

# Now Is the Time to Take the First Step



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## I. Introduction

Recently, I was talking with one of the founders of the Prison Creative Arts Project in Michigan<sup>1</sup> about some of her favorite prisoner art and my attention was drawn to one of the paintings she was discussing. The painting was of a prisoner lying uncomfortably on his bunk (Figure 1). Somehow the artist had managed to make his subject's body look realistic but also painfully transfigured by the experience of prison. My friend mentioned that the artist was communicating how the stress and uncomfortable experience of just living in prison breaks down human bodies. I couldn't agree more—in my personal experience, incarceration is not good for anyone's health or well-being.

When I was in prison, it was not uncommon to see people violently attacked. Most often, people would get attacked for not paying off a debt, but sometimes I saw a person attacked for having the temerity to reach across the table for the salt shaker, for starting a conversation with someone without following the correct social protocols, or, once, for being suspected of being gay. New inmates were recruited into gangs, extorted or beaten for showing weakness, and once I was almost assaulted just because someone didn't like the way I looked. Being an inmate in prison is a process of constantly having to watch your back (and your front). Violence in prison sometimes seems to be in the atmosphere itself, something you try to avoid but that seems to sweep almost everyone into its ever-expanding vortex.

Now, I have plenty of reasons for supporting the FIRST STEP (Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person) Act—not the least of which is that incarceration does not make us safer as a society<sup>2</sup>—but when people ask, the first response I give is always the same: “Living in boxes outside of prison is better than living in boxes inside of a prison.” In the five years since my exit from the Cotton Correctional Facility in Jackson, Michigan, I have never once woken up to someone beaten down outside of my cube or found one of my friends lying on the ground after being stabbed or having his jaw broken.

Prison reform can have an immediate impact on many of the people negatively affected by federal incarceration the minute the FIRST STEP Act is signed into law. The FIRST STEP Act can move people from boxes inside prison into boxes (or houses) outside of prison. Even more exciting, as the result of a recent compromise brokered by the President

and agreed to by Senate Judiciary Committee Chairman Chuck Grassley, the FIRST STEP Act will now also include some of the best parts from the Sentencing Reform and Corrections Act.

## II. So What Is the FIRST STEP Act?

The FIRST STEP Act is a prison reform bill allowing select current and future prisoners (who participate in evidence-based and proven recidivism-reducing programming) the opportunity to serve out part of their sentence while under home confinement or while in a halfway house (under the supervision of community corrections). After the aforementioned compromise, the FIRST STEP Act will now also

- reduce many mandatory minimum sentences,
- prohibit the doubling up (stacking) of certain other mandatory minimum sentences,
- increase judicial discretion in addressing low-level crimes, and
- retroactively address the crack vs. powder cocaine sentencing disparity.

Now, while I don't believe that the FIRST STEP Act is some kind of a magic potion that will resolve all of the many outstanding problems in prisons, I do believe it will make an immediate and positive difference in the lives of many current and future federal prisoners and their families. The FIRST STEP Act doesn't necessarily shorten sentences—it is a bill about *where* and *how* a person serves out their sentence.

I have already addressed the benefits of this legislation in regard to protecting people from violence. Way too often, as Professor Bruce Western of Harvard discussed in his recent book *Homeward: Life in the Year after Prison*, we pretend that violence in prison doesn't count or that it is somehow earned or deserved:

Researchers claim that prison has an ‘incapacitative’ effect that reduces violence by removing it from society. But this claim assumes that prisons themselves are safe and secure and that whatever occurs within their walls need not be counted in statistics on violent crime.<sup>3</sup>

But, regardless of how you personally feel about violence in prison, it often generates more violence—and, ultimately, recidivism outside of prison (and most inmates will return

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**Figure 1**  
**Count Time, painting by Alan Campo.\*\***



to society). Other recidivism-reducing features of this new legislation include

- a quicker route to the reunification of families separated by incarceration;
- incentives for inmates to engage in the programming necessary to get on the right path upon return;
- new pathways to programming, including the opportunity for motivated and talented individuals (and nonprofits) who don't work for prisons or prison-based industries to provide programming in ways not possible prior to this legislation;
- moving many federal inmates closer to home;
- moving many medically frail prisoners out of prison for compassionate reasons; and
- preventing women from being shackled while pregnant and ensuring they have access to feminine hygiene products.

Given so many positives, what are the criticisms of the bill?

### III. Criticisms

#### A. Sentencing Reform

One of the most persistent criticisms of the FIRST STEP Act—that the bill was limited to prison reform and did not include sentencing reform—was largely addressed by the recent compromise. But, because the new agreement includes both prison reform and elements of the Sentencing Reform and Corrections Act, the resulting legislation is superior to either prison reform or sentencing reform alone, as Erik Luna explained in his review of mandatory minimums:

There is little evidence that lengthy prison terms serve specific deterrence. Rather, imprisonment either has no effect on an inmate's future offending or perhaps even increases recidivism. This is hardly surprising given the absence of meaningful rehabilitative programs for inmates and, worse yet, the deplorable conditions of incarceration facilities. It

has often been argued that prisons serve as “colleges for criminals,” where offenders are psychologically damaged by incarceration, for instance, or learn new anti-social skills from their criminally involved peers, and thus come out more likely to recidivate. They may also be at risk of reoffending because of imprisonment's social and economic consequences, such as the difficulties of obtaining gainful, lawful employment after release.

As for general deterrence, research has largely failed to show that mandatory minimums decrease the commission of crime, and some studies suggest that such punishment schemes may even generate more serious crime. Regardless, any deterrence-based reduction in crime is far outweighed by the increased costs of incarceration from long mandatory sentences.<sup>4</sup>

In other words, by prioritizing both programming and incentives in order to create better outcomes and getting rid of failed sentencing methods, the new FIRST STEP Act becomes greater than its constituent parts alone.

#### B. Risk Assessment

A second consistent criticism has been that the FIRST STEP Act relies on a potentially biased risk assessment tool to determine who gets to receive its full benefits. Right now, the Federal Bureau of Prisons (BOP) makes all of its release decisions based only on the discretion of its employees. The FIRST STEP Act orders the creation of a risk-assessment tool that will help BOP officials make evidence-based decisions about the dangerousness of people who might qualify for relief under the FIRST STEP Act.

It is certainly true that risk assessment tools, because they are created in a society and a criminal justice system rife with structural disparities, are usually biased. However, it is hard to imagine that the tools alone are less biased than discretion alone. As Greg Berman and Julian Adler of the Center for Court Innovation explained in their recent book, *Start Here: A Road Map to Reducing Mass Incarceration*:

Risk assessment is not an exact science. But, in the aggregate, it is massively superior to what constitutes business as usual at the moment: judges and prosecutors and other criminal justice officials making decisions about who should be in jail and who shouldn't with little information beyond a rap sheet and their own instincts and inherent bias.<sup>5</sup>

We do have to always remain vigilant and insist on algorithmic accountability measures to address bias, but it is hard to imagine how the risk assessment tool could be worse for prisoners than the status quo.

#### C. Jeff Sessions

A more specific version of the risk assessment critique of the FIRST STEP Act argues that the tool will be particularly dangerous because Attorney General Jeff Sessions will

control its creation, implementation, and administration. However, this is based on a misunderstanding of the FIRST STEP Act's language.<sup>6</sup> It is true that according to Section 101 of the Act, Sessions would be responsible for creating the risk assessment tool, but Section 101 also stipulates that the Attorney General has to carry out this duty in consultation with the

- Director of the BOP,
- Director of the Administrative Office of the U.S. Courts,
- Director of the Office of Probation and Pretrial Services,
- Director of the National Institute of Justice, and
- Director of the National Institute of Corrections.

And, in addition to these consultations, after the instrument is created the Attorney General has to prepare and present an extensive, evidence-based report demonstrating the effectiveness of the instrument to the U.S. Congress annually (Section 101). In addition, the General Accounting Office “must audit” the use of the tool at BOP facilities (Section 103).

Clearly, this legislation does not give the Attorney General unchecked power to create or unaccountable power to implement a risk assessment tool—and Sessions will not always be the Attorney General. Legislation tends to survive many administrations and any particular office holders. Finally, it is incomprehensible to me how the FIRST STEP Act could make Sessions more powerful than he already is. He is 100% in charge now and, absent the passage of the FIRST STEP Act, there are no “good time” credits, early releases to halfway houses or home supervision, or access to programming coming to anyone under the status quo.

#### **D. Community Corrections**

Opponents argue that the FIRST STEP Act will “widen the net,” allowing more mass supervision and surveillance of returning citizens. In particular, they are very concerned that the bill will accelerate corporate takeover of reentry functions from public servants.

Right now, every year and all over the United States, private prison companies like Core Civic and the Geo Group are buying up community corrections, monitoring, reentry, and treatment facilities to service the demand from the approximately 600,000 people who will be released annually into community corrections with or without the FIRST STEP Act. While the Act unquestionably creates a small increase in demand for community-based monitoring, treatment, and community corrections services (the federal prison population is much smaller than the population of state prisoners), it also disrupts this model by creating new in-reach opportunities for community and noncorporate programming providers that would not otherwise exist.

In addition, these privatization discussions often beg a larger question: the problem isn't privatization, it is how contracting and incentives are created when dealing with private companies. As Professor of Criminology John Pfaff, of Fordham University, put it on Twitter several months ago: “Moreover, the problem isn't w[ith] PROFIT, it's with INCENTIVES. If you pay prisons per prisoner per day, they will cut programming and staffing and training and fight any reform. Whether public or private.”<sup>7</sup> As he noted in an earlier tweet: “With better contracts, they could be a force for BETTER policies.”<sup>8</sup>

#### **E. Halfway Houses**

Some have made the argument that halfway houses would be overrun by the reforms created by the FIRST STEP Act. It is easy to understand why this would be a concern, as there are certainly issues with the reliability of the network of halfway houses in the United States and the bill doesn't seem to earmark any funding for the creation of new halfway houses. However, Section 402 addresses this problem directly: “The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”<sup>9</sup> In other words, much of the overcrowding (to the extent that it exists now) will be alleviated by allowing all low-risk-level prisoners to move from halfway houses to home confinement or move directly to home confinement upon release.

I think a fair criticism of Section 402 is that it allows for an expansion of the surveillance state, especially since the people being released are not seen as a risk to the communities they are being released to. And even courts are starting to question the efficacy of electronic monitoring<sup>10</sup>—a practice that creates real complications for returning citizens.<sup>11</sup> At the same time, this expansion is happening at a rapid rate all over the country, and larger conversations will need to happen around this topic because politicians seem to be demanding electronic monitoring as a quid pro quo for acceptance of alternative supervision schemes.

#### **F. Carve-outs**

It is unfortunate that we still feel it necessary to create extensive carve-outs (exceptions to reform) despite an ever-increasing amount of evidence that violence is usually contextual and is something people age out of. I wish there were not so many carve-outs in this legislation—it is troubling. Luckily, though, this legislation does not increase penalties on those left behind or foreclose more action to create future reforms. Language matters, and unlike past criminal justice reform legislation, this legislation purposefully holds the door open to future reforms to redress additional problems. Given all the good things this bill promises, holding those that would be helped hostage as we try to address larger reform questions seems counterproductive and cruel.

#### IV. Take the FIRST STEP

We have not had a meaningful prison or sentencing reform bill signed into law in the United States in decades. Right now, at this exact moment and despite incredible “odds against,” we have a chance to pass not just reform, but reform that matters. Estimates suggest that soon after this bill is signed,

- approximately 4,000 people in federal custody will be able to move from prison to a halfway house or directly home,
- women will no longer be shackled during pregnancy by the BOP or have to pay for feminine hygiene products,
- federal mandatory minimums will be reduced and the crack vs. powder cocaine distinction will finally be addressed, and
- medically frail people in prison will be granted compassionate release.

Prison is often a brutal place, and in many ways a person who has been incarcerated is never the same again. Prisons break down the body, the mind, and the spirit. Prisons also deeply and permanently affect the lives of children, friends, and family members of prisoners. We have an opportunity to both shorten the exposure for many thousands of people and to send a signal to the entire country that criminality can be addressed in better ways. Let’s all work together to take this first step.

#### Notes

- \* Josh is the host of the Decarceration Nation podcast, a freelance writer, and a criminal justice reform activist in Michigan.
- \*\* Reproduced with the artist’s permission.
- <sup>1</sup> Prison Creative Arts Project, <https://lsa.umich.edu/pcap> (last visited Oct. 21, 2018).
- <sup>2</sup> David Roodman, *The Impacts of Incarceration on Crime*, <https://blog.givewell.org/wp-content/uploads/2017/09/The-impacts-of-incarceration-on-crime-10.pdf>.
- <sup>3</sup> Bruce Western, *Homeward: Life in the Year After Prison* (2018).
- <sup>4</sup> Erik Luna, *Mandatory Minimums*, 4 *Reforming Criminal Justice* 117, 128–129. [http://academyforjustice.org/wp-content/uploads/2017/10/7\\_Criminal\\_Justice\\_Reform\\_Vol\\_4\\_Mandatory-Minimums.pdf](http://academyforjustice.org/wp-content/uploads/2017/10/7_Criminal_Justice_Reform_Vol_4_Mandatory-Minimums.pdf).
- <sup>5</sup> Greg Berman & Julian Adler, *Start Here: A Road Map to Reducing Mass Incarceration* (2018).
- <sup>6</sup> FIRST STEP Act, H.R. 5682, 115th Cong. (2017–2018), <https://www.congress.gov/bill/115th-congress/house-bill/5682>.
- <sup>7</sup> @JohnPfaff, Twitter (Jan. 11, 2018, 1:12 PM), <https://twitter.com/JohnFPfaff/status/951562427958734848>.
- <sup>8</sup> @JohnPfaff, Twitter (Feb. 23, 2017, 1:52 PM), <https://twitter.com/JohnFPfaff/status/834883622989619200>.
- <sup>9</sup> *Supra* note 7, § 402.
- <sup>10</sup> Robert Richardson, *NC Court of Appeals Ruling: Tracking Sex Offenders for Decades Considered a Search*, CBS17 (Raleigh, NC), <https://www.cbs17.com/news/north-carolina-news/nc-court-of-appeals-ruling-tracking-sex-offenders-for-decades-considered-a-search/1357703725>.
- <sup>11</sup> James Kilgore and Emmett Sanders, *Ankle Monitors Aren’t Humane. They’re Another Kind of Jail*, *Wired* (Aug. 4, 2018), <https://www.wired.com/story/opinion-ankle-monitors-are-another-kind-of-jail/>.