinion, *Kamala Harris Was Not a ‘Progressive Prosecutor,’* N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html> [https://perma.cc/KDB8-RVVK]; Ed Krayewski, *Kamala Harris: No Friend to Criminal Justice Reform*, REASON (Jan. 12, 2018, 11:15 AM), <https://reason.com/blog/2018/01/12/kamala-harris-is-not-smart-on-crime> [https://perma.cc/F2QW-5SPD]. The criminal justice system’s breadth and impact on American communities is massive. One recent study estimates that 113 million people in the United States have a close family member who has been incarcerated. See Christal Hayes, *‘This Isn’t Just Numbers – but Lives’: Half of Americans Have Family Members Who’ve Been Incarcerated*, USA TODAY (Dec. 6, 2018, 6:10 AM ET), <https://www.usatoday.com/story/news/politics/2018/12/06/half-americans-have-family-who-have-been-jailed-new-study-shows/2206521002/> [https://perma.cc/PBH9-BYPR]. Mass incarceration is the single most important liberty and civil rights issue of our day, and those running for elected office with backgrounds of supporting the carceral state have a high bar in convincing me to vote for them.
84. See Shon Hopwood, *Those in Federal Prison and Their Families Can’t Wait for the Ideal Reform Bill. A Response to Just Leadership*, PRISON PROFESSORS (July 26, 2018), <https://prisonprofessors.com/first-step> [https://perma.cc/AQZ3-CG4K].
85. See Silber et al., *supra* note 16; CHARLES KOCH INST., *supra* note 55.
86. See Hulse, *supra* note 16.
87. See generally, Michael M. O’Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 FED. SENT. R. 75 (2007).
88. Other legal scholars also believe there is little support for a movement to completely reform the federal criminal justice system. As Professor Douglas A. Berman notes,

actually tackled comprehensive reform, the results have been mixed, no matter which party was in the majority.⁸⁹ If this Congress tried tackling bold and comprehensive reform, I would have grave concerns. Imagine the tradeoffs that would have to be attached to any bill for it to successfully clear the Senate.⁹⁰

While public opinion is rapidly moving towards reform, Congress has not moved at the same pace. Even when it does move on reform, the inevitable political compromises often produce bad policy. Many in the federal reform community, for example, advocated against the list of exclusions from the First Step Act's earned-time credit.⁹¹ These exclusions prevent those who have committed certain crimes—such as violent, sexual, and certain white-collar crimes—from obtaining the earned-time credit and serving part of their sentence in home confinement rather than a federal prison.⁹² The First Step Act's exclusions will negatively affect public safety because those who have committed violent crimes will

I would like to see reform that goes beyond the FIRST STEP Act. But broader reforms have been stalled by leaders in DC who are likely to be in place at least until 2020 if not later. Hoping and waiting for something better leaves current prisoners and their families waiting and waiting and waiting. And if the politics are really behind “overhauling and wholly transforming our criminal justice system” now or later, passage of the FIRST STEP Act seems very unlikely to change those politics.

Douglas A. Berman, *Another Attack on the FIRST STEP Act Failing to Acknowledge Modern Political Realities*, SENT'G L. & POL'Y (July 21, 2018), https://sentencing.typepad.com/sentencing_law_and_policy/2018/07/another-attack-on-the-first-step-act-failing-to-acknowledge-modern-political-realities-.html [<https://perma.cc/443U-D9YX>].

89. See Sentencing Reform Act of 1984 (SRA), Pub. L. No. 98-473, 98 Stat. 1987; see also discussion *supra* notes 2-3 and accompanying text.
90. Republican Senator Tom Cotton would likely attempt to load any reform bill with new mandatory minimum punishments. See Rachel Roubein, *GOP Senators Push Tougher Sentencing for Synthetic Opioid*, HILL (Mar. 22, 2018), <https://thehill.com/policy/healthcare/379761-gop-senators-push-tougher-sentencing-for-powerful-synthetic-opioid> [<https://perma.cc/6RHL-J8BS>] (explaining how Senator Cotton introduced a bill that would reduce the amount of fentanyl required for mandatory minimum sentences to apply). Senator Cotton has a long history of opposing reform and has claimed that the United States has an “under-incarceration problem.” Nick Gass, *Sen. Tom Cotton: U.S. Has ‘Under-incarceration Problem,’* POLITICO (May 19, 2016), <https://www.politico.com/story/2016/05/tom-cotton-under-incarceration-223371> [<https://perma.cc/ZB5X-75AR>]; see also Megan Keller, *Cotton: Reducing Mandatory Minimum Sentencing Isn't Reform, It's Jailbreak*, HILL (Aug. 16, 2018), <https://thehill.com/homenews/news/402145-cotton-striking-mandatory-minimums-isnt-criminal-justice-reform-its-jailbreak> [<https://perma.cc/3FDB-5LRG>].
91. See Letter from the Leadership Conference on Civil and Human Rights to the House Judiciary Comm. (May 8, 2018), <http://civilrightsdocs.info/pdf/policy/letters/2018/not-retroactive-Sign-On-Letter-Oppose-First%20Step%20Act-5.8.18-FINAL.pdf> [<https://perma.cc/NA8B-82RY>].
92. See First Step Act, H.R. 5682, 115th Cong. § 3632(d)(4)(D) (as passed by House of Representatives, May 22, 2018).

not be incentivized to successfully complete meaningful rehabilitation programming. But that does not mean they will never be released; it just means that fewer of those convicted of violent crimes will come out of federal prison rehabilitated as a result.⁹³ The exclusions were a compromise to which many in the House quickly acceded—some Democrats included—even as the reform community pressed for reducing the exclusion list, and even though many other parts of the bill changed substantially. In the current political climate, the best evidence-based practices are often excluded from legislation; in this, the First Step Act was no different.

After spending a year speaking with lawmakers on Capitol Hill, I did not see significant consensus—particularly from members elected from states in the Midwest and South—to pass comprehensive reform. And holding out for comprehensive reform will only prevent those currently in the federal system from receiving any relief while serving long sentences in deplorable conditions with little hope of accessing meaningful rehabilitative programs. Those in federal prison and their families should not have to wait for the perfect administration, the perfect Congress, and the perfect bill. The way forward is through incremental and bipartisan reform.⁹⁴

III. WHAT CRITERIA SHOULD THE REFORM COMMUNITY USE IN DECIDING WHETHER A REFORM BILL IS MEANINGFUL AND WORTHY OF SUPPORT?

Deciding which tradeoffs, compromises, and bills to support is no easy task. When many of the federal reform groups convened for a meeting about First Step in fall 2018, we were told by congressional staffers that most of the sentencing reform would be applied prospectively only. That was hard to hear. Many of those in federal prison (including some friends of mine) would benefit from retroactive application of these sentencing provisions, which is why I argued for retroactivity at every meeting I attended. Yet at a certain point, when the votes for retroactive application just weren't there, the question remained: support the First Step Act without retroactive application, or don't support it at all? In the end, I supported the bill because, even while it was chock full of compromises, the Act met my criteria for “meaningful” reform.

93. See Shon Hopwood, *Beyond First Steps: How to Reform the Federal Bureau of Prisons*, FED. SENT. R. (forthcoming 2019) (on file with author).

94. See Obama, *supra* note 31, at 822 (“But because the current system reflects years of changes and policy developments, I am also clear-eyed about the fact that change will likely happen gradually, with an emphasis on evidence-based reforms and incremental approaches that enjoy broad support.”).

In considering whether a federal criminal justice reform bill represents meaningful reform worth supporting, the following factors guide my decision-making: 1) whether the bill supports the goals of increasing fairness and public safety while also reducing reliance on prison as a sanction; 2) whether it reduces racial disparities in the criminal justice system; 3) whether those directly affected by the legislation support it; 4) whether there is a realistic probability of passing a better alternative in the near future; and 5) whether passage will lead to further reform. The First Step Act satisfied every one of those criteria.

The First Step Act reduces the imprint of the federal prison system, because it will reduce the time served by those who will be sentenced in federal court and those currently in the system. The First Step Act only contains sentencing provisions that reduce sentences. This is not a bill like the Sentencing Reform and Corrections Act, which, if it had passed, would have removed mandatory minimum punishments for some crimes while creating new mandatory minimums for other crimes.⁹⁵ On the prison reform side, the Act increases public safety by forcing the BOP to provide evidence-based rehabilitation programs that will reduce recidivism rates while at the same time moving people out of federal prison and into home confinement to serve part of their sentence.⁹⁶

I support legislation that reduces the worst forms of custody — such as incarceration in prison, which often fails to rehabilitate people and is criminogenic in and of itself⁹⁷ — even if the legislation simply moves people to reduced forms of custody, such as parole or home confinement. Oftentimes legislators are not comfortable with passing legislation leading to outright release, so moving people to home confinement is often the second-best option in our current political climate. To use a concrete example, I supported the Act's earned-time provisions, which lead to release on monitored home confinement, even as I advocated for expanded good time that would result in outright release. One criminal justice reform organization, JustLeadershipUSA, opposed the First Step Act in part because it does not provide prisoners with outright release and instead expands home monitoring, thereby opening “the door wide open for the federal government to use these tools to expand mass supervision into communities across the country.”⁹⁸ Michelle Alexander, while not taking a public stance on the First Step

95. See Sentencing Reform and Corrections Act of 2017, S. 1917, 115th Cong. § 109 (proposing new mandatory minimum sentencing provisions for fentanyl offenses).

96. First Step Act of 2018, Pub. L. No. 115-391, §§ 101, 602, 132 Stat. 5194.

97. See Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049 (arguing that incarceration may be causing a net increase in crime).

98. See *POLICY BRIEF: FIRST STEP Act and Sentencing Reform and Corrections Act*, JUSTLEADERSHIPUSA, https://www.justleadershipusa.org/wp-content/uploads/2018/11/First-Step-Act_Policy-Brief_-112019.pdf [<https://perma.cc/7CCS-6J8U>].

Act, also argued that expansion of “e-incarceration” is difficult to call “progress.”⁹⁹ But the Act does not introduce these measures. The federal criminal justice system already employs halfway houses and home confinement while someone is serving their sentence, and most judges impose a period of supervised release to be served after a prison sentence.¹⁰⁰ So the First Step Act doesn’t *expand* “e-incarceration,” except to the extent that those currently incarcerated can serve more of their sentence in a halfway house or home confinement.

Certainly, we don’t want to replace a system of mass incarceration with a system of mass supervision. But the more immediate goal is not to remove supervision; it’s to move over 180,000 people out of the worst form of custody—prison. When people go to prison, they are exposed to a much greater risk of serious bodily injury, death, and suicide, and they are often delayed or even denied medical care.¹⁰¹ Their children are at greater risk of developing health and psychological issues, and they often slip into lower socioeconomic statuses while achieving lower levels of educational attainment. One study estimated that children of incarcerated parents are six times more likely to become incarcerated themselves.¹⁰² By moving some people out of federal prison and into home confinement, the First Step Act significantly reduces these harms. Home confinement—where at least families can be reunited, and people can sleep in their own bed without fear of assault—simply does not rise to the same level of harm as a prison sentence. If outright release is not politically feasible in this moment, the reform community should support bills that remove or reduce some of the greatest harms of the criminal justice system even as we move for more reform.

The Act will also reduce some, though not all, racial disparities in incarceration. The sentencing provisions of the First Step Act, both the retroactive and

99. Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html> [<https://perma.cc/99Y4-SX25>].

100. See 18 U.S.C. § 3621(b) (2018) (providing the BOP may designate “any available penal or correctional facility that meets minimum standards of health and habitability”); 18 U.S.C. § 3624(c)(1) (2018) (providing that for every term of imprisonment, BOP shall “afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community. Such conditions may include a community correctional facility.”); 18 U.S.C. § 3583(a) (2018) (authorizing supervised release after imprisonment); *Frequently Asked Questions About Federal Halfway Houses & Home Confinement*, FAMILIES AGAINST MANDATORY MINIMUMS (Apr. 24, 2012), <https://famm.org/wp-content/uploads/FAQ-Halfway-House-4.24.pdf> [<https://perma.cc/83HP-8V8C>]; *Number of Offenders on Federal Supervised Release Hits All-Time High*, PEW (Jan. 2017), https://www.pewtrusts.org/-/media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf [<https://perma.cc/H5E6-SH59>].

101. See Hopwood, *supra* note 10, at 80-81.

102. *Id.* at 82.

prospective provisions, will largely benefit African Americans.¹⁰³ At the same time, the earned-time provision will likely lead to more racial disparities because non-citizens who have been ordered deported, most of whom are Hispanic,¹⁰⁴ were excluded from the ability to earn credits towards early release.¹⁰⁵ In addition, the First Step Act excludes certain categories of offenses, which will have further racial consequences. For example, white defendants make up a large percentage of those charged and sentenced to federal sex offenses.¹⁰⁶ Because those who have committed sex offenses are precluded categorically from receiving earned time, that largely white group of prisoners will be excluded from early release.¹⁰⁷ With the different exclusions, from non-citizens to certain categories of offenders, predicting the racial aftermath is not currently possible. As to the earned-time provision, the Act includes a requirement that DOJ create a risk-assessment tool that is given independent review. This review will hopefully help to prevent future racial disparities for those released through the earned-time provision, and also track those that do occur, leading to refining of the risk-assessment tool until no unwarranted disparities remain.¹⁰⁸

-
103. See *Sentence and Prison Estimate Summary of First Step Act*, U.S. SENT. COMM'N (Jan. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/January_2019_Impact_Analysis.pdf [https://perma.cc/HW2W-CH6R] (noting that 89.1 percent of defendants to whom the Fair Sentencing Act of 2010 will apply retroactively are Black, and that 48.5 percent of the defendants who will be impacted by the broadening of the safety valve are Black).
104. According to the Department of Homeland Security, 245,306 of the 340,056 people who were removed from the United States in fiscal year 2016 were Mexican nationals. *Table 41. Aliens Removed by Criminal Status and Region and Country Of Nationality: Fiscal Year 2016*, DEP'T HOMELAND SECURITY, <https://www.dhs.gov/immigration-statistics/yearbook/2016/table41> [https://perma.cc/YV9F-8WX9]. And at the U.S.-Mexico border, apprehensions of Central Americans exceed those of Mexicans. Gustavo López et al., *Key Findings About U.S. Immigrants*, PEW RES. CTR. (Nov. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/11/30/key-findings-about-u-s-immigrants> [https://perma.cc/NF49-2KZU].
105. First Step Act § 101. If the sole criterion for reform were whether a law introduces any new sources of racial disparity, the Act would not be supportable because it excludes these noncitizens from receiving any earned time towards earlier release, which might lead to Hispanics serving more time than other racial demographics. But providing federal tax money to pay for rehabilitation programs and early release for those who will be deported had no chance of passing in the current Congress. This is why the majority of the reform community supported the Act's passage even though it might lead to some racial disparities.
106. See *Mandatory Minimum Penalties for Sex Offenses in the Federal Criminal Justice System*, U.S. SENT. COMM'N 21 (Jan. 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190102_Sex-Offense-Mand-Min.pdf [https://perma.cc/ETZ8-9XBD].
107. First Step Act of 2018, Pub. L. No. 115-391, § 101(4)(D), 132 Stat. 5194.
108. *Id.* § 101. For an analysis of why the First Step Act's risk-assessment and earned-time provisions will not create unacceptable racial disparities, see Joshua Hoe, *First Step & Risk Assessment: Why RAI's Are Not a Reason to Oppose Criminal Justice Reform*, MEDIUM (Dec. 15, 2018),

When evaluating the First Step Act's earned-time provision, I give ample deference to the views of those who are currently in prison. I'm in email contact with hundreds of people in federal prison and with their families through Facebook, in addition to serving on the board of FAMM, which remains in email contact with 35,000 of those incarcerated in federal prison. To my knowledge, an overwhelming majority of those in federal prison and their families support the Act, including a system of earned time that moves them from federal prison to home confinement.¹⁰⁹ The few in prison against the First Step Act were opposed not because it could lead to home confinement, but because most of the sentencing reform provisions will not be applied retroactively, meaning they will continue serving needlessly long sentences.¹¹⁰ An evaluation of what represents best policy—especially when the policy choice consists of moving those in prison to lesser forms of custody—must consider and give great deference to the views of those currently and directly impacted.¹¹¹

Any evaluation of the First Step Act should be also mindful of the political climate in Congress. As noted above, that climate does not currently lead to policies providing outright release of those in federal prison.¹¹² Several reform groups pushed for Congress to create a system of expanded good-time credits that cut sentences short, rather than a system of earned-time credits that allow people to serve part of their sentence in home confinement. There was little appetite for more good time in Congress, especially from many conservatives. As noted above, federal reform opportunities rarely occur because of the enormous

<https://medium.com/@ypsifactj/first-step-act-risk-assessment-1b521190b6a9> [https://perma.cc/X3MY-XVWP].

109. See Hopwood, *supra* note 84; see also Wheldon Angelos (@weldon_angelos), TWITTER (Dec. 16, 2018, 11:15 AM), https://twitter.com/weldon_angelos/status/1074382650742255617 [https://perma.cc/5FRA-S6JK]. Mr. Angelos is a former federal prisoner who was sentenced to fifty-five years in federal prison under the sentencing provisions amended by the First Step Act. See Jacob Sullum, *Fairer Sentencing Laws Won't Free Murderers and Muggers*, CHI. SUN TIMES (Nov. 21, 2018, 10:34 AM), <https://chicago.suntimes.com/columnists/federal-sentencing-reform-first-step-act-donald-trump> [https://perma.cc/8G87-5QRC] (discussing Wheldon Angelos's case in relation to the First Step Act).
110. See Hopwood, *supra* note 84.
111. See, e.g., Matthew Charles, *I was Released under The First Step Act. Here's What Congress Should Do Next.*, WASH. POST (Feb. 1, 2019), https://www.washingtonpost.com/opinions/i-was-released-under-the-first-step-act-heres-what-congress-should-do-next/2019/02/01/1871f1fo-24bb-11e9-ad53-824486280311_story.html?utm_term=.76d7f3940366 [https://perma.cc/EP5V-4YV9].
112. Congress, for example, has never passed a sentencing reform bill that is retroactively applicable to those contemporaneously serving time in custody. The First Step Act, however, changes that pattern by applying the Fair Sentencing Act of 2010 retroactively. See Justin George, *What's Really in the First Step Act?*, MARSHALL PROJECT (Nov. 16, 2018), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act> [https://perma.cc/2S5H-3TFV].

compromises that a majority of lawmakers must agree upon before a bill even comes to the floor for a vote. Reformers shouldn't risk holding up a bill that moves people out of prison, without any provisions creating longer sentences, on the off chance that a preferred reform can pass several years from now. And, in fact, reform groups that publicly opposed the Act could not point to a potentially better alternative that is politically feasible in the near future.

There is also reason to believe that if the First Step Act's passage will lead to further reform. If the earned-time provisions lead to lower recidivism rates, states will take notice and pass similar reforms. For better or worse, state governments look to the federal system as a model of best practices. Several states, including Florida, Tennessee, Kentucky, Alabama, and Illinois, have reached out to the reform community in the wake of the First Step Act passing, asking about using the bill as a model for their respective state prison systems.¹¹³ That is no coincidence. When Congress passed and President Trump signed the First Step Act into law, it gave sufficient political cover for conservative state legislatures and governors to create their own reforms. The Act thus could ultimately bring about even more meaningful reforms in the state criminal justice systems, which hold the majority of the 2.2 million people held in U.S. jails and prisons.

The First Step Act will ultimately affect every person confined in federal prison and their families, even if the sentencing and earned-time provisions do not provide particular prisoners with earlier release. The Act will force changes in rehabilitative programming, and it provides other incentives that will be available to many in federal prison. For those who do obtain earlier release—whether by way of the earned-time, sentencing, or compassionate-release provisions—their release should alleviate some of the overcrowding and staffing issues currently in the federal prison system, creating improvements affecting everyone. Put differently, the Act might be modest, but it is also meaningful reform—undoubtedly the best reform bill to be passed by the Congress in the past forty years.¹¹⁴

113. See Lawrence Mower, *Sen. Jeff Brandes Says He'll File a 'First Step Act' for Florida*, TAMPA BAY TIMES (Jan. 23, 2019), <https://www.tampabay.com/florida-politics/2019/01/23/sen-jeff-brandes-says-hell-file-a-first-step-act-for-florida/> [https://perma.cc/D3H4-JZEM]; John Sharp, *Could Federal Criminal Justice Reform Spur Action in Alabama?*, AL.COM (Dec. 13, 2018), <https://www.al.com/news/2018/12/could-federal-criminal-justice-reform-spur-action-in-alabama.html> [https://perma.cc/6TDC-MCXS].

114. The First Step Act is the best federal reform bill Congress has passed in forty years, even though implementation of the Act has not gone as smoothly as the reform community had hoped. There might have been a drafting error in the Act that is leading to a delay in the application of good-time credits. See Doug Berman, *Spotlighting Problems with Immediate Application of Expanded Good Time Credit in the FIRST STEP Act*, SENT'G L. & POL'Y (Jan. 9, 2019), https://sentencing.typepad.com/sentencing_law_and_policy/2019/01/spotlighting-problems-with-immediate-application-of-expanded-good-time-credit-in-the-first-step-act

CONCLUSION

Three years ago, those of us in the criminal justice reform community would have been shocked to hear about a bill like the First Step Act passing. Congress had an almost a forty-year track record of either making criminal justice more punitive or stalling on any potential reform. But with the efforts of the criminal justice reform community pushing from all sides of the political aisle, Congress finally broke the logjam and passed meaningful reform. That incremental and modest reform will provide meaningful relief to those in federal prison and their families, while leading to a decrease in recidivism, making all our communities safer. And with a reinvigorated, newly powerful, and better-funded federal criminal justice reform community, hopefully the bipartisan and incremental second step won't take so long.

Associate Professor of Law, Georgetown University Law Center. I'd like to thank the editors of the Yale Law Journal for inviting me to participate in this unique Collection of Essays highlighting the voices of the formerly incarcerated and for providing wonderful editorial advice. I'd also like to thank my research assistant, Margaret Rusconi, for her tireless research and wise comments on this Essay.

.html [<https://perma.cc/44AN-5YUE>]. Despite some of the implementation delays, people are being released under the Act's sentencing and compassionate-release provision. See, e.g., Julieta Martinelli, *Released from Prison Again, After Criminal Justice Reform Became Law*, NPR (Jan. 3, 2019, 5:13 PM ET), <https://www.npr.org/2019/01/03/681979139/released-from-prison-again-after-criminal-justice-reform-became-law> [<https://perma.cc/9C4X-DRAX>] (discussing my client Matthew Charles, released under the First Step Act's retroactive application of the Fair Sentencing Act); Mitch Smith, *A New Law Made Him a 'Free Man on Paper,' but He Died Behind Bars*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/criminal-justice-reform-steve-cheatham.html> [<https://perma.cc/2LBA-9F2M>] (telling the story of Steve Cheatham, who obtained compassionate release under the First Step Act but, tragically, passed away before returning home).