

**The First Step Act of 2018**

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My name is Emily Brubaker, and I am 23 years old. I am from Lancaster, Pennsylvania. I received a Bachelor of Arts in Psychology degree from Messiah University in May of 2020. I also obtained minors in sociology and criminology. Currently, I am working on my Master of Science in Criminal Justice degree from Liberty University Online, and I will be graduating in May of 2022.

## The First Step Act of 2018

The Trump Administration signed into law the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act or the First Step Act (FSA) on December 21, 2018. The bill is the product of several years of congressional debate regarding what might be done to reduce the overall size of the federal prison population while implementing mechanisms to maintain the safety of the public (James, 2019). In addition, it is the most significant piece of criminal justice reform legislation to pass since the introduction of the Sentencing Reform and Corrections Act (SRCA) in 2017 (Gill, 2018). FSA was devised by the United States House of Representatives Hakeem Jeffries (D-NY) and Doug Collins (R-GA) with the hope that an incremental criminal justice reform package would be passed. Initially, the bill simply improved upon the prison reform mandates in SRCA; however, Senators Chuck Grassley (Iowa) and Dick Durbin (Illinois) insisted the bill had to include sentencing reforms if it were to pass in the House. After further alterations to accommodate the senators' recommendations, FSA passed by a bipartisan vote of 360 to 59 in the House of Representatives, which marked a significant bipartisan victory for criminal justice reform and a momentous triumph for the Trump Administration. Although FSA is a significant beginning piece of legislation in criminal justice reform, proper implementation and further provisions are necessary for the act to achieve its desired objectives.

Essentially, there are three notable components of the act: (1) sentencing reforms as a result of adjustments to penalties for some federal offenses, (2) the reauthorization of the Second Chance Act of 2007, and (3) the development of a risk and needs assessment system to be established at the BOP. Ultimately, the main objectives of the risk and needs assessment are for BOP to evaluate each federal prisoners' recidivism risk and to then reduce that risk by placing prisoners in productive activities and programs. A prisoner who successfully completes a recidivism reduction program may earn additional time credits, which will enable them to be assigned to pre-release custody earlier than was previously permitted. One stipulation of FSA, however, is that prisoners convicted of crimes categorized as espionage, human trafficking, terrorism, violent, sex and sexual exploitation, high-level drug offenses, certain fraud, and repeat felon in possession of firearms are ineligible to receive additional time credits. Although some prisoners cannot earn additional time credits, they are able to obtain other benefits, such as additional visitation time, if they complete a recidivism reduction program, successfully. Therefore, there is still an incentive for individuals to enroll in a recidivism reduction program even if the end result is not early release.

As stated above, one of the notable components of the act is sentencing reforms as a result of adjustments to penalties for some federal offenses. First, FSA reforms 18 U.S.C. 924(c), which is also known as "stacking." Previously, federal law required consecutive five-, seven-, ten-, and thirty-year mandatory minimum sentences for brandishing, discharging, or possessing a

firearm during the course of a violent crime or a drug trafficking crime. The requirement to “stack” the penalties was necessary even when the criminal charges arose from one offense or a single indictment, which resulted in obsessive punishments. For example, a man, named Frederick Turner, was given a forty-year sentence for simply delivering a firearm to a confidential informant during his involvement in a drug conspiracy. At the time of the crime, Turner was a low-level, first-time offender who was consumed by his addiction. The reform provision of SRCA clarified that twenty-five-year sentences for second or subsequent offenses could only be applied when the prior conviction was finalized before the appointment of the current offense. Out of all the proposed sentencing reforms in FSA, the revision of “stacking” is considered to be the least controversial.

The second significant sentencing reform is changes to mandatory minimums for certain drug offenses (James, 2019). When an offender has one prior qualifying conviction, FSA lowers the 20-year mandatory minimum to a 15-year sentence. Furthermore, when an individual has two or more qualifying convictions, the act reduces the mandatory minimum of a life sentence to a 25-year mandatory minimum. In addition, FSA alters the prior conviction criteria that mandate how mandatory minimum sentences are applied. Now, the prior convictions of the offender must be classified as either a serious violent felony or a serious drug felony rather than simply a felony drug offense. Finally, the last considerable sentencing reform is the expansion of the safety valve. Under the safety valve initiative, judges can sentence low-level, nonviolent drug offenders to periods of imprisonment that are lower than the associated mandatory minimum. Previously, the safety valve provision was only applied to offenders with nearly spotless criminal records; however, FSA now allows drug offenders with minor criminal records to be eligible for the provision.

The third noteworthy component of the act is the reauthorization of the Second Chance Act of 2007 (SCA). SCA, itself, reauthorized the Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA), which used grant funding to promote thorough planning and collaborative delivery of rehabilitative services to individuals recently released from prison (Nelson & Turetsky, 2008). Essentially, SCA reauthorized, but did not appropriate, \$300 million in grants to operate successful reentry programs. The act authorized \$20 million to reentry courts, \$40 million for grant projects to provide mentoring, transitional services, and job training, \$110 million to juvenile and adult offender local and state reentry demonstration programs, and \$130 million to education and training, mentoring, and substance abuse treatment. Under FSA, the reauthorization of SCA requires the National Institute of Justice (NIJ) to assess grants implemented by the United States Department of Justice (DOJ) to support recidivism reduction and reentry programs at the local, tribal, state, and federal levels. NIJ must complete the assessment within five years and is required to identify the goals of SCA’s programs, such as education, employment, housing, and public safety. Therefore, the reauthorization of SCA

enables successful reentry programs and recidivism reduction initiatives to continue receiving funding, which will ensure offenders are taught the skills necessary to prosper upon their release.

Equally important, however, are several other lesser-known components of FSA. In 2007, Congress signed into law SCA and directed the BOP to initiate a two-year program aimed at assessing the efficacies of earlier releases to community supervision for elderly offenders. In 2010, the program expired, and the final results indicated that only 71 out of 885 applicants were accepted for early release, which led Congress to question the BOP's definition of an eligible applicant. Under FSA, Section 231(g) of SCA is reauthorized for the 2019-2023 fiscal years, and it redefines "elderly" to be 60 years old rather than the previous requirement of 65 years old. In addition, the time-served requisite no longer mandates a 10-year minimum, and an offender only has to serve two-thirds of his or her sentences rather than 75 percent before applying for early release. Also, "terminally ill offenders" who are deemed to be suffering from "terminal illnesses" by a BOP-approved physician are now included in the eligibility pool, especially if they are in need of healthcare at an intermediate care facility, a nursing home, or an assisted living facility. Furthermore, a terminally ill prisoner has no time-served threshold and cannot be disqualified even if they are serving a life sentence.

Next, is compassionate release, which under 18 U.S.C. 3582(c)(1)(A) gives courts the authority to reduce sentences for "extraordinary and compelling reasons" (Bussert, 2019). Previously, the BOP sparingly used its authority to accept compassionate release petitions submitted by federal offenders. In short, if institution staff deem a prisoner eligible for a reduction in sentence, they prepare a petition for the warden, which states their reasoning for the motion. Then, the warden submits the request to the Director of the BOP who, in turn, will ask the United States Attorney for the district, in which the prisoner is held, to file a motion with the sentencing judge and recommend a reduction in sentence (RIS). Before the passage of FSA, a court's jurisdiction was dependent upon the BOP initiating a RIS petition. In an effort to increase the BOP's use of compassionate release, the act allows prisoners to have access to the courts by submitting their applications directly to them. Now, inmates are less likely to be restricted by the BOP's precise definition of what constitutes a "compelling and extraordinary" reason, which led to too many denials of compassionate release motions in the past.

The final, lesser well-known yet excruciatingly important component of FSA is the prohibition of the use of restraints on pregnant prisoners. The act forbids the use of restraints from the time a woman's pregnancy is confirmed until the end of postpartum recovery, which is at least 12 weeks after birth. There are exceptions, such as when the individual presents a serious risk of harm to herself or others, is considered a flight risk, or medical professionals deem the use of restraints appropriate. Even in such circumstances, however, the restraints must be as least restrictive as possible and may not be wrapped around the legs or waist, the ankles, or cause the woman's hands to be restrained behind her back. All in all, the three components just mentioned

are not as well-known as the provisions, which include sentencing reforms, the reauthorization of SCA, or the development of a risk and needs assessment system. Nonetheless, the three elements are a prominent step towards ensuring that all individuals are afforded equal rights and protection, regardless of their incarceration.

The passage of FSA marks a prominent achievement for individuals, grass-roots groups, and politicians from both sides of the aisle (Young, 2019). Republicans and Democrats alike are calling the bill a breakthrough, but even more revealing is the endorsement by conservative and far-right groups, such as the Cato Institute, Americans for Prosperity, the Federal Correctional Officers' Union, and the Fraternal Order of Police (Robinson & Soto, 2019). The newfound concern for criminal justice reform appears to include an assortment of conservative and liberal corporate-funded foundations like The Heritage Foundation, the Koch Brothers, and the foundations of Ford, MacArthur, Rockefeller, Soros, Carnegie, Kellogg, and Mellon. Essentially, FSA represents a culmination of state and federal lawmakers who urged Congress to respond to the country's most prominent criminal justice issue: mass incarceration (Todd, 2019).

According to the United States Bureau of Justice Statistics, in 2018, an estimated 2 million people were imprisoned within the country. On average, the United States incarcerates 693 individuals for every 100,000 citizens, which places America as the eleventh highest incarcerator in the world. The phenomenon has been a direct result of the transition from a rehabilitative criminal justice system to a retributive one. In the 1990s, the War on Drugs' legislation implemented "tough on crime" mandates, such as mandatory minimum sentencing. Under the mandatory minimum sentencing structure, judges have no discretion to evaluate each offense on a case-by-case basis, which forces them to punish all individuals in an identical manner. Therefore, the consensus among legal professionals and criminal justice reform advocates is that the United States' high prison incarceration rates are the result of the "tough on crime" mandates.

Judge Tracie A. Todd of Alabama conducted a research study to examine the significance of a judge's role in sentencing and how it contributes to the mass incarceration issue. The reason being, state and federal judges are responsible for adjudicating cases and imposing sentences; however, state officials impose the most criminal sentences. In 2017, 75,861 criminal cases were filed in federal court compared to an estimated 14 million in state court systems. Todd serves as a State of Alabama Circuit Court Judge for the Tenth Judicial Circuit Criminal Division, so her report focuses on judges in Alabama as well as Massachusetts. Evidently, Alabama has one of the highest rates of incarceration in the country compared to its New England counterpart, which has one of the lowest. The Commonwealth of Massachusetts has a population of about 7 million and incarcerates roughly 330 individuals for every 100,000 people. On the other hand, Alabama's population amounts to roughly 5 million people and incarcerates approximately 987 people for every 100,000 citizens. In order to eliminate the mass incarceration problem, Todd

concludes that criminal justice reform legislation, such as FSA, must include the emendation of mandatory minimums sentencing guidelines.

The problem of mass incarceration is a compelling reason to devise legislation like FSA but reducing recidivism and improving public safety are convincing incentives as well (Whetzel & Johnson, 2019). In 2014, Congress established the Charles Colson Task Force on Federal Corrections to identify the causes of mass incarceration and to amass information on effective recidivism reduction programs. The Task Force was a culmination of bi-partisan members whose efforts were informed by research, which demonstrated that intensive programming was most effective when reserved for high-risk inmates and that long sentences did not improve the goals of public safety. After a year, the Task Force's final report was produced in collaboration with the Urban Institute and included the following recommendations: reinvest savings to support the expansion of necessary supervision, programs, and treatment, ensure successful reintegration by using evidence-based practices and supervision and support, reserve the use of prison for people convicted of the most serious crimes, enhance the coordination, performance, accountability, and transparency of federal correctional agencies, incentivize participation in risk reduction programming, and promote a culture of safety and rehabilitation in federal facilities. Overall, FSA encompasses many of the Task Force's recommendations; however, the implementation of the act will prove whether the totality of the suggestions and the Congressional intent are achieved.

Although FSA is a transformative piece of legislation, there are still those scholars and legislators who believe it falls short considering it does not benefit individuals outside of the federal corrections system. Furthermore, it does not reach enough people at the federal level and not enough relief is given to those it does apply to (Young, 2019). Mark Holden, counsel to Koch Industries and an influential member in the passage of FSA, says a second and third act is necessary to encompass all of the reforms needed. Holden identifies five provisions that need to be included in future legislation: increased judicial discretion at sentencing, reentry reform, prosecutorial reform, effective assistance of counsel from the first day of contact with the offender, asset forfeiture (law enforcement should not be revenue collectors), and the extension of bail reform to states. In addition to the five recommendations stated above, Holden published an opinion piece in the *Crime Reporter* in which he introduced the idea of future legislation including retroactive sentencing reform.

Additionally, there are two prominent implementation issues of FSA that cause distress for legislators and criminal justice reform advocates. First, the careless separation of criminogenic needs and dynamic risks (Skeem & Monahan, 2020). Second, the deceptive reliance on evidence-based risk reduction programs and activities. One of the initial mandates of FSA is the development of a risk and needs assessment system that should be used by BOP to determine the recidivism risk of each offender. The provision requires the assessment system to be "objective

and statistically validated” and based on dynamic risk factors (DRF), which are factors that can reasonably be expected to change while an individual is in prison. More specifically, DRF are described as symptom-like features of inmates and their environments, such as their attitudes towards prison staff or their abuse of substances (Heffernan et al., 2019). As of now, FSA separates “risk assessment” from “needs assessment.” Currently, the BOP is utilizing the FSA risk assessment instrument known as the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) to give each individual offender a recidivism risk score (“First Step Act: BOP Issues RFI,” 2019). Furthermore, the needs assessment portion assesses the specific needs of an inmate in order to reduce his or her risk of reoffending. The specific needs seem to be determined by the BOP’s use of a medical questionnaire, an unstandardized psychological evaluation, and screening tests for English fluency and educational attainment (Skeem & Monahan, 2020). Apparently, the BOP will primarily use the needs assessment to inform how recidivism risk reduction programs will be delivered to each individual and the risk assessment will only be used to track risk over time and incentivize offenders to participate in such programs. Ultimately, the separation of risk assessment and needs assessment compromise, or severely limit, the act’s ability to accomplish the designated goal of providing treatment that targets a prisoner’s specific risk factors in order to reduce the likelihood that he or she will reoffend.

The second implementation problem of FSA is the deceptive reliance on evidence-based risk reduction programs. A foundational mandate of the bill is that every prisoner who is eligible will receive evidence-based recidivism reduction programming that is based on his or her specific criminogenic needs. The challenge arises, however, in identifying the programs that actually reduce recidivism. The BOP offers a wide assortment of programs at its institutions all across the nation, and those services are divided into more than 50 categories, 18 of which are considered “national models” that range from spiritual/religious models to cognitive behavioral ones. Out of all the BOP programs, the Residential Drug Abuse Program (RDAP) is the only one to ever undergo a controlled study with a follow-up evaluation period of at least one year. This initiative was operated between 1990 and 1995 and was only provided in halfway houses for those offenders who had a recorded history of serious substance abuse. The program included 9-12 months of residential drug abuse treatment, which was delivered in a therapeutic and cognitive behavioral community format. Overall, the evaluators of RDAP deemed it to have a “positive but modest effect” on the inmates’ recidivism after a three-year follow up period.

The responsibility of BOP to provide FSA-compliant evidence-based initiatives will have to involve the implementation of correctional programs from state prisons that have been shown to reduce recidivism. First, there is evidence to suggest that correctional treatment programs that target a range of risk factors are more likely to reduce recidivism than programs that focus solely on variables with little relationship to recidivism like mental health and self-esteem. Therefore,



the BOP's programs should predominantly address variable risk factors. Second, the most compelling body of evidence on correctional treatment programs show that cognitive-behavioral therapy (CBT) that focuses on risk factors, such as emotional dysregulation, social skills deficits, antisocial peers, and criminal thinking patterns, profoundly reduces the chance an inmate will reoffend. In high-quality meta-analyses of controlled trials, CBT achieves the greatest and most consistent effect sizes, reducing recidivism by up to 50%. According to a recent meta-analysis that evaluated programs for violent offenders, multimodal CBT vigorously prevented both general and violent recidivism. All in all, CBT is particularly effective because it teaches offenders pro-social skills for self-management, problem-solving, and interpersonal interaction. Arguably, if the BOP is to utilize an evidence-based risk reduction initiative like FSA states, it should aim to use a multimodal CBT program and implement the program throughout the entire system.

In a biblical perspective, FSA is a monumental achievement towards ensuring all individuals are treated justly and fairly, regardless of their incarceration. The United States' criminal justice system is a promoter of injustice, specifically when it comes to the rights and treatment of prisoners. In Christianity, the two greatest commands given are to love the Lord with all of one's heart, soul, and mind and to love one's neighbor as oneself. It is important to note that there are no stipulations in the command to love one's neighbor. The reason being, the Bible does not promote discrimination but rather it advocates unity. Therefore, factors, such as age, race, sexual orientation, and socioeconomic status of an individual, should not be taken into account when identifying the manner in which one loves or cares for another. Furthermore, in the book of Psalms, one line of scripture reads, "He loves righteousness and justice; the earth is full of the steadfast love of the Lord" (Holy Bible: New International Version, 2016, Psalm 33:5). The challenge, then, is to correct oppression and promote justice in a governmental system that is designed to persecute specific civilian populations. Thankfully, FSA is a beginning step in seeking justice for those plagued by the inequities of the United States' criminal justice system.

In conclusion, the Trump Administration signed into law the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act or the First Step Act (FSA) on December 21, 2018. The act passed by a vote of 360 to 59 in the House of Representatives, which marked a significant bi-partisan achievement and a momentous triumph for legislators and criminal justice reform advocates. The three notable components of the act, sentencing reforms, the reauthorization of the Second Chance Act (SCA), and the development of a risk and needs assessment system, were discussed in detail. In addition, lesser well-known components of FSA were described to ensure the acknowledgment of their importance to the overall objectives of the bill. The key executive agencies, legislative subcommittees, and interest groups involved in the policy process related to FSA were identified. Furthermore, the impact of political stakeholders was evaluated to analyze stakeholder engagement at the various stages of the policy's formation.

Finally, there was a review of the bill’s impact on the United States criminal justice system and what the implications were if it was properly implemented and enforced. In the end, FSA is a significant beginning piece of legislation in criminal justice reform; however, proper implementation and further provisions are necessary for the act to achieve its desired objectives.

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### Footnotes

- Footnote (p. 1):** Nathan James, "The First Step Act of 2018: An Overview." *Congressional Research Service* 1 (2019): 1.
- Footnote (p. 1):** Molly Gill, "Threading the Needle: The FIRST STEP Act, Sentencing Reform, and the Future of Criminal Justice Reform Advocacy," *Federal Sentencing Reporter* 31, no. 2 (2018): 107.
- Footnote (p. 2):** Nathan James, "The First Step Act of 2018: An Overview." *Congressional Research Service* 1 (2019): 8-9.
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- Footnote (p. 3):** Todd Bussert, "What the First Step Act Means for Federal Prisoners," *The Champion* (2019): 30.
- Footnote (p. 4):** William Robinson and Oscar Fabian Soto, "Passive Revolution and the Movement against Mass Incarceration: From Prison Abolition to Redemption Script." *Social Justice* 46, no. 4 (2019): 122.
- Footnote (p. 4):** Tracie A. Todd, "Mass Incarceration: The Obstruction of Judges." *Law and Contemporary Problems* 82, no. 2 (2019): 191-192.
- Footnote (p. 4):** Young, Malcolm C. "The First Step Act and Reentry." *Journal of Community Corrections* 29, no. 1 (2019): 9.
- Footnote (p. 5):** Jay Whetzel and Sarah Johnson, "'To the Greatest Extent Practicable' - Confronting the Implementation Challenges of the First Step Act." *Federal Probation* 83, no. 3 (2019): 5-6.
- Footnote (p. 6):** "First Step Act: BOP Issues RFI," last modified January 9, 2019, accessed January 4, 2021, [https://www.bop.gov/resources/news/20191230\\_rfi.jsp](https://www.bop.gov/resources/news/20191230_rfi.jsp).
- Footnote (p. 6):** Roxanne Heffernan, Tony Ward, Stijn Vandeveld, and Lore van Damme. "Dynamic Risk Factors and Constructing Explanations of Offending: The Risk-Causality Method." *Aggression and Violent Behavior* 44 (2019): 48.
- Footnote (p. 6):** Jennifer Skeem and John Monahan, "Lost in Translation: 'Risks,' 'Needs,' and 'Evidence' in Implementing the First Step Act." *Behavioral Sciences and the Law* 38, no. 3 (2020): 288
- Footnote (p. 6):** Young, Malcolm C. "The First Step Act and Reentry." *Journal of Community Corrections* 29, no. 1 (2019): 9-10.
- Footnote (p. 7):** Jennifer Skeem and John Monahan, "Lost in Translation: 'Risks,' 'Needs,' and 'Evidence' in Implementing the First Step Act." *Behavioral Sciences and the Law* 38, no. 3 (2020): 291-292.
- Footnote (p. 8):** Ps. 33:5 (NIV)