

The First Step Act is not Reentry-Friendly: What to Do About It

The First Step Act brings real if modest reforms to federal criminal justice, promising an earlier release for thousands of incarcerated individuals, humanitarian relief for others, and increased programing within the Bureau of Prisons. But the Act falls short of addressing longstanding inadequacies in federal reentry. This paper describes the Act's shortcomings in reentry and steps to take to correct for them.

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Scores of grass-roots groups and individuals who brought The First Step Act (FSA)¹ forward, including politicians on both sides of the aisle, are celebrating its passage. And they should. Credit rightfully goes both to those who pushed long and hard from the beginning to gain some ground in Congress and win the passage of a reform bill and to those whose insistence that earlier versions of the bill did not go far enough, gaining important improvements toward the end. They persisted, and real people will benefit, some right away and some in the future.

Yet nearly every person and organization favoring justice reform agrees that the First Step Act doesn't reach enough people, provide enough relief for those it reaches, or directly benefit anyone outside the federal system which holds about 12% of America's imprisoned population. For the moment, however, these concerns have been met with assurances that second and third steps will follow, broadening and deepening reforms initiated with the First Step Act. Just two days after the First Step Act became law, Mark Holden, influential in these matters, declared to an Axiom forum in Washington, D. C: "We're ready for the 'Second Step.'"

Holden listed a worthy set of goals for action: prosecutorial reform; increased judicial discretion at sentencing (music to the ears of someone who opposed mandatory guidelines from the start); "Sixth Amendment," the effective assistance of counsel from day one; asset forfeiture ("Law enforcement should not be revenue collectors"); "Eighth Amendment" bail reform extended to the states; and, reentry reform. In a subsequent piece published in *The Crime Report*, Holden expanded his call for reforms to include retroactive sentence reductions and sentencing reform.² To the Marshall Project he suggested that culpability in conspiracy prosecutions be linked to intent rather than association with principle wrongdoers.³

Holden is hardly alone, with organizations like the Brennan Center⁴ and publications like *The New Republic*⁵ pivoting from victory laps to calling for more and deeper sentencing reform.

¹ For a succinct but thorough summary of the bill prepared by Families Against Mandatory Minimums (FAMM), one of the most effective and long-standing advocates for the First Step Act, see: "Summary First Step Act, S. 756 (115th Congress 2018)" accessible at: <https://famm.org/wp-content/uploads/FAMM-FIRST-STEP-Act-Summary-Senate-version.pdf>

² Mark Holden, "The First Step Act: It's Only a 'First Step'," *The Crime Report* (February 18, 2019) at <https://thecrimereport.org/2019/02/18/the-first-step-act-its-only-a-first-step/>

³ Justin George, "Okay, What's with the Second Step?" *The Marshall Project* December 19, 2018; at <https://www.themarshallproject.org/2018/12/19/okay-what-s-the-second-step>

⁴ "It's imperative that this first step not be the only step," said [Inimai Chettiar](#), director of the Brennan Center's Justice Program. "Now we must focus our efforts on bigger and bolder widespread reforms that will make our system more fair and more humane. We know better, and we must do better," in: Ames Grawert and Tim Lau, "How the FIRST STEP Act Became Law — and What Happens Next: The making of a historic criminal justice reform bill" (January 4, 2019) at <https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next>

⁵ Matt Ford, "What the Next Criminal Justice Reforms Should Be," *The New Republic* December 20, 2018, at <https://newrepublic.com/article/152791/next-criminal-justice-reforms-first-step-act>

So maybe this is a good time to step back from criticism of the number of people who will benefit or the amount of time by which their prison sentences will be reduced under the First Step Act and turn to a topic that is not otherwise being addressed: flaws in the First Step Act's approach to reentry.

To be clear, the flaws that are there were not introduced by the FSA. But the FSA perpetuates them in large part because the FSA, like much of the rhetoric about corrections and criminal justice, is hyper-focused on reducing recidivism.

Of course, reducing recidivism is an appropriate goal of criminal justice reform. But the methods by which the FSA seeks to accomplish this goal rely on shaky criminology while failing to correct longstanding deficiencies in federal reentry.

As far as the shaky criminology is concerned, Title I of the First Step Act⁶ requires the BOP, under the Attorney General's direction, to put in place a "system" of empirically-proven "evidence-based recidivism reduction programs" ("EBRRP"s) and "productive activities" tied to risk and needs assessments.⁷ As described in the House Report, the "system" is premised on the assumption that tying selection and admissions to programs to risk assessment instruments which are yet to be developed will improve "efficiency" which in turn will ultimately decrease recidivism among individuals released from the BOP.⁸ This is a stretch.

The House Report draws upon the report of the Charles Colson Task Force on Federal Corrections⁹ which placed a high value on occupational training and educational programs and recommended expanding them within the BOP. But the "evidence" that participation in corrections-based educational and job-training programs significantly reduces recidivism is actually fairly weak:

- According to evaluations of programs which are summarized on the Council of State Government/ National Institute of Justice website, www.CrimeSolutions.gov, only a minority of corrections-based reentry programs have been statistically shown to have positively reduced recidivism or improved employment opportunities. While a handful were able to claim dramatic reductions in recidivism --- as much as by 30-40% --- the majority of programs reported at most a modest decrease or no effect on outcomes at all.¹⁰
- In an effort to validate federally-funded reentry programs, the Second Chance Act undertook a multi-year, rigorous cross-site evaluation of seven grantees. Published in June 2018, the report found, in summary, that:

⁶ The "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act," passed as a 56 page Senate Bill S. 756 and was signed by President Trump. The House of Representatives prepared a 106 page Report accompanying H. R. 5682 which sets forth the House versions of sections of the final bill, a statement of purpose and summary, and dissenting views. For simplicity's sake citations hereafter will be to the "Senate Bill" or the "House Report."

⁷ Principally described Title I Sec. 101, § 3632 through § 3635 in both the House Report and the Senate bill.

⁸ See, House Report, "Background and Need for Legislation," at p. 22.

⁹ *Transforming Prisons, Restoring Lives*, Final Recommendations of the Charles Colson Task Force on Federal Corrections (Urban Institute, Washington, D. C., January 2016).

¹⁰ The Council of State Governments/ National Institute of Justice has categorized and reported on evaluations of over 570 social service, drug treatment, and adult and juvenile correctional and reentry programs. The highly-interactive web site allows sorting and filtering short summaries of these evaluations. According to one sort, 69 corrections-based reentry programs have been evaluated or rated. Of these, three were rated "effective," 46 were considered "promising," and 20 were determined to have had "no effect" on outcomes. Of 12 corrections programs serving adults, eight were considered "promising," resulting in better outcomes for program participants, and four were found to have had "no effect" on outcomes. Further limiting success rates for American programs, several of the programs rated "effective" are located in European countries. The website is accessed at: <https://www.crimesolutions.gov/Programs.aspx>

The prospective outcome study found that enrollment increased access to services, with the greatest impact found for prerelease services compared to post-release services; however, the treatment group apparently did not have better rearrest or other reentry outcomes compared to the control group; however, they had more positive outcomes for housing independence and employment.

No clear pattern of consistent positive effects were found in any site, and no site had consistently negative effects. The findings suggest that program developers should pursue opportunities for providing long-term post-release supports that are informed by reassessment results, since most grantees had relatively short post-release service periods¹¹

- Finally, the findings in about ten rigorous program evaluations are sufficiently weak to have been used to support the position of advocates opposed to continued federal funding for corrections-based reentry programs.¹²

Between weak or inclusive evaluations and a lack of the rigorous evaluations touted by criminologists and the organizations that undertake them, at considerable cost, it's not at all clear how many "evidence-based" EBRRP's there are to replicate.

The problem, though, isn't with occupational training and educational programs such as the Colson Task Force recommended. These can and do contribute to rehabilitation and preparation for life after prison. The problem is in the way we evaluate these programs, seeking statistical proof that they reduce recidivism two or three years after a participant completes them.

Only in a corrections- and criminal justice-obsessed environment would the value of educational, vocational, drug treatment and other programs be measured first and foremost by their attenuated impact on "recidivism," itself loosely and variously defined by everything from a violation of rules of behavior to conviction of a serious crime. But that's the way we do it. Evaluations framed in this manner largely ignore the qualitative aspects of programs: the soundness of a drug treatment protocol; the technical sufficiency and skill levels taught in a vocational training program; the impact of an academic program on critical or creative thinking. Most evaluations don't assess the quality or professionalism of programs, some of which are conducted by volunteers and instructors lacking credentials to teach outside corrections. Why, then, should we be surprised that a work readiness program teaching irrelevant job skills or teaching them poorly might not have much impact on participants' future employment or on recidivism?

Measuring program value by rates of recidivism among participants reflects a poor understanding of the lives of people caught up in criminal justice. Even the best of correctional programs occupies just a short period of time in the lives of participants. Once participants are released from correctional custody, they fall under all kinds of influences: personal stressors, family situations, neighborhood conditions, and combinations of successes and failures. It borders on silliness to hold a prison-based drug or alcohol treatment program accountable for failure to reduce recidivism if program support ends once the individual is released, or if collateral issues, such as the trauma and stress of imprisonment itself, are not independently addressed.

This brings us to a major flaw in federal reentry. As the Colson Task Force reported, there is a huge gap in reentry support for federal prisoners, due in part to distance between prison and home, but also, to a failure in communication and coordination between the BOP, its quasi-independent and differently-administered

¹¹ "Cross-Site Evaluation of the Bureau of Justice Assistance FY 2011 Second Chance Act Adult Offender Reentry Demonstration Projects: Final Report," National Institute of Justice, accessible at: <https://nij.gov/publications/pages/publication-detail.aspx?ncjnum>

¹² David B. Muhlhausen, "Studies Cast Doubt on Effectiveness of Prisoner Reentry Programs," Heritage Foundation *Background* December 2015. Muhlhausen is currently Director of the National Institute of Justice which is intrinsically involved with the administration of the FSA.

contract halfway houses, and finally federal probation which ends up supervising individuals released from federal custody.¹³ Even the process of release itself imposes obstacles to successful reentry: a person returning from federal prison may first be moved hundreds of miles to a more proximate federal prison or minimum security “camp” before being released to a BOP-contracted halfway house which imposes a new set of rules and offers varying support for the returning citizen. Some individuals will be placed on home detention, others not; nearly all will finally be released to the supervision of a federal probation officer and a new set of rules with, again, varying levels of support.

To give credit where deserved, the FSA opens a door to improved coordination between the BOP and probation. Up until this time, in some locations federal probation officers could not enter halfway houses or interview individuals until their full release from BOP custody. According to information given Project New Opportunity, some prison wardens would bar probation officers from entering to speak with future probationers. The Act requires the Director of the BOP to enter into agreements permitting federal probation officers to begin working with individuals on home confinement or in pre-release custody.¹⁴

But with its heavy emphasis on corrections-based programming, the FSA fails to address one of the more incisive of the Colson Task Force’s observations about federal reentry:

Providing those exiting prison with the tools, resources, and services necessary to succeed following BOP confinement helps stop the cycle of recidivism, thus improving public safety. Reentry support is most critical in the first days, weeks, and months immediately following release, when the risk of recidivism is highest. Studies have found that a continuum of care is crucial to maintaining gains from prison-based treatment.¹⁵

The absence of continuity of care in both current BOP reentry programming and the FSA’s “system” is an obstacle to successful reentry. Individuals returning from prison need help dealing with disorientation and psychological disconnection and coping with an almost learned inability to make decisions for oneself, phenomenon described by researchers and formerly incarcerated individuals alike. People in this situation are often frightened, vulnerable, and in need of guidance grounded in experience.¹⁶ The failure to respond to these needs is likely a more accurate explanation for poor to modest outcomes, measured by recidivism, among main-line, otherwise highly-touted reentry programs.

There are other, related problems.

Deana Hoskins of Just Leadership USA, among others, fears that the FSA’s heavy reliance on risk assessments will penalize African Americans and other minorities and objects because the “system” prioritizes low-risk individuals for access to the earned good time credits. As Hoskins correctly states, research shows that recidivism-reducing programs are more effective when provided high-risk individuals than they are when provided to low-risk individuals.¹⁷

¹³ Charles Colson Task Force on Federal Corrections, *supra*, at pp. 50 – 54.

¹⁴ Senate Bill Title I, Sec. 102 (b) adding to the end of Section 3624 of Title 18, U.S.C. subsection (g)(7), at pp. 19 – 20.

¹⁵ Charles Colson Task Force report at p. 50 (citations omitted). The FSA’s lack of attention to interagency communications, pre-release planning, and a continuum of services for individuals being released from the federal system contrasts to the priority Congress assigns to prerelease planning, “comprehensive and continuous reentry” and a continuum of services in state reentry programs funded through the Second Chance Reauthorization Act of 2018. See, Title Senate Bill Title V, Sec. 502 amending Section 2976 of 34 U.S.C. 10631 subsection (f)(3)(C) at p. 32.

¹⁶ Justice Strategies Working Paper: “Lessons for Sentencing Reform and Reentry: A Case Study of Project New Opportunity,” Center for Community Alternatives (New York, December 2018) pp. 6 – 7. Accessed at: <http://www.communityalternatives.org/pdf/PNO-Document-New-Version-Final.pdf>

¹⁷ Deanna Hoskins, President and CEO JustLeadershipUSA, speaking at the Atlantic’s forum, “And Justice for All: The Impact of Incarceration in America,” (Washington, D. C. 28 February 2019). May be viewed at

And while a “system” that purports to rely upon risk assessments to select participants and design programs might seem organized and rational, this one is not. The FSA excludes individuals convicted of about 40 different crimes from participation in the “system’s” programs. Some of excluded crimes are related to violence, terrorism or more serious offenses, while others appear to be a “crime of the hour”.¹⁸ Estimates are that because of the number of individuals excluded on the basis of their offense, the “system” will be available to about 100,000 individuals, about 56% of the BOP population.¹⁹ The individuals deemed ineligible won’t be able to participate in the system’s programs or its benefits, regardless of low risk assessment scores or an unblemished institutional record. The benefits are consequential: as incentives to participate in programs, the FSA authorizes reductions of up to 10 days for each 30 days in a program, expanded telephone and visitation privileges, a priority for assignment to a BOP facility closer to the individual’s home, and other rewards that the BOP may approve.²⁰

The process by which an individual may be assigned to a program ends up being anything but rational. Much will be determined simply by program capacity, currently greatly lacking and oversubscribed. The roughly half of all prisoners who are deemed “eligible” will be assigned to programs based on the outcome of an abstract and static risk and needs assessment. Some individuals will be motivated to participate solely for the incentives and not for the substance of the program. In all of this, there is no assurance that the program or assistance offered will match up to the individual’s actual or perceived needs or to his or her deepest concerns at the time he or she enters the program, is released from BOP custody, and then makes the difficult transition to life outside prison.

Matching reentry support to the felt needs of the individual is important. The experience at PNO taught that many incarcerated individuals are preoccupied by a single pressing problem: desperation to find a lost child or reunite with family, or more mundanely, to deal with child support or with accumulated traffic tickets. Sometimes little concerns would balloon out of proportion and needed to be tactfully deflated. But we found that unless and until the issues of most concern to the individual were addressed, he or she would have trouble dealing with other challenges. The “system” established by the FSA does no more to accommodate those needs than does the present system.

Finally, it’s going to take some time before the FSA is fully implemented. Even if things move on schedule, the time line for implementing the “system” extends two and a half years, beginning with an ambitious, possibly unattainable target of July 2019 at which time the Attorney General is to have developed and released the “risk and needs assessment system.”²¹ Not more than 180 days following release of the risk and needs assessment, the BOP’s Director is to have administered the needs and risk assessment to each prisoner and to have begun to assign prisoners to “appropriate evidence-based recidivism reduction programs based on that determination.”²² Given the paucity of programs today, with long waiting lists at many BOP facilities, establishing a full complement of programs in two years is an ambitious goal.

https://www.youtube.com/watch?v=CDpYtC_yGpA&list=PLwj46yNDLyTUVbDHZhPTNlrugOdPx1a4&index=3 starting at 1:50 minutes.

¹⁸ Senate Bill Title I, Sec. 101, § 3632 (d)(4)(D) at pp. 5 – 10. Among those excluded from programming are individuals sentenced for kidnapping, drive-by shootings, child pornography, aiding certain aliens to enter the United States, violations of the Atomic Energy Act of 1954 or a transaction involving methamphetamines in which the individual was an organizer, leader or manager.

¹⁹ Individuals incarcerated in the BOP as of May 2018 who are not disqualified as an “ineligible prisoner” as defined in the bill as it was reviewed by the United States Sentencing Commission “Estimated Effect of Clarification of 18 U.S. C. Sec. 924(c)”. The bill has since been modified, so this number may understate the number of individuals eligible under the bill.

²⁰ Senate Bill Title I, Sec. 101, § 3632 (d)(1) through § 3632 (d)(4)(A – C) at pp. 4 – 5.

²¹ Senate Bill Title I, Sec. 101, § 3632(a) at p. 3.

²² Senate Bill Title I, Sec. 102 (a) amending Title 18 U.S.C. Sec. 3621, at pp. 15 – 16.

Two years after completing the risk and needs assessment, or about July 2021, the BOP is to provide evidence-based recidivism reduction programs “for all prisoners.”²³ The Attorney General’s first report back to Congress on implementation of the Act falls is two years after completion of the risk assessment instrument, in about December 2021.²⁴

The FSA allows the Attorney General to expedite implantation. The Act authorizes (but does not require) the BOP to treat an existing program as an approved EBRRP if research shows that it is “likely to be effective in reducing recidivism.”²⁵ Similarly, the Act authorizes (but does not require) the BOP to immediately expand existing programs and productive activities and offer the Act’s incentives to participating individuals.²⁶

Particularly where the Attorney General or the BOP have discretion to act, the speed with which the “system” is implemented depends upon the enthusiasm and diligence with which the Attorney General and the BOP go about the business of implementing the FSA’s various program requirements. Some observers have already expressed concerns.²⁷ After all, when he was last Attorney General, William Barr famously declared a clear choice: more prisons or more crime.²⁸ Now he is required to implement a “system” with a lot of moving parts, grounded in empirical research, the ultimate goal of which is to shorten the length of time individuals remain in prison.

And we should heed Pat Nolan’s impassioned warning, that a BOP bureaucracy which “refuses to let go” may pose the greatest threat to the FSA’s successful implantation. The day it was signed into law, the FSA could have supported the immediate release of a number of federal prisoners. Instead, the BOP “cheated those individuals out of that time” by taking advantage of a 120 period administratively allowed for implementation of a new law.²⁹

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These, then, are the problems in reentry largely left unresolved by the FSA. They can be addressed by several affirmative actions.

- 1) Continued vigilance, reporting out, and advocacy by the numerous organizations supporting federally-incarcerated people, including organizations led by formerly incarcerated and justice-involved individuals and by federal defenders.

²³ Senate Bill Title I, Sec. 102 (a) amending Title 18 U.S.C. Sec. 3621, at pp. 16.

²⁴ Senate Bill Title I, Sec. 101 § 3634 at p. 12.

²⁵ Senate Bill Title I, Sec. 101 § 3635 (3)(A) at p. 14

²⁶ Senate Bill Title I, Sec. 102 amending Title 18 Sec 3621 by adding subsections including (h)(4), at p. 16.

²⁷ E. g., see Lara Yeretsian, “Perspectives: Barr Could Steer the First Step off Course” Law 360 (January 27, 2019) on-line at <https://www.law360.com/articles/1122358/barr-could-steer-first-step-act-off-course>

²⁸ “The Case for More Incarceration”, United States Department of Justice (1992), monograph prepared and issued by direction and with the endorsement of then-Attorney-General William P. Barr. A copy of the report is accessible at: <https://www.ncjrs.gov/pdffiles1/Digitization/139583NCJRS.pdf> At his confirmation hearing on January 15, 2019, Barr pledged somewhat ambiguously, “I have no problem with the approach of reforming the prison structure and I will faithfully implement the law,” reported by Tim Lau for the Brennan Center at <https://www.brennancenter.org/blog/barr-pledges-implement-first-step-act> (emphasis added).

²⁹ Pat Nolan, , Director, Center for Criminal Justice Reform, American Conservative Union, at the Atlantic’s forum, “And Justice for All: The Impact of Incarceration in America,” (Washington, D. C., 28 February 2019). May be viewed starting at 18:30 and continuing through 19:40 minutes at: https://www.youtube.com/watch?v=CDpYtC_yGpA&list=PLwj46yNDLyTUVbDHZhPTNlrugOdPx1a4&index=3

- 2) Oversight by relevant Congressional committees in both the House and the Senate beginning well in advance of the Attorney General’s required first report to Congress. One can hope that the bi-partisan support for the FSA will carry over to bi-partisan interest that the Act be promptly and properly implemented.
- 3) Congressional action which is consistent with the intent of the FSA and which can bolster federal reentry. Most immediate among these would be the full reestablishment of Pell Grant awards to incarcerated individuals.
- 4) Provide individuals leaving federal prison, including but not limited to those released “early” under authority of the FSA, with advance preparation and “wrap-around” continuity of support navigating around barriers envisioned in the Colson Task Force report. All parties, from the bi-partisan federal legislators who supported the First Step Act and are invested in its success, to federal courts and local communities to which federal prisoners return, have an interest in improving federal reentry. In this regard, Project New Opportunity offers a successful program model, tested with clemency recipients and beneficiaries of the “Drugs-minus-Two” reforms. (See, Project New Opportunity and the First Step Act.)

For additional information, see www.Projectnewopportunity.org or contact:

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