# The First Step Act's Prison Reforms

## Uneven Implementation and the Path Forward

**By Ames C. Grawert and Patricia L. Richman**

**T**hree years ago, Congress passed the First Step Act, the first major federal criminal justice reform legislation in nearly a decade.[1] The culmination of years of bipartisan advocacy, the law included both long-overdue changes to excessively punitive federal sentencing laws and reforms aimed at improving conditions in the federal prison system.

This brief examines the structure of the First Step Act's prison reforms, how they have been implemented, and what more Congress and the Department of Justice (DOJ) must do to realize their potential.

## Background

In the 1980s, Congress enacted rigid mandatory penalties, which require judges to impose minimum terms of incarceration for certain federal crimes or when certain statutory criteria are satisfied.[2] Sometimes these penalties are triggered by specific conduct, such as possessing a firearm or possessing drugs above a specified threshold quantity.[3] These laws significantly expanded the size of the federal prison system and led to an explosion in racial disparities in punishment, all without addressing drug use or improving public safety.[4]

The federal prison system strained under the effects of these penalties, with lawmakers describing a "state of crisis" as the prison population climbed.[5] Indeed, the federal prison population grew eightfold between the 1980s and the mid-2010s, outpacing growth in state-level incarceration, with weapon and drug offenses making up more than 60 percent of the growth in federal imprisonment.[6] Mechanisms for checking excessive custodial sentences did not keep pace. Compassionate release, for example, which allows a federal court to reduce or end a prison sentence for "extraordinary and compelling circumstances," was severely underused.[7] People in prison had limited opportunities to earn early release through their conduct; "good time" credits, earned for good behavior while incarcerated, amounted to at most 47 days per year of incarceration.[8]

Congress began to rectify this situation in 2010 with the Fair Sentencing Act, which reduced the crack/powder cocaine sentencing ratio from 100:1 to 18:1 in drug trafficking cases and eliminated the five-year mandatory minimum for simple possession of crack.[9] However, these changes applied only prospectively, meaning that people sentenced before the law went into effect remained in prison, serving the same wildly disproportionate sentences that Congress had just repudiated. Additionally, the act did not address the long-standing consensus that federal prisons were failing to provide meaningful programming and rehabilitation to incarcerated people.

The First Step Act attempted to address these shortcomings. Among other things, its sentencing reforms made the Fair Sentencing Act retroactive, permitting people sentenced under the old 100:1 crack/powder cocaine penalty scheme to apply for resentencing as if the Fair Sentencing Act's 18:1 ratio had been "in effect at the time the covered offense was committed."[10] The act also revised other mandatory minimums and for the first time allowed people in federal prison to petition a federal court for compassionate release.[11] Additionally, and critically, it introduced a system for people to reduce their time spent in prison by participating in programming and activities.

The First Step Act's changes to federal sentencing laws had an immediate, significant impact. As of May 2021, roughly 3,700 people had benefited from a reduction in their sentence under the provision making the Fair Sentencing Act retroactive.[12] The average sentence was reduced by around three years, or roughly 25 percent.[13] And, according to the Bureau of Prisons, the act has led to compassionate releases or sentence reductions in more than 4,200 other cases.[14] The act's other sentencing reforms have begun to impact new cases, too. The restoration of judicial discretion in select drug cases benefited roughly 1,400 people in the first year of enactment.[15]

# The FSA's Prison Reforms: Challenges and Successes

Unfortunately, errors and half-starts have marred the rollout of the First Step Act's prison reforms.

The act aimed to create a system that would encourage people in prison to participate in programming designed to reduce recidivism — that is, the risk that they would come in contact with the criminal justice system, through arrest or otherwise, after release. This new system has several key components:

- **Incentives and rewards for program participation.** The act incentivizes engagement with "evidence-based recidivism reduction programming" (e.g., drug treatment or literacy programs) and "productive activities" (e.g., work or vocational training) by awarding time credits for participation that people can apply toward early transfer to supervised release, home confinement, or a residential reentry center (i.e., a halfway house).[16] However, a laundry list of disqualifications excludes people convicted of certain offenses from participating.[17]

- **A risk assessment tool.** This tool is designed to determine the "recidivism risk of each prisoner" and the "type and amount of evidence-based recidivism reduction programming for each." Risk scores generated by the tool affect both the number of time credits individuals can earn and how they can redeem them, making its design and implementation vital to the act's success.[18]

- **Expanded recidivism reduction programming opportunities.** The act also seeks to expand the availability of job training and other programming for all incarcerated individuals.[19]

Unlike the act's sentencing reforms, these changes to the prison system were phased in, to give the Bureau of Prisons (BOP) time to build out the relevant policies. The final rule governing the awarding of time credits did not go into effect until January 2022.

Along the way, the act's corrections reforms have hit a series of snags in implementation, requiring continued attention from policymakers to ensure that they succeed. What went wrong?

## Rocky Start to Earned Time Credit Implementation

The core of the First Step Act's corrections reforms is a system that allows some people to receive earned time credits (ETCs) for participating in designated programming or activities behind bars, such as drug treatment or cognitive behavioral therapy. ETCs effectively shorten sentences, making them a powerful incentive for participating in programs. Implementation of the ETC system stalled, however, after the act's passage.[20] The BOP initially refused to award ETCs and issued draft regulations that would have sharply limited the reach of the program.[21]

That changed in January 2022 when the BOP, responding to broad and bipartisan criticism, issued a rule that dramatically increased the rate at which completed programs translate to ETCs. Simultaneously, the BOP calculated and awarded ETCs retroactively back to the date of the First Step Act's enactment.[22] As a result, by April 5, 2022, more than 6,100 people had been transferred to supervised release and another 3,155 people had been transferred to prerelease custody — that is, a residential reentry center or home confinement.[23]

Under the law and current regulations, eligible people can earn 10 to 15 days of ETCs for every 30-day period in which they successfully participate in programs or productive activities.[24] (People deemed minimum or low risk earn 15 days, while those classified at higher risk levels earn 10 days.) Once they have accrued time credits equal to the time remaining on their sentence, those credits can potentially be cashed in for either an early transfer to supervised release (by up to a year) or to prerelease custody.[25]

Yet not all people are eligible to earn ETCs. The act excludes those convicted of many crimes.[26] These exclusions prevent nearly half of the federal prison population from benefiting from credits.[27] The exclusions also

appear to serve no policy purpose. According to the Independent Review Committee (IRC), the expert panel tasked with helping the BOP implement the law, there is "no significant difference in the collective recidivism-risk profiles of the BOP's ETC-eligible and ETC-ineligible inmate populations."[28]

Additionally, despite the announcement of new rules improving the ETC system's operation, it appears that the process of awarding ETCs continues to move slowly. People in federal prison have reported that they are not having their time credits applied or not being released as early as they should be, and that BOP staff have not received training or guidance in how to operate the new system. These missteps point to a need for continued oversight to ensure timely and accurate implementation.[29]

## Flawed Risk and Needs Assessment Tools

The First Step Act calls for an assessment system to evaluate each person's risk of recidivism (defined as arrest or return to prison within three years of release) and criminogenic needs (factors that, unless addressed, may predict future contact with the criminal justice system).

The act's corrections reforms rely on the system's accuracy and fairness. People who score as minimum or low risk earn ETCs more quickly than those in higher risk categories. The BOP is also required to apply credits earned by people categorized as minimum or low risk toward prerelease custody or supervised release. In contrast, individuals classified as medium or high risk must meet additional criteria, including special approval by the warden, before their credits can be applied against their sentence. Additionally, those in the higher risk categories cannot earn early transfer to supervised release; they can apply their credits only to prerelease custody.[30]

These high stakes make it particularly important that the risk and needs system be transparent, fair, and unbiased.[31] Unfortunately, the part of the system focused on criminogenic needs was slow to be deployed. Worse, the system released by the DOJ for assessing risk, called PATTERN (Prisoner Assessment Tool Targeting Estimated Risks and Needs), remains flawed despite major revisions and renewed attention from the Biden administration.[32]

Some elements of PATTERN have improved over time as the DOJ has responded to stakeholder criticism. But correcting all of its flaws would require fundamentally reevaluating what type of risk PATTERN measures and how it translates that risk to policy judgments — a top-to-bottom reconstruction that goes beyond the remedies the administration has proposed to date.

### Background on PATTERN
Like any risk assessment tool, PATTERN was developed to predict the likelihood of a defined behavior based on a series of inputs associated with that behavior. It seeks to predict a specific type of recidivism: "a return to BOP custody or a rearrest within three years of release from BOP custody, excluding all traffic offenses except driving under the influence and driving while intoxicated."[38]

The tool works by collecting information on a person and assigning them points based on factors in their background, which add up to a total risk score. Each factor carries a different weight; for example, completing a prison program will subtract one to three points from the total score. By contrast, being under the age of 26 can add a significant number of points. The BOP then determines how to translate these scores into a policy judgment — whether the person presents a minimum, low, medium, or high level of risk.[39]

Different versions of the tool exist for men and for women, and for predicting general recidivism risk (defined as the likelihood of rearrest or return to BOP custody for any offense) and violent recidivism risk (the same likelihood but for an offense deemed violent).[40] These tools serve

## Risk Assessment Tools in the Criminal Justice System

Risk assessment tools are designed to calculate the likelihood that someone will engage in certain behaviors based on characteristics they share with others in a group. Predictions tend to rely on a mix of dynamic factors, which people can change over time (such as participation in prison programming), and static factors, which people cannot change (such as age and criminal history). Before being put into practice, these actuarial tools are usually calibrated by comparing their predictions against data gathered from the real world.[33]

Risk assessment isn't math; it's policy. Indeed, these models reflect policy choices at every phase, from judgments about risk tolerance to beliefs about criminal behavior. As a result, they remain both controversial and imperfect. They often classify individuals inaccurately and tend to misclassify people who are unlikely to pose a real threat as moderate or high risk.[34] An overreliance on static factors can also lead these tools to incorrectly classify Black people and others from overpoliced and disadvantaged communities as high risk.[35] Last, because tools are tested against historical data, they risk replicating biases in that data when predicting risk. For example, historical racial disparities in policing can lead an algorithm that was calibrated using arrest data to predict, incorrectly, that Black and white people reoffend at different rates — when in fact they are merely policed at different rates.[36] In the words of one expert, "No predictive tool is better than the data set from which it originates."[37]

different purposes, but — critically — when the risk tiers they produce diverge, the higher score governs. Practically, this means that someone's potential ability to transfer to prerelease custody is limited until and unless they score into the low or minimum tiers on both assessments.[41]

## Missteps in PATTERN's Development (2019–Early 2022)

PATTERN's rollout was characterized by implementation mistakes and policy missteps, raising concerns that the tool entrenched racial bias in the prison system, relied on an overly conservative definition of recidivism risk, and failed to account for people's capacity for personal growth and change while incarcerated. These issues plagued the first years of implementation, even if (as discussed below) the DOJ has since taken steps to partially correct them.

- **Technical errors.** PATTERN required repeated technical corrections just to function as designed.[42] Reviews conducted by the National Institute of Justice (NIJ), the DOJ agency tasked with reviewing the tool to guarantee its accuracy, revealed mistakes in how the model's variables were defined and applied.[43] A January 2021 NIJ report identified scoring, coding, and weighting errors and recommended a revised version of PATTERN.[44] In the months that followed, the NIJ found even more errors, described in a December 2021 report.[45] These problems were compounded by human error by BOP staff in the scoring process. As a result, many people in BOP custody were assigned to the wrong risk category, even as the DOJ relied on PATTERN to make potentially life-and-death decisions about whether to transfer people to home confinement during the pandemic.[46]

- **Racial bias.** In November 2021 the Bureau of Justice Statistics (BJS) reported that the vast majority of Black people in BOP custody — more than 70 percent — were classified by PATTERN as medium or high risk.[47] Further releases show that PATTERN continues to overpredict the likelihood that Black, Hispanic, and Asian people will commit new crimes or violate rules after leaving prisons, relative to white people in prison.[48]

  These biases stem in part from PATTERN's focus on rearrest. Arrest is a poor proxy for criminal activity, as it may reflect policing decisions — where officers are deployed and their biases in making arrests — rather than actual criminality.[49] Designing a risk assessment tool based on arrest patterns also means relying on data tainted by decades of discriminatory policing, a concern raised by stakeholders years ago.[50]

  For that reason, the IRC, among others, has recommended a narrower definition of recidivism, one that "might better identify individuals likely to engage in serious criminal activity post-release" and potentially reduce the tool's reliance on racially biased data.[51] In

2020, however, the DOJ rejected calls to redesign PATTERN to include a narrower definition of recidivism, such as reconviction or re-incarceration, claiming such a definition would be unworkable because of data limitations.[52]

- **Risk tolerance.** Translating a PATTERN score to a risk designation is a policy judgment. There is no objective quantifier of acceptable risk.[53] Instead, it is up to policymakers and the algorithm's designers to define risk and decide how much of it their system should tolerate.[54] In making those judgments, the DOJ initially adopted a set of fairly conservative cut points — borders between risk categories — that were derived in part from the average predicted risk of recidivism of people released from the BOP.[55] But early data about recidivism among those scored by PATTERN showed that fewer than 2 percent of people scored as low risk were rearrested between July 2019 (when PATTERN was implemented) and September 2020. Further, only 4.5 percent of "high risk" individuals were rearrested in the study period.[56] That data led the Urban Institute to conclude that PATTERN overpredicted recidivism and that individuals with a higher PATTERN score should properly be classified in a lower risk category.[57]

- **Variable weights.** Choosing which factors in someone's background PATTERN should consider when scoring them is also a policy choice, as is the weighting of those factors — even if the latter is informed by mathematics.

  Contrary to Congress's intent, PATTERN has consistently overemphasized static factors like age and criminal history, which makes it difficult for people to change their assessment score over the course of their incarceration. Dynamic factors are weighted less heavily, and more than half of the dynamic factors in the model actually increase a person's risk score.[58] Perhaps unsurprisingly, then, just 23–35 percent of people in one NIJ analysis had been able to reduce their assessed risk level "at the last assessment compared to the first."[59] The stickiness of PATTERN assessments suggests that the tool does not yet appropriately account for personal growth — or program participation — during incarceration.[60]

## Revisions to PATTERN (April 2022–Present)

In April 2022 the DOJ finally announced a plan to address some of these issues. The attorney general approved a new version of PATTERN that attempts to fix the problems discussed above, and the BOP announced that it would use the new tool to rescore all individuals in its custody.[61]

Alongside this revision, the DOJ announced that it would revise the cut points for evaluating general recidivism risk to increase the percentage of people who qualify

TABLE 1

## Share of Men Classified as Minimum or Low Risk

|  | TOTAL | WHITE | BLACK | HISPANIC | NATIVE AMERICAN | ASIAN |
|---|---|---|---|---|---|---|
| Original cut points | 44.0% | 55.7% | 31.7% | 51.0% | 21.7% | 70.0% |
| Revised cut points | 55.2% | 65.2% | 43.1% | 64.4% | 33.8% | 78.9% |

**Source:** U.S. Department of Justice, *First Step Act Annual Report*, 15–16.

for lower risk tiers. Under the new cut points, 55 percent of the BOP's male population and 83 percent of its female population are projected to fall into the minimum- and low-risk categories under the general tool — up from 44 and 78 percent, respectively. Cut points for determining violent recidivism risk remain unchanged.[62]

This change was specifically adopted to "help mitigate the effects of various racial and ethnic disparities associated with previous risk groupings" — that is, to reduce the tool's racial bias — and will indeed result in more Black and Hispanic people being categorized as minimum or low risk, as shown in table 1.[63] However, the changes will not correct PATTERN's tendency to overpredict the recidivism risk of nonwhite people, as the DOJ itself conceded.[64]

Nor does this revision really address PATTERN's overly conservative risk profile, because it leaves the cut points for evaluating risk of violent recidivism unchanged. As shown in table 2, those cut points erect a high bar for inclusion in the lower risk categories. As currently drafted, fully 80 percent of people classified as a medium risk of recidivism would go on to have no rearrest for a violent offense, to say nothing of reconviction or re-incarceration. And recall that risk assessment outcomes do not lead to immediate release; they instead determine "who is given more robust incentives to engage in rehabilitative

TABLE 2

## Predicted Likelihood of No Post-Release Arrest for a Violent Crime (Male)

| PATTERN RISK CATEGORY | PREDICTED LIKELIHOOD |
|---|---|
| Minimum | 98.6% |
| Low | 90.8% |
| Medium | 79.8% |
| High | 63.9% |

**Source:** U.S. Department of Justice, *First Step Act Annual Report*, 13.

programming and who might earn a change in the type of prerelease custody."[65]

Changes to the general tool's cut points will likely allow people to earn ETCs faster under the provision granting additional ETCs to people with low PATTERN scores.[66] But they may have limited impact on the ETC system's broader functioning, as a high violent score will continue to override a low general score when determining someone's eligibility to apply ETCs to prerelease custody or supervised release.[67] This limited impact also means racial disparities in access to prerelease custody will persist.

Taken together, the April 2022 revisions fall short of addressing every problem with PATTERN and the First Step Act's use of risk assessment tools generally. But these remedial efforts represent progress, as does the greater level of transparency in the DOJ's and NIJ's more recent reports.[68] Furthermore, the DOJ's April report pledged to "consider all legally permissible options for reducing the differential prediction based on race and ethnicity," including potentially revisiting PATTERN's focus on rearrest risk — an important, if overdue, break with the previous administration's policy.[69]

### Delayed Criminogenic Needs Tool

In March 2022 the DOJ finally released a report on the last component of the act's prison reforms: its assessment tool designed to identify and address each "prisoner's specific criminogenic needs."[70] The tool, SPARC-13, is intended to complement PATTERN by directing people in prison toward programming that meets their needs.

While it is too early to evaluate SPARC-13's implementation, several details from the DOJ's initial report stand out. For one, BOP staff report low levels of familiarity with the needs assessment system and how to administer it.[71] The tool also appears to rely heavily on self-reporting by imprisoned people themselves, leading to a very high rate of refusal for some assessment areas. Nearly one-third of those assessed refused to be screened for trauma, for example.[72] The BOP should work to reduce this refusal rate, including by making people aware that by refusing screening they may forgo opportunities to earn time credits.[73]

## Lack of Adequate Prison Programming

For the ETC system to succeed, the BOP must significantly expand the availability of programming and productive activities. That is a heavy lift. Historically the BOP has failed to provide enough programming to satisfy the needs and wants of the people in its custody, even before accounting for the contemplated expansion.[74] Pandemic restrictions significantly hindered what programming was available; many programs were "highly impacted" by the virus, and some shut down entirely.[75] But the IRC warned in 2020 that "even a full return to pre-COVID-19 BOP programming levels will not be sufficient to make available evidence-based recidivism reduction programs and productive activities" for all eligible individuals in BOP custody by 2022, and it identified troubling demographic disparities in program participation among eligible individuals.[76]

The final ETC system offers a partial response to this problem by allowing eligible people to earn credits if their program is interrupted through no fault of their own. But it is unclear whether this rule applies when a person is unable to even start a program. The rule's explanatory text states that "inmates will not be penalized if specifically recommended [programs] are unavailable to them or at full enrollment at their facilities," but the rule itself references only program "interruption."[77] This lack of clarity is concerning, particularly in light of a recent BJS report showing that the programs providing the most hours of credit were, at least through the end of 2021, also the least available.[78] Some reports also indicate that BOP staff are not receiving clear guidance from DOJ leadership on how to implement new policies and regulations, and that programs may not be staffed or resourced to ensure a prompt and faithful rollout — further complicating an already byzantine system.

That said, recent information from the DOJ gives some reason for optimism. The DOJ's latest publication describes a significant increase in the number of approved programs available to people in prison. During FY 2021, BOP staff also "recorded a marked increase in participation" in prison programming and productive activities. Furthermore, the BOP recently posted and filled a wide range of positions related to First Step Act implementation and contracted for evaluations of its programs. Last, the DOJ reported that more than $362 million "in appropriated FSA funding" had been used "to expand reentry programs and their delivery."[79] It is not clear how much of that funding was new, how much was distributed from elsewhere within the DOJ, and how much the BOP may still need to make up for programming shortfalls.[80]

# The Path Forward

For all its successes, the First Step Act continues to fall short of its promise. Yet its problems are fixable. Some solutions can be achieved simply through executive action; others call for congressional intervention, which may be (and certainly should be) achievable on a bipartisan basis.

The Department of Justice is equipped to make immediate policy changes that could drastically expand the reach of the First Step Act's correctional reforms. The following steps would ensure that the department's implementation efforts better align with congressional intent:

- **Prioritize transparency.** Despite long-standing requests from criminal justice reform advocates, among others, the DOJ has not released the data needed to fully assess PATTERN for accuracy and bias. Stakeholders will continue to regard PATTERN with skepticism and distrust until the department releases the information necessary to independently evaluate and validate PATTERN and adopts a practice of timely disclosures about progress and setbacks in its implementation.

- **Revise PATTERN.** Recent revisions to the risk assessment tool show that the DOJ understands the need to rebuild trust in this area of the act's implementation, but much more needs to be done. The DOJ should start by reorienting PATTERN to focus on predicting a different type of recidivism — the risk of reconviction or re-incarceration, rather than rearrest. This change alone would reduce racial disparities in PATTERN's risk predictions. Additionally, the DOJ should revisit its decision to leave unchanged PATTERN's cut points for predicting violent recidivism.

- **Expand prison program offerings.** The list of programs that allow people to earn time credits has until recently been quite short, and it is unclear how much demand remains unmet since recent expansions. The BOP should continue to build out prison programming services and interpret rules expansively to ensure that people can earn credits where programs are inaccessible or booked. Additionally, the BOP should ensure that correctional staff are fully trained to implement new rules being promulgated by the DOJ, and provide transparency on how that training is conducted.

Congress should address structural problems in the First Step Act's design by taking these steps:

- **Broaden eligibility for earned time credits.** The percentage of people in prison eligible for ETCs is far too small: half of those incarcerated by the BOP are ineligible because of their offense of conviction. There is no public safety justification for these exclusions, and Congress should repeal them.

- **Decouple PATTERN from earned time credit eligibility.** The First Step Act's use of PATTERN to determine how much time individuals serve in prison is fundamentally flawed. It is also unusual: most state systems use risk assessments only for more limited purposes.[81] Congress should amend the First Step Act to limit PATTERN's role in its corrections reforms. Specifically, Congress should detach risk classification from ETC eligibility so that all people incarcerated by the BOP are incentivized to participate in programming and productive activities.

- **Increase funding for prison reforms.** Early in its implementation, the act suffered from funding shortfalls, with Congress even failing to appropriate new money for implementation during the law's first year. While recent reports indicate that the BOP's implementation efforts are now on better footing, policymakers should ensure, through oversight and sustained contact with BOP administrators, that the agency has the resources it needs to deploy high-quality prison programming to all people and in all facilities where it is needed.

# Endnotes

**1**  First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194 (2018), https://www.congress.gov/115/plaws/publ391/PLAW-115publ391. pdf [https://perma.cc/9TWB-U5HD].

**2**  See, e.g., United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, 2002, 4–11, https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/drug-topics/200205-rtc-cocaine-sentencing-policy/200205_Cocaine_and_Federal_Sentencing_Policy.pdf [https://perma.cc/36DL-K5NQ] (providing background on the passage and structure of mandatory minimums in the Anti-Drug Abuse Acts of 1986 and 1988).

**3**  FAMM Foundation, *Federal Mandatory Minimums*, Families Against Mandatory Minimums, 2015, 1–16, https://famm.org/wp-content/uploads/Chart-All-Fed-MMs.pdf [https://perma.cc/JW3E-963E] (collecting mandatory minimums by offense, including by drug type and weight).

**4**  James Cullen, "Sentencing Laws and How They Contribute to Mass Incarceration," Brennan Center for Justice, October 5, 2018, https://www.brennancenter.org/our-work/analysis-opinion/sentencing-laws-and-how-they-contribute-mass-incarceration [https://perma.cc/8B98-S3ED]; Ram Subramanian et al., *A Federal Agenda for Criminal Justice Reform*, Brennan Center for Justice, 2020, 19–20, https://www.brennancenter.org/our-work/policy-solutions/federal-agenda-criminal-justice-reform [https://perma.cc/LQ72-DDSZ]; and Paul J. Hofer, "Federal Sentencing After *Booker*," *Crime & Justice* 48 (2019): 171–74, https://www.journals.uchicago.edu/doi/abs/10.1086/701712.

**5**  J. C. Watts Jr. et al., *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections*, Urban Institute, 2016, vii, https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf [https://perma.cc/U8QV-79T2].

**6**  Watts et al., *Transforming Prisons, Restoring Lives*, 10.

**7**  28 U.S.C. § 3582(c)(1)(A). For the difficulty of securing compassionate release before the First Step Act's passage, see United States v. Brooker, 976 F.3d 228, 231–32 (2d Cir. 2020); United States v. McCoy, 981 F. 3d 271, 275–76 (4th Cir. 2020); United States v. McGee, 992 F.3d 1035, 1041–42 (10th Cir. 2021); United States v. Maumau, 993 F.3d 821, 830 (10th Cir. 2021) (discussing the history and under-use of compassionate release), *cert. denied*, 142 S. Ct. 583 (2021); U.S. Department of Justice, Office of the Inspector General, *The Federal Bureau of Prisons' Compassionate Release Program*, 2013, 1, https://www.oversight.gov/sites/default/files/oig-reports/e1306.pdf [https://perma.cc/E5JD-9U5C]; and Christie Thompson, "Old, Sick and Dying in Shackles," *Marshall Project*, March 7, 2018, https://www.themarshallproject.org/2018/03/07/old-sick-and-dying-in-shackles [https://perma.cc/T49J-JBR5].

**8**  For background on this credit system — which was expanded by the First Step Act to 54 days per year, with the difference in credits awarded retroactively — see Good Conduct Time Credit Under the First Step Act, 84 Fed. Reg. 72,274, 72,274–76 (December 31, 2019) (codified at 28 C.F.R. § 523), https://www.federalregister.gov/documents/2019/12/31/2019-27976/good-conduct-time-credit-under-the-first-step-act [https://perma.cc/E4LD-4Y6D]. For the credit provision as it currently exists, see 18 U.S.C. § 3624(b).

**9**  Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 (2010). See also Terry v. United States, 593 U.S. __, 141 S. Ct. 1858, 1861 (2021) (reviewing the history of cocaine sentencing laws).

**10**  First Step Act of 2018 § 404, 132 Stat. 5194, 5222 (2018).

**11**  First Step Act of 2018 § 603(b).

**12**  United States Sentencing Commission, *First Step Act of 2018 Resentencing Provisions Retroactivity Data Report*, 2021, 5, table 2

and n.1, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/20210519-First-Step-Act-Retro.pdf [https://perma.cc/W4B9-FWM5].

**13**  United States Sentencing Commission, *First Step Act Resentencing Provisions Retroactivity Data Report,* 9, table 6. Note that due to data limitations, this analysis was based on a smaller sample — roughly 2,500 of the 3,700 cases the commission was aware of in total.

**14**  Federal Bureau of Prisons, "First Step Act: FSA Numbers," accessed July 27, 2022, https://www.bop.gov/inmates/fsa/ [https://perma.cc/BV33-T8YE].

**15**  Julie Zibulsky and Christine Kitchens, *The First Step Act of 2018: One Year of Implementation*, United States Sentencing Commission, 2021, 19–22, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [https://perma.cc/VK52-6JYH].

**16**  See First Step Act of 2018 § 101(a) (codified at 18 U.S.C. §§ 3632(d), 3633, 3635(3)).

**17**  First Step Act of 2018 § 101(a) (codified at 18 U.S.C. § 3632(d)(4)(D)).

**18**  See First Step Act of 2018 § 101(a) (codified at 18 U.S.C. § 3632(d)(4)(A) (providing higher amounts of earned time credit for some individuals deemed "minimum" or "low" risk) and (g)(1) (restricting eligibility to transfer to supervised release or prerelease custody to individuals in minimum- or low-risk categories, absent warden approval under specified circumstances).

**19**  See First Step Act of 2018 § 101(a) (codified at 18 U.S.C. §§ 3621(h)(4) & (6) (requiring the attorney general to "provide all prisoners with the opportunity to actively participate in evidence-based recidivism reduction programs, according to their specific criminogenic needs, throughout their entire term of incarceration").

**20**  See, e.g., memorandum from Inspector General Michael E. Horowitz to Michael Carvajal, director, BOP, "Management Advisory Memorandum 22-007: Impact of the Failure to Conduct Formal Policy Negotiations on the Federal Bureau of Prisons' Implementation of the FIRST STEP Act and Closure of Office of the Inspector General Recommendations," November 15, 2021, https://oig.justice.gov/reports/management-advisory-memorandum-impact-failure-conduct-formal-policy-negotiations-federal [https://perma.cc/YB5T-R6EW].

**21**  FSA Time Credits, 85 Fed. Reg. 75,268 (proposed November 25, 2020) (superseded), https://www.federalregister.gov/documents/2020/11/25/2020-25597/fsa-time-credits [https://perma.cc/P9K4-X47R]. Under the proposed rule, an imprisoned person would have needed to complete eight hours of programming to accrue a "day" of "participation" in programming. FSA Time Credits, 85 Fed. Reg. at 75,269. That guidance would have interacted with the BOP's sparse programmatic offerings — which in some cases meet for just a few hours a day — to make it very difficult to earn any meaningful amount of ETCs. See James M. Byrne, "The Effectiveness of Prison Programming: A Review of the Research Literature Examining the Impact of Federal, State, and Local Inmate Programming on Post-Release Recidivism," *Federal Probation* 84, no. 1 (2020): 20, https://www.uscourts.gov/sites/default/files/84_1_1_0.pdf [https://perma.cc/5S4B-B7EB]. According to one estimate, "even if a person took every approved program the BOP offered . . . she would accrue only 8,143 hours of program time — over 600 hours short of what is necessary to obtain a year's worth of time credits." Federal Public and Community Defenders Legislative Committee letter to Federal Bureau of Prisons, Office of General Counsel, re: Comments on Docket No. BOP-1176P, RIN 1120-AB76, "FSA Time Credits," January 22, 2021, 5, https://perma.cc/RL3H-38QV. An Urban Institute analysis found that "only 15 programs" in the BOP catalog "would provide credits of more

than three weeks." Julie Samuels and Emily Tiry, *Implementation of the First Step Act: The Risk and Needs Assessment System*, Urban Institute, 2021, 4, 17, https://www.urban.org/research/publication/implementation-first-step-act-risk-and-needs-assessment-system [https://perma.cc/ZK43-WVWZ].

**22**   In the final rule, BOP acknowledged that certain aspects of the original proposal had been "inconsistent with the goals of the FSA" and corrected many of the concerns raised. The final rule aimed to create a "simpler . . . time credits program . . . that will more fully encourage and reward participation in evidence-based recidivism reduction programs and productive activities." The final rule awards 10 days of ETCs for each 30-day period in which an eligible person participates in recommended programming, with an additional 5 days awarded to people who meet certain risk assessment criteria. FSA Time Credits, 87 Fed. Reg. 2705, 2706, 2708 (January 19, 2022) (to be codified at 28 C.F.R. pts. 523 & 541), https://www.federalregister.gov/documents/2022/01/19/2022-00918/fsa-time-credits [https://perma.cc/95RC-DPHJ]. U.S. Department of Justice, "Justice Department Announces New Rule Implementing Federal Time Credits Program Established by the First Step Act," January 13, 2022, https://www.justice.gov/opa/pr/justice-department-announces-new-rule-implementing-federal-time-credits-program-established [https://perma.cc/GK7C-FSLE] (noting promulgation of revised regulation and retroactive application); and *Oversight of the Bureau of Prisons, Hearing Before the H. Comm. on the Judiciary,* 117th Cong. (2022) (statement of Michael D. Carvajal, director, Federal Bureau of Prisons), 4, https://docs.house.gov/meetings/JU/JU08/20220203/114370/HHRG-117-JU08-Wstate-CarvajalM-20220203.pdf [https://perma.cc/TD7U-9Z2C].

**23**   U.S. Department of Justice, *First Step Act Annual Report, April 2022*, 2022, 28–29, https://www.ojp.gov/library/publications/first-step-act-annual-report-april-2022 [https://perma.cc/A49Q-8LHN].

**24**   FSA Time Credits (2022), 87 Fed. Reg. at 2706, 2708.

**25**   FSA Time Credits (2022), 87 Fed. Reg. at 2706–08 (implementing rule); 18 U.S.C. § 3632(d)(4) (describing credit eligibility); and 18 U.S.C. § 3624(g) (listing rules for usage of credits).

**26**   First Step Act of 2018 § 101(a) (codified at 18 U.S.C. § 3632(d)(4)(D)).

**27**   U.S. Department of Justice, *First Step Act Annual Report*, 28.

**28**   James M. Byrne et al., *Report of the Independent Review Committee Report Pursuant to the Requirements of Title I Section 107(g) of the First Step Act (FSA) of 2018 (P.L. 115-391)*, United States Senate Committee on the Judiciary, 2020, 2, https://firststepact-irc.org/wp-content/uploads/2020/12/IRC-FSA-Title-I-Section-107g-Report-12-21-20.pdf [https://perma.cc/3SGR-QZTP].

**29**   Erik Ortiz, "Thousands of Federal Inmates Still Await Early Release Under Trump-Era First Step Act," NBC News, July 3, 2022, https://www.nbcnews.com/news/us-news/thousands-federal-inmates-still-await-early-release-trump-era-first-st-rcna35162 [https://perma.cc/Q86A-8M8W].

**30**   See First Step Act of 2018, § 101(a) (codified at 18 U.S.C. § 3632(d)(4)(A)) (providing higher amounts of earned time credit for some individuals deemed "minimum" or "low" risk) and (g)(1) (restricting eligibility to transfer to supervised release or prerelease custody to individuals in minimum- or low-risk categories, absent warden approval under specified circumstances).

**31**   See, e.g., letter from David Patton, co-chair, Federal Public and Community Defenders Legislative Committee, to David B. Muhlhausen, director, National Institute of Justice, re: DOJ First Step Act Listening Session on PATTERN, September 13, 2019 (available as Exhibit A to *The Federal Bureau of Prisons and Implementation of the First Step Act, Hearing Before the H. Judiciary Comm. Subcomm. on Crime, Terrorism, and Homeland Security*, 116th Cong. (2019) (statement of David E. Patton), 15, https://www.congress.gov/116/meeting/house/110089/witnesses/HHRG-116-JU08-Wstate-PattonD-20191017.pdf [https://perma.cc/CYX2-6YMR]).

**32**   See U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System*, 2019, https://nij.ojp.gov/first-step-act/the-first-step-act-of-2018-risk-and-needs-assessment-system.pdf [https://perma.cc/EC6L-5NRL]. For revisions and administration support for further change, see "Revisions to PATTERN (April 2022–Present)" in this report.

**33**   Pamela M. Casey, Jennifer K. Elek, and Roger K. Warren, *Offender Risk & Needs Assessment Instruments: A Primer for Courts*, National Center for State Courts, 2014, 15, 20–22, https://www.ncsc.org/__data/assets/pdf_file/0018/26226/bja-rna-final-report_combined-files-8-22-14.pdf [https://perma.cc/7R5V-VXEX].

**34**   See letter from David E. Patton, co-chair, Federal Public and Community Defenders Legislative Committee, to Senator Richard Durbin, re: CORRECTIONS Act (S. 467), February 5, 2015, 8 (on file with the authors).

**35**   Watts et al., *Transforming Prisons, Restoring Lives*, 33–34; and Julia Angwin and Jeff Larson, "Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say," ProPublica, December 30, 2016, https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say [https://perma.cc/NSS9-684G].

**36**   See letter from Ames Grawert, senior counsel, Brennan Center for Justice, to David B. Muhlhausen, director, National Institute of Justice, re: "Public Comment on 'PATTERN,' the First Step Act's Risk and Needs Assessment Tool," September 3, 2019, 4–5, https://www.brennancenter.org/our-work/research-reports/brennan-centers-public-comment-first-step-acts-risk-and-needs-assessment [https://perma.cc/73CL-YXZC].

**37**   Jessica M. Eaglin, "Constructing Recidivism Risk," *Emory Law Journal* 67 (2017): 72, 94–99, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3647&context=facpub [https://perma.cc/6Q2X-YKXF].

**38**   Federal Bureau of Prisons, "New FSA Resources Available," October 26, 2020, https://www.bop.gov/resources/20201026_fsa_update.jsp [https://perma.cc/NNE7-NWFA].

**39**   National Institute of Justice, *2020 Review and Revalidation of the First Step Act Risk Assessment Tool*, 2021, 14, 17–19 and table 2.3, https://www.ojp.gov/pdffiles1/nij/256084.pdf [https://perma.cc/P55N-SKRZ].

**40**   While "general" and "violent" recidivism are technically different categories, both focus squarely on arrest risk. No conviction is necessary to qualify as a recidivating event in either case, and in fact the arrest need not even withstand the scrutiny of a grand jury. U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System — Update*, 2020, 12–14, https://nij.ojp.gov/first-step-act/the-first-step-act-of-2018-risk-and-needs-assessment-system.pdf [https://perma.cc/BV9D-KL5B].

**41**   U.S. Department of Justice, *First Step Act Annual Report,* 13–14.

**42**   Carrie Johnson, "Justice Department Works to Correct Bias in Deciding Who's Released from Prison," NPR, April 19, 2022, https://www.npr.org/2022/04/19/1093538706/justice-department-works-to-curb-racial-bias-in-deciding-whos-released-from-pris [https://perma.cc/QX4F-UY65]; and U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System*, 2019, https://nij.ojp.gov/first-step-act/the-first-step-act-of-2018-risk-and-needs-assessment-system.pdf [https://perma.cc/EC6L-5NRL].

**43**   U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System — Update*; U.S. Department of Justice, *First Step Act Implementation Fiscal Year 2020 90-Day Report*, 2020, https://www.ojp.gov/pdffiles1/nij/254799.pdf [https://perma.cc/NF77-FV4E]; U.S. Department of Justice, *The Attorney General's First Step Act Section 3634 Annual Report*, 2020, https://www.ojp.gov/Attorney-Generals-First-Step-Act-Section-3634-Annual-Report-December-2020 [https://perma.cc/6BAN-AVMV]; National Institute of Justice, *2020 Review and Revalidation*; and National Institute of Justice, *2021 Review and Revalidation of the First Step Act Risk*

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**44** National Institute of Justice, *2020 Review and Revalidation*, 7.

**45** National Institute of Justice, *2021 Review and Revalidation*, 7–8.

**46** Ian MacDougall, "Bill Barr Promised to Release Prisoners Threatened by Coronavirus — Even as the Feds Secretly Made It Harder for Them to Get Out," ProPublica, May 26, 2020, https://www. propublica.org/article/bill-barr-promised-to-release-prisoners-threatened-by-coronavirus-even-as-the-feds-secretly-made-it-harder-for-them-to-get-out [https://perma.cc/Y2V5-SUBE].

**47** E. Ann Carson, *Federal Prisoner Statistics Collected Under the First Step Act, 2021*, U.S. Department of Justice, Bureau of Justice Statistics, 2021, 16, table 10, https://bjs.ojp.gov/library/publications/ federal-prisoner-statistics-collected-under-first-step-act-2021 [https://perma.cc/3YFZ-8GW2].

**48** National Institute of Justice, *2021 Review and Revalidation*, 40.

**49** Grawert, "Public Comment on 'PATTERN,' " 3–4.

**50** See Grawert, "Public Comment on 'PATTERN,' " 2–4 (arguing that defining recidivism based on rearrest incorporates racial disparities in policing); and U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System — Update*, 13–14 (considering but rejecting a change to narrower definition of recidivism).

**51** Byrne et al., *Report of the Independent Review Committee*, 3.

**52** The DOJ also argued that rearrest is the definition of recidivism "most widely used in the federal system," and that therefore retaining it for PATTERN "would make comparisons across risk assessment and criminal justice systems easier." U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System — Update*, 2020, 14.

**53** Samuels and Tiry, *Implementation of the First Step Act*, 9; and Amy Cyphert, "Reprogramming Recidivism: The First Step Act and Algorithmic Prediction of Risk," *Seton Hall Law Review* 51, no. 2 (2020): 331–381, 351–353, https://scholarship.shu.edu/cgi/ viewcontent.cgi?article=1773&context=shlr [https://perma.cc/ BB26-YW2C].

**54** Michael Tonry, "Legal and Ethical Issues in the Prediction of Recidivism," *Federal Sentencing Reporter* 26, no. 3 (2014): 167–176, 167, https://scholarship.law.umn.edu/cgi/viewcontent. cgi?article=1535&context=faculty_articles [https://perma.cc/ R4KX-SKND].

**55** U.S. Department of Justice, *First Step Act Implementation Fiscal Year 2020*, 2. For criticisms, see Samuels and Tiry, *Implementation of the First Step Act*, 9.

**56** U.S. Department of Justice, *The Attorney General's First Step Act Section 3634 Annual Report*, 24.

**57** Emily Tiry and Julie Samuels, "Three Ways to Increase the Impact of the First Step Act's Earned Time Credits," Urban Institute, April 30, 2021, https://www.urban.org/urban-wire/three-ways-increase-impact-first-step-acts-earned-time-credits [https://perma. cc/7LES-WELQ].

**58** National Institute of Justice, *2020 Review and Revalidation*, 14.

**59** National Institute of Justice, *2021 Review and Revalidation*, 28–29. See also Department of Justice, *First Step Act Annual Report*, 10.

**60** For more on this subject, see, e.g., Grawert, "Public Comment on 'PATTERN,' " 5–7.

**61** U.S. Department of Justice, *First Step Act Annual Report*, 5, 9–12.

**62** U.S. Department of Justice, *First Step Act Annual Report,* 12–18.

**63** U.S. Department of Justice, *First Step Act Annual Report,* 14.

**64** U.S. Department of Justice, *First Step Act Annual Report,* 12, 11 ("Thus, transitioning to PATTERN 1.3 will neither exacerbate nor solve these racial bias issues."), and 20 (noting that changes to cut points "will not directly correct the racial differential prediction rates found to be associated with the PATTERN tool").

**65** *The First Step Act, the Pandemic, and Compassionate Release: What Are the Next Steps for the Federal Bureau of Prisons?, Hearing Before the H. Judiciary Comm. Subcomm. on Crime, Terrorism, and Homeland Security*, 117th Cong. (2022) (statement of Melissa Hamilton, professor of law and criminal justice, University of Surrey), 4, https://docs.house.gov/meetings/JU/JU08/20220121/114349/ HHRG-117-JU08-Wstate-HamiltonM-20220121.pdf [https://perma. cc/2Y8F-4TBZ].

**66** Department of Justice, *First Step Act Annual Report*, 20 ("The updated version of the tool and the revised cut points are anticipated to result in expanded opportunities for the earning of time credits under the FSA system, which will in turn incentivize a greater number of inmates to participate in evidence-based recidivism reduction programs and productive activities and reduce their predicted risk of recidivism even further.").

**67** Department of Justice, *First Step Act Annual Report*, 13–14.

**68** National Institute of Justice, *Stakeholder Statements Submitted in Response to NIJ's First Step Act Listening Sessions*, 2019, https:// www.ojp.gov/pdffiles1/nij/253115.pdf [https://perma.cc/25E8-DPDE] (noting stakeholder requests for greater transparency).

**69** Department of Justice, *First Step Act Annual Report*, 11–12.

**70** 18 U.S.C. § 3632(a)(3).

**71** Federal Bureau of Prisons, *First Step Act: Initial Review of the SPARC-13 Needs Assessment System*, U.S. Department of Justice, 2022, 14, https://www.bop.gov/inmates/fsa/docs/bop_fsa_needs_ validation_report_2021.pdf [https://perma.cc/XS45-GDX2].

**72** Federal Bureau of Prisons, *Initial Review of SPARC-13*, 12, table 4.

**73** Federal Bureau of Prisons, *Initial Review of SPARC-13*, 10–13.

**74** See *The Federal Bureau of Prisons and Implementation of the First Step Act* (statement of David E. Patton), 1, 5–7.

**75** U.S. Department of Justice, *First Step Act Annual Report,* 33–35; and Byrne et al., *Report of the Independent Review Committee*, 1.

**76** Byrne et al., *Report of the Independent Review Committee*, 2–3.

**77** FSA Time Credits (2022), 87 Fed. Reg. at 2711.

**78** Carson, *Federal Prisoner Statistics Collected*, 17–20 and table 11. This may have changed with the development of new programs and rollout of the January 2022 ETC rule. See U.S. Department of Justice, *First Step Act Annual Report*, 32–33 ("The passage of the Time Credits rule in January 2022 expanded the services which qualify as PAs.").

**79** Department of Justice, *First Step Act Annual Report,* 32–36, 45–48.

**80** While the First Step Act authorized up to $75 million annually for programming, Congress failed to appropriate that amount for the first year of implementation, forcing the DOJ to move money from elsewhere in its budget. Ames Grawert, "What Is the First Step Act — and What's Happening With It?", Brennan Center for Justice, June 23, 2020, https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it [https://perma. cc/7M3A-E9AU].

**81** See Amy Baron Evans et al., "Federal Defender Analysis of Corrections Act of 2015," *Federal Sentencing Reporter* 28, no. 2 (2015): 151–153, 151 ("The system in the bill is novel and untested. State correctional systems . . . award time credits for participating in programs based on performance and/or disciplinary record, not risk assessment scores.").

**ABOUT THE AUTHORS**

▶ **Ames Grawert** is senior counsel and John L. Neu Justice Counsel in the Brennan Center's Justice Program. He leads quantitative and policy research focused on trends in crime and the collateral costs of mass incarceration. Additionally, he advocates for criminal justice reform at the state and federal levels. Previously Grawert served as an assistant district attorney in the Appeals Bureau of the Nassau County (New York) District Attorney's Office, where he reviewed and litigated claims of actual innocence in addition to appellate work. Before entering public service, he was an associate at Mayer Brown LLP, where he represented people pro bono in post-conviction litigation.

▶ **Patricia L. Richman** is national sentencing resource counsel to the Federal Public and Community Defenders, where she leads legislative work. Previously Richman served as crime counsel to Sen. Dick Durbin on the Senate Judiciary Committee and as an assistant federal public defender in Maryland. Before that, Richman was an associate at Williams & Connolly LLP, a clerk for a federal district court judge in Philadelphia, and a special education teacher in Prince George's County, Maryland.

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