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A Critical Assessment of the First Step Act's Recidivism-Reduction Measures

Raquel Wilson*

ABSTRACT

The First Step Act of 2018 (“FSA”) is the most impactful federal sentencing reform of the past 40 years. While the Act represents a partial resurgence of the rehabilitative model of imprisonment, which had fallen out of favor decades before, it also represents a missed opportunity to fully integrate evidence-based rehabilitation programs for those offenders who pose the greatest risks to public safety.

The public has a strong interest in reducing recidivism, particularly among violent offenders, most of whom will be released from federal prison eventually. The FSA incentivizes participation in evidence-based, recidivism-reducing programs offered by the Bureau of Prisons (“BOP”) by allowing participants to earn additional time credits that reduce their sentence. Yet Congress excluded from its incentive program many violent offenders as well as others convicted of non-violent offenses relating to immigration and drug trafficking. This Article argues that this exclusion was a critical mistake for several reasons: (1) Programming such as cognitive behavioral therapy has been shown to be most effective for offenders who pose the highest risk of recidivism, including violent offenders; (2) Given limited resources in the BOP, incentivizing participation among only non-violent offenders will likely result in less programming for violent offenders; (3) The BOP already exhibits significant shortcomings in its ability to properly calculate release dates, and forcing the BOP to calculate time credits based on a complex list of excluded offenses will only create additional administrative burdens that may result in more inaccuracy in release dates; and (4) In creating a politically-driven list of excluded offenders, Congress missed an opportunity to focus on data-driven reforms to reduce crime and risks to public safety.

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A better approach would be a simpler, more straightforward one that would be easier for the BOP to administer and that would incentivize participation of all people in prison who will be released into local communities. Congress has expert bodies with which it can consult, including the social science arm of the Department of Justice and the United States Sentencing Commission. Allowing expert bodies to make decisions and recommendations can insulate both Congress and the President from the political backlash that sometimes hampers meaningful criminal justice reform. Finally, federal judges can be trusted with release decisions. Judges demonstrated strong adherence to Sentencing Commission guidance when ruling on compassionate release motions once Congress allowed people in prison to file for early release under that statutory provision. Congress should consider creating a second-look provision that would allow federal judges to apply Commission guidance to early release petitions, taking into account successful completion of recidivism-reducing programs.

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INTRODUCTION

A. Overview

The First Step Act of 2018 (“FSA”) brought the most comprehensive reforms to federal sentencing in decades. Not since the Sentencing Reform Act of 1984 have penalties for federal crimes undergone such a dramatic shift. The FSA’s proponents recognized that penalties for some of the most commonly charged federal offenses, specifically drug trafficking and certain related firearms offenses, were longer than necessary.¹ In addition, they recognized the need to incentivize participation by the incarcerated in effective recidivism-reducing programs.² FSA drafters and proponents also paid attention to longstanding issues in the Federal Bureau of Prisons (“BOP”); the FSA directed the BOP to make specific improvements to conditions of confinement.³ The FSA came when criminal justice reform, specifically movements away from very long sentences, had already gained widespread support from the public and public officials.⁴ Arguably, showing leniency to certain offenders through the FSA became politically safe.⁵

However, this Article argues that the FSA also illustrates the shortcomings of relying on legislation by elected officials to make

1. See Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://tinyurl.com/5e95etzk> [<https://perma.cc/HT2N-RTDL>] (“In all, it includes four changes to federal sentencing laws. One would shorten mandatory minimum sentences for some nonviolent drug offenses, including lowering the mandatory ‘three strikes’ penalty from life in prison to 25 years. Another would provide judges greater liberty to use so-called safety valves to go around mandatory minimums in some cases. The bill would also clarify that the so-called stacking mechanism making it a federal crime to possess a firearm while committing another crime, like a drug offense, should apply only to individuals who have previously been convicted.”); Press Release, U.S. Senate Comm. on the Judiciary, Durbin, Grassley Introduce Bipartisan Legislation to Advance the First Step Act’s Goals (Mar. 26, 2021), <http://tinyurl.com/yx8zppdr> [<https://perma.cc/PG5Q-VVWC>].

2. Fandos, *supra* note 1.

3. See NATHAN JAMES, CONG. RSCH. SERV., R45558, THE FIRST STEP ACT OF 2018: AN OVERVIEW 17–18 (Mar. 4, 2019), <https://tinyurl.com/yckmjv4z> [<https://perma.cc/E2X6-SLCS>] (discussing the FSA’s prohibition on the use of restraints on pregnant prisoners, placement of prisoners closer to their families, increasing the availability of home confinement for low-risk prisoners, and increasing the use and transparency of compassionate release).

4. *Overwhelming Bipartisan Majorities Support Bill Giving Judges Discretion to Moderate Prison Sentencing*, PROGRAM FOR PUB. CONSULTATION (Aug. 21, 2018), <https://tinyurl.com/2x4y5uzh> [<https://perma.cc/YL46-JX8A>].

5. See Zak Cheney-Rice, *Tom Cotton’s America is Not a Free America*, N.Y. MAG. INTELLIGENCER (Dec. 13, 2018), <https://tinyurl.com/4p7hahuu> [<https://perma.cc/Y3PG-LJNR>] (discussing widespread bipartisan support for the Act in the Senate).

changes beneficial to the public.⁶ In the FSA, elected officials failed to take the most effective steps they could have taken to promote public safety. Instead, politics prevented more effective reforms. Not only was this a missed opportunity to reduce recidivism among offenders who the public considers most dangerous—thereby improving public safety—but it was also a missed opportunity for the federal government to model for the states⁷ a proven, evidence-based approach to reduce crime.

B. The FSA in the Context of Recent Criminal Justice Reforms

In recent years, federal elected officials at the highest levels have taken substantial action to reduce sentences for federal offenders. With two years remaining in his second term, President Obama launched the clemency initiative of 2014, releasing close to 1,700 federal drug trafficking offenders.⁸ Most recently, President Biden wiped away convictions for simple possession of marijuana for thousands of federal offenders.⁹ However, the most impactful reforms took place at the end of 2018 when President Trump signed the First Step Act into law. The FSA is the most significant federal sentencing reform since the Sentencing Reform Act of 1984.¹⁰ The FSA reduced specific mandatory minimum sentences that apply to repeat drug trafficking

6. See RACHEL BARKOW, PRISONERS OF POLITICS 110 (2019) (“So while our democratic process produces harsh responses to crime, that process does not necessarily reflect the actual preferences of voters on specific policies when they are fully informed.”).

7. This Article does not address state-level criminal justice reforms, although those reforms often suffer from the same maladies as the federal reforms discussed here. See Alexi Jones, *Reforms Without Results: Why States Should Stop Excluding Violent Offenses from Criminal Justice Reforms*, PRISON POL’Y INITIATIVE (2020), <http://tinyurl.com/wh2bbwpn> [<https://perma.cc/CPZ4-QPR5>]. State reforms are also passed by elected officials who are often unwilling to make bold, impactful decisions for fear of losing power and influence if their political opponents are able to use crime statistics, or even one particularly frightening criminal episode, against them. See BARKOW, *supra* note 6, at 110–12 (discussing political pressures on elected officials related to their stances on crime).

8. U.S. SENT’G COMM’N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 13–14 (2017), <https://tinyurl.com/5edtz52n> [<https://perma.cc/M6WW-45JT>].

9. Proclamation No. 10467, 87 Fed. Reg. 61441 (Oct. 6, 2022); see also U.S. SENT’G COMM’N, UPDATED ANALYSIS RELATING TO EXECUTIVE ACTION TO PARDON FEDERAL CONVICTIONS FOR SIMPLE POSSESSION OF MARIJUANA (2022), <https://tinyurl.com/myauuf9s> [<https://perma.cc/ZSR3-KFLW>] (concluding that there were 6,577 U.S. citizen offenders whose only conviction was for marijuana possession offenses).

10. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984). The SRA ended indeterminate sentencing, abolished parole, created new rights to appeal sentences, and created the U.S. Sentencing Commission, charging it with developing mandatory sentencing guidelines for courts to use in all federal felony and Class A misdemeanor offenses. *Id.*

offenders¹¹ and to offenders who used or possessed a firearm in relation to a crime of violence or drug trafficking offense.¹² It made prior reductions to penalties for trafficking crack cocaine retroactive¹³ and it enabled prisoners to file motions for compassionate release, a power which previously rested exclusively with the Federal Bureau of Prisons (“BOP”).¹⁴ Finally, the Act made certain prisoners eligible to earn time credits that reduce their sentence if they participate in recidivism-reducing programs.¹⁵

Each of these actions responded to shifting public opinion about what constitutes a serious crime and what type and length of consequences offenders should face for violating the law. Apart from eliminating the stacking of mandatory minimum penalties for using or possessing a firearm in relation to a crime of violence, the FSA’s reforms mainly target non-violent offenders.¹⁶ This Article argues that excluding offenders convicted of violent and other serious crimes is short-sighted, lacks a sound basis in social science research, unduly complicates the BOP’s administration of justice, and gives some in the criminal justice field the false impression that federal prisons are places of healing and rehabilitation.

Expending time and attention determining which violent offenders to exclude from reduced sentences or from the full benefits of recidivism-reducing programs diverts energy and focus away from developing evidence-based, recidivism-reducing programs for violent offenders. Furthermore, when lawmakers draft exclusionary lists, they tend to expand them over time as the latest crime *de jure* grabs their attention.¹⁷

11. First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194 (2018) (reducing mandatory minimums that apply to repeat drug trafficking offenders).

12. *Id.* § 403 (clarifying that Section 924(c)’s stacking provisions apply only to a violation that occurs after a prior conviction for the same offense has become final).

13. *Id.* § 404 (applying the Fair Sentencing Act retroactively).

14. *Id.* § 603(b) (titled “Increasing the Use and Transparency of Compassionate Release”).

15. *Id.* § 101(d)(4)(A) (titled “Evidence-Based Recidivism Reduction Program Incentives and Productive Activities Rewards – Time Credits”).

16. *Id.* § 402. While in theory, programs could be made available to all offenders even if they do not qualify for additional time off awards, as a practical matter, excluding violent offenders from eligibility for additional time credits will mean less programming for violent offenders. In addition, the expansion of existing safety valve provisions, under which drug trafficking offenders can find relief from mandatory minimum terms of imprisonment, excludes offenders with certain violent prior convictions or with violence as part of the instant offense of conviction.

17. See generally Diana R. Podgorny, *Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the “Aggravated Felony” Concept*, 99 J. CRIM. L. & CRIMINOLOGY 287 (2008). For example, in the immigration context, Title 8 contains a list of aggravated felonies—crimes for which both lawful permanent residents and undocumented noncitizens can be

The FSA's reforms and Congress' ever-changing directives will fall on the federal BOP to administer. The BOP is an agency rife with serious problems affecting the time a person serves and the conditions of their confinement.¹⁸ It will be difficult, if not impossible, for the BOP to administer these new programs accurately and consistently. Because prisons are unattractive workplaces, staff shortages pose a constant challenge,¹⁹ and programming is the first area to suffer.²⁰ Prisoners are left with few options to occupy their time, leading to more incidents of violence and unrest.²¹ By requiring the BOP to allocate scarce programming resources exclusively to eligible offenders—all while managing what is arguably a more dangerous population prevented from reaping the full benefits of rehabilitative programming—Congress has effectively complicated the BOP's ability to effectuate its congressional intent.

This ultimately harms citizens whose safety Congress purports to protect. While federal sentences can be lengthy, most offenders,

deported, removed, or excluded from the United States. *Id.* at 293–94; *see* 8 U.S.C. § 1101(a)(43).

18. *See Improving Management of the Federal Prison System*, U.S. DEP'T OF JUST. OFF. OF INSPECTOR GEN. (2022), <https://tinyurl.com/mrusj2uk> [<https://perma.cc/M64S-7DQ7>] (“For at least the past decade, the Office of the Inspector General (OIG) reports have found weaknesses and failures in the management of BOP operations and have made dozens of recommendations to address them. We also have consistently identified managing the federal prison system as one of the most significant and important management challenges facing the Department.”); *Oversight of the Federal Bureau of Prisons: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 2 (2022), <https://tinyurl.com/5y9j3ydn> [<https://perma.cc/Q2R7-3VPR>] (statement of Shane Fausey, President, Council of Prison Locals) (“Excessive overtime, abusive mandatory double shifts of forced overtime, and augmentation became by-products of insufficient numbers of correctional officers resulting in countless assaults on Bureau employees, inmate homicides, and a deterioration of conditions within our federal prisons and penitentiaries.”).

19. *See Improving Management of the Federal Prison System*, *supra* note 18 (“Since 2015, the OIG has repeatedly identified staffing shortages as one of the most significant challenges facing the BOP.”).

20. LARS TRAUTMAN, ADDRESSING STAFFING CHALLENGES IN FEDERAL PRISONS 7 (2022), <https://tinyurl.com/459zd382> [<https://perma.cc/4V3Y-623B>].

[S]taffing shortages can impair the ability of incarcerated individuals to participate in programming or access other services. If a staffing shortage forces a facility to choose between employees essential to the day-to-day operations of a facility, such as correctional officers, and those with long-term programmatic responsibilities, such as educators, short-term security and operations needs will prevail.

Id. (citation omitted).

21. *See* GRANT DUWE, NAT'L INST. OF JUST., THE USE AND IMPACT OF CORRECTIONAL PROGRAMMING FOR INMATES ON PRE- AND POST-RELEASE OUTCOMES 8, 12 (2017), <https://tinyurl.com/yny8ewtb> [<https://perma.cc/JL3U-EMRQ>] (discussing findings that prison employment, educational, and vocational programming reduce prison misconduct, and cognitive behavioral therapy has an even greater positive impact).

including those convicted of violent crimes, will be released someday.²² One of the key challenges to designing and fully implementing evidence-based reforms is the fact that change rests largely in the hands of elected officials who are often loath to risk short-term pain in the form of losing reelection, even at the expense of long-term gains in the form of increased public safety.²³ Another factor perpetuating this dysfunctional dynamic is the illusion that we are not simply warehousing people whose criminogenic circumstances might be more effectively addressed outside the prison context: Judges and policy-makers—believing that prison programming provides benefits—may find themselves lulled into accepting this illusion at face value.²⁴

This Article argues that the FSA's recidivism-reducing measures fail to incorporate what we know about what works to reduce recidivism, particularly among the worst offenders. To address this problem, Congress should systematize reliance on unelected experts to develop guidelines and standards for prison practices aimed at recidivism. Part I describes the historical background of rehabilitation as a purpose of punishment in the federal system and how our reliance on it in determining sentencing policy has shifted over the years. Part II describes changes in the FSA that purportedly aim to reduce recidivism and predicts the resulting administrative challenges. Part III proposes a better approach focused on improving public safety by harnessing the power and experience of experts and non-partisan administrative bodies. This part includes a discussion about the mechanisms by which Congress could implement these changes.

This Article does not examine state sentencing reforms. State prisons generally lack meaningful programming, even where states

22. See generally SARAH CRAUN & ALYSSA PURDY, U.S. SENT'G COMM'N, LIFE SENTENCES IN FEDERAL PRISON (2022), <https://tinyurl.com/yw2ejhbt> [<https://perma.cc/C2J2-DMH4>]. A quarter of one percent (709 offenders, or 0.2 percent) of federal prisoners are serving life sentences, and nearly half of those are serving time for murder. *Id.* at 2. Another 0.2 percent (799 offenders) are serving de facto life sentences, half of them convicted of sexual abuse. *Id.* at 3. A de facto life sentence is one in which the sentence length exceeds the prisoner's life expectancy. *Id.*

23. See Hannah Meisel, *Facing Election Year Pressure, Divided Ill. Dems Walk Fine Line on Response to Crime, Inflation*, NPR ILL. (Apr. 8, 2022, 8:00 AM), <https://tinyurl.com/3s4ftaf8> [<https://perma.cc/H3NB-XFQU>] (discussing potential perils of adopting a platform that could be seen as soft on crime).

24. See generally U.S. DEP'T OF JUST. FED. BUREAU OF PRISONS, 5070.10, PROGRAM STATEMENT (1997), <https://tinyurl.com/f8nzkne> [<https://tinyurl.com/f8nzkne>] [hereinafter PROGRAM STATEMENT]. It is common practice for federal judges to recommend that offenders be housed in specific prisons and be enrolled in specific programs, as evidenced by the BOP's program statement on responding to such requests. See *id.*

sentence offenders to decades behind bars.²⁵ State politics around violent crime are similar to those on the federal level, so state-level reforms also tend to exclude violent and sex offenders. By creating arbitrary exclusions, federal officials are missing an opportunity to use the expertise of federal research agencies to implement more sensible and practical changes, thus leading the way for the states to accomplish the same public safety goal in their local communities.

C. Overview of Some Reforms Aimed at Non-Violent Federal Offenders

In a recent move signaling leniency toward non-violent drug offenders, President Biden pardoned all prior federal offenders convicted of simple possession of marijuana and urged governors to do the same for state offenders.²⁶ Biden also ordered an administrative study examining whether marijuana should remain a Schedule I substance alongside heroin, LSD, and other dangerous drugs.²⁷ While no federal offenders are incarcerated for simple possession of marijuana alone,²⁸ a pardon means a former offender could regain benefits and rights stripped upon conviction, assuming the marijuana conviction is the only one on their record.

While Biden's move is reform-minded, it can hardly be called bold. The announcement came weeks ahead of midterm elections in which Democrats risked losing their majority in both the House and Senate. According to NORML, an advocacy group pushing for marijuana legalization and expungement of marijuana-related criminal convictions, some form of medical marijuana is legal in 43 American states and territories.²⁹ Twenty-six states, plus the District of Columbia, have either fully or partially decriminalized the possession of marijuana.³⁰ According to the Pew Research Center, 10 percent of Americans believe marijuana should not be legal, and 59 percent believe it should be legal for medical and recreational use.³¹

25. See Leah Wang, *The State Prison Experience: Too Much Drudgery, Not Enough Opportunity*, PRISON POL'Y INITIATIVE (Sept. 2, 2022), <https://tinyurl.com/yp9eu7j4> [<https://perma.cc/3P9S-TF26>].

26. Press Release, White House, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), <https://tinyurl.com/2c7tuwth> [<https://perma.cc/CJA2-3BPG>].

27. *Id.*

28. U.S. SENT'G COMM'N, UPDATED ANALYSIS RELATING TO EXECUTIVE ACTION 1-3 (Oct. 12, 2022), <https://tinyurl.com/bdhkpyrt> [<https://tinyurl.com/bdhkpyrt>].

29. See generally *Medical Marijuana Laws*, NORML, <http://tinyurl.com/mshbsxvy> [<https://perma.cc/P8TF-SHUR>] (last visited Jan 19, 2024).

30. See *id.*

31. Ted Van Green, *Americans Overwhelmingly Say Marijuana Should be Legal for Recreational or Medical Use*, PEW RSCH. CTR. (Nov. 22, 2022), <https://tinyurl.com/3vx3wcde> [<https://perma.cc/NWG9-GSKZ>].

A majority of individuals across every voting-eligible age group believe marijuana should be legal in some form, with the most significant opposition coming from those 75 years and older, among whom only 16 percent believe marijuana should not be legal in any form.³² A great majority of liberal and conservative Americans believe marijuana should be legal.³³

President Obama's clemency initiative tapped into a similar bank of support. During his last two years in office, Obama announced the clemency initiative of 2014, designed to release non-violent offenders from decades-long sentences that would have been shorter had the offenders come before courts at a later time.³⁴ There could be many reasons why a sentence would have been shorter if imposed at the time of the initiative.

First, case law interpreting recidivist statutes changed such that some offenders subject to recidivist enhancements when they were sentenced would no longer be subject to those same mandatory minimum sentences.³⁵ Second, offenders sentenced before the U.S. Supreme Court's decision in *Booker v. United States*³⁶ were sentenced when the federal sentencing guidelines were mandatory. Since *Booker*, courts have enjoyed more freedom to impose sentences outside the range prescribed by the federal sentencing guidelines.³⁷ In most cases, sentences outside the guideline range are below the range rather than above it.³⁸ Finally, four years before Obama's initiative, Congress drastically reduced sentences for crack cocaine offenses in

32. *Id.*

33. *Id.*

34. *Obama Administration Clemency Initiative*, U.S. DEP'T OF JUST. OFF. OF PARDON ATT'Y (Jan. 12, 2021), <https://tinyurl.com/ymeksefa> [<https://perma.cc/79NA-3ZCH>].

35. *See, e.g.*, *United States v. Johnson*, 576 U.S. 591 (2015). In *Johnson*, the Supreme Court held that the so-called residual clause of the statute defining violent felonies for purposes of applying a 15-year mandatory minimum penalty to certain felon in possession of a firearm convictions was unconstitutionally vague. *Id.* at 597. The U.S. Sentencing Commission used the same flawed definition in its guideline for repeat drug trafficking offenders. *See Beckles v. United States*, 580 U.S. 256 (2017).

36. *Booker v. United States*, 543 U.S. 220, 245 (2005) (finding that the Sixth Amendment requires that the U.S. Sentencing Guidelines be considered advisory instead of mandatory).

37. *See, e.g.*, *Peugh v. United States*, 569 U.S. 530, 537 (2013) ("Overall, this system 'requires a court to give respectful consideration to the Guidelines,' but it 'permits the court to tailor the sentence in light of other statutory concerns as well.'" (quoting *Kimbrough v. United States*, 552 U.S. 85, 101 (2007))).

38. *See, e.g.*, *Sentence Imposed Relative to the Guidance Range: Fiscal Year 2022*, U.S. SENT'G COMM'N (2022), <https://tinyurl.com/2vy4t8rx> [<https://perma.cc/U3N7-QTVD>] (showing downward variances from applicable sentencing ranges were present in 29.8 percent of sentences imposed in FY 2022, while upward variances were present in 2.3 percent).

the Fair Sentencing Act, implementing a 1990s-era recommendation from the U.S. Sentencing Commission.³⁹

The criteria in President Obama's initiative did not limit clemency to any particular conviction type, but rather addressed violence in several ways. Among other qualifications, prisoners had to be non-violent, low-level offenders without significant ties to large-scale criminal organizations, gangs, or cartels. Further, they could not have a significant criminal history, had to have demonstrated good conduct in prison, and could not have a history of violence before or during their current term of incarceration.⁴⁰

Ultimately, Obama commuted the sentences of 1,696 offenders⁴¹ out of an estimated 9,000 people in federal prison who met the initiative's criteria.⁴² All clemency recipients were drug trafficking offenders.⁴³ In contrast to the announced criteria, more than 500 of the clemency recipients, nearly one-third, had a weapon involved in their offense, and that weapon was most often a firearm.⁴⁴ More than 200 offenders were also convicted of violating 18 U.S.C. § 924(c), which prohibits using, carrying, or possessing a firearm in relation to or in furtherance of a drug trafficking offense or a crime of violence.⁴⁵ More than 300 recipients received increases under the Sentencing Guidelines for acting as an organizer, leader, manager, or supervisor in the criminal activity that formed the basis of their conviction.⁴⁶

The clemency initiative came under sharp criticism for not going far enough, for the excruciatingly slow pace of processing petitions, and for allowing Department of Justice ("DOJ") officials to have final say on clemency petitions from prisoners they previously

39. See U.S. SENT'G COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007), <https://tinyurl.com/ypsampz4> [<https://perma.cc/54ZE-WHC9>].

40. See *An Analysis of the Implementation of the 2014 Clemency Initiative*, U.S. SENT'G COMM'N 7, 24 (Sept. 2017), <https://tinyurl.com/4xfcf6rs> [<https://perma.cc/E593-WPU9>].

41. See *id.* at 17.

42. See Mark Osler, *Obama's Clemency Problem*, N.Y. TIMES (Apr. 1, 2016), <https://tinyurl.com/56wwr96p> [<https://perma.cc/79XG-7AEK>].

43. *An Analysis of the Implementation of the 2014 Clemency Initiative*, *supra* note 40, at 9 ("A review of the offenders granted clemency under the Initiative shows that at some point the Clemency Initiative was limited to drug trafficking offenders, as all the offenders who received commutations under the Initiative had committed a drug trafficking offense. This focus was not identified when the Initiative was announced and no formal public announcement was made later that the Initiative had been limited to drug trafficking offenders.").

44. See *id.* at 15.

45. See *id.* at 15 fig.5 (showing that all of the clemency recipients were drug trafficking offenders, so their 924(c) convictions were likely associated with a drug trafficking offense rather than a crime of violence).

46. See *id.* at 15.

prosecuted.⁴⁷ Other critics complained that the Obama administration had granted clemency to “violent offenders.”⁴⁸

I. REHABILITATION AS A PURPOSE OF PUNISHMENT

Criminal punishment can take many forms. It can mean imprisonment, or it can mean remaining out of custody but coming under the control of a supervising officer and complying with specified conditions. Punishment can take the form of community service or some other specific action ordered by the court. Irrespective of whether it is meted out in a prison context or in the outside world, punishment has four main purposes⁴⁹ that are articulated in criminal law.

First, retribution (or “just deserts”) is the idea that an offender owes a pound of flesh to society for committing a crime. Retribution can be focused on the harm done to an individual victim, or in victimless crimes, to society writ large. Retribution can also be used to justify a sentence of death.

Second, incapacitation is based on the principle that a person should be physically unable to access the tools of criminality, either because they are imprisoned or are otherwise rendered incapable of committing crimes. Imprisonment is the most common tool used to incapacitate. However, other forms of incapacitation, such as

47. See Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 395 (2017) (“By favoring the view of prosecutors over others involved in criminal justice, the Executive Branch unavoidably favors punishment and a law enforcement model over rehabilitation; retribution and a focus on harm over culpability and redemption; and the status quo over innovation.”); Paul J. Larkin, Jr., *“A Day Late and a Dollar Short” – President Obama’s Clemency Initiative*, 16 GEO. J.L. & PUB. POL’Y 147, 162 (2018) (“Obama also should have remedied the structural defects in the federal clemency system, flaws that make it difficult for clemency applicants to get a fair shake, the principal one being the stranglehold that the Justice Department has on clemency recommendations.”); U.S. DEP’T OF JUST. OFF. OF INSPECTOR GEN., REVIEW OF THE DEPARTMENT’S CLEMENCY INITIATIVE 39–40 (2018), <https://tinyurl.com/ys5rb78m> [perma.cc/SE46-E46K] (noting variation in implementation of the announced eligibility criteria and questioning whether the Department of Justice “treated all petitions consistently over the course of the initiative”).

48. Letter from Sen. Richard Shelby, Chairman, Sen. Subcomm. on Com., Just., Sci. & Related Agencies, to Att’y Gen. Loretta Lynch (Mar. 16, 2016), <https://tinyurl.com/2p8ae6bm> [https://perma.cc/79DN-C3UQ] (expressing concern over sentence commutations for 12 individuals, including “seven convictions of possession of a firearm in furtherance of a drug trafficking crime; four convictions of possession of a firearm by a felon; and two convictions of use of a firearm in furtherance of a drug trafficking offense”).

49. Restitution, or payment to the victim for damages, is a fifth purpose of punishment not described here because the focus of this Article is on incarceration as the punishment.

chemical (and even surgical) castration for sex offenders,⁵⁰ can also be used.

Third, deterrence is the idea that imprisonment deters others (general deterrence) or the offender (specific deterrence) from reengaging in crime once they are released. For deterrence to work, the offender must get caught and be prosecuted in the first instance.

Finally, the concept of rehabilitation suggests that a sentence of imprisonment can build an offender up by teaching them life and work skills and treating substance abuse and mental health problems, thereby reducing the likelihood that they will reoffend.

Federal sentencing incorporates all these purposes,⁵¹ though the types of sentences available are sometimes fewer than in state courts.⁵² Today, more than 90 percent of those sentenced for felony offenses in the federal system are imprisoned.⁵³ Federal sentencing still incorporates rehabilitation as a purpose of punishment, but the way it does so has changed over time.⁵⁴

For much of the 20th century, rehabilitation was considered an essential purpose of incarceration in both federal and state criminal justice systems. Whereas capital and corporal punishment were the most common criminal penalties before the American Revolution (possibly representing both retribution and deterrence purposes), the Quakers rejected the “Puritanical conception” of punishment.⁵⁵ The Quakers’ conception of punishment was confinement in a prison where the convicted could contemplate their misdeeds in solitary confinement and during hard labor, along with religious instruction. While the conditions of confinement were intentionally harsh, hope underpinned its purpose; the Quakers believed people could change.⁵⁶

50. See Edward A. Fitzgerald, *Chemical Castration: MPA Treatment of the Sexual Offender*, 18 AM. J. CRIM. L. 1, 3 (1990); CAL. PENAL CODE § 645(e) (2022) (allowing voluntary permanent surgical castration in lieu of chemical castration); see TEX. OCC. CODE § 501.601 (2021) (describing procedures for surgical castration of inmates convicted of certain offenses).

51. See 18 U.S.C. § 3553(a) (listing factors to be considered in imposing a sentence).

52. See *id.* § 3551 (stating that an individual can be sentenced to probation, a fine, or imprisonment).

53. See *Sentence Type for Federal Offenders: Fiscal Year 2022*, U.S. SENT’G COMM’N (2022), <https://tinyurl.com/np4nhe23> [<https://perma.cc/ZA2P-8GJ8>].

54. See generally Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167 (2017).

55. See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1039 (1991).

56. *Id.*

Shut out from a tumultuous world, and separated from those equally guilty with himself, he can indulge his remorse unseen, and find ample opportunity for reflection and reformation, His daily intercourse is with good men, who, in administering to his necessities, animate his crushed hopes, and pour into his ear the oil of joy and consolation.⁵⁷

While overwrought and likely not reflective of actual prison conditions at the time, the preceding description more than hints at the notion of rehabilitation as a purpose of imprisonment.

Later came a form of incarceration known as the reformatory, which adopted rehabilitation as a goal even more explicitly.⁵⁸ States named their prison administrations “Departments of Corrections,” suggesting that their administrations would correct the perpetrators’ poor behavior before releasing them to the public. Most states refer to their prison administrations as departments of corrections, and several also include rehabilitation in the title.⁵⁹

The federal government embraced rehabilitation from nearly the beginning. The first federal prison, USP Lewisburg, was built in 1932.⁶⁰ Two years later, Congress established Federal Prison Industries, “a correctional program that focuse[d] on helping offenders acquire the work skills necessary to successfully make the transition from prison to law-abiding, contributing members of society.”⁶¹ The BOP rapidly expanded its facilities and incorporated programming in the 1940s. Programming increased in the 1950s and 1960s, consistent with the growing belief that offenders could be rehabilitated in prison, provided they received the proper training.

In the federal system, for most of the 20th century, the parole system also expressed the notion of rehabilitation. While indeterminate sentencing gave judges considerable discretion over what sentence to impose as long as the sentence fell within a predetermined statutory range,⁶² the time a person would spend in prison also depended

57. Harry Elmer Barnes, *Historical Origin of the Prison System in America*, 12 J. CRIM. L. & CRIMINOLOGY 35, 50 (1921).

58. See generally *Williams v. New York*, 337 U.S. 241 (1949).

59. Of the 50 states, 47 use the term “corrections” in the title. See *Where Can I Find a Listing of All the Prisons and Jails in the United States?*, NAT’L INST. OF CORR., <http://tinyurl.com/nrr3uhd3> [<https://perma.cc/NDJ6-6HJA>] (last visited Jan. 20, 2024).

60. *Historical Information*, FED. BUREAU OF PRISONS, <https://tinyurl.com/jkerk7za> (last visited Jan. 20, 2024) (noting that before the Federal Bureau of Prisons formed in the 1930s, federal prisoners were housed in state facilities).

61. *Id.*

62. Newton & Sidhu, *supra* note 54, at 1169.

on when the Parole Commission decided to release them.⁶³ Until the 1970s, the Parole Commission had no clear articulable standards as to when they would parole someone.⁶⁴ However, the general idea was that a person would win release once they were rehabilitated.⁶⁵ By the 1970s, growing skepticism about the Parole Commission's ability to judge whether a person was truly rehabilitated arose. Critics charged that release decisions were arbitrary.⁶⁶ The Commission's decision-making system amounted to a black box, because without written standards, the public lacked any understanding about how sentence length was really determined.⁶⁷

Even as skepticism grew in the 1970s about whether the BOP could rehabilitate individuals in prison, the BOP continued offering rehabilitative programs. Rehabilitation remained an avowed purpose for imprisonment, perhaps because government officials

63. See Stephen G. Breyer, *The Original U.S. Sentencing Guidelines and Suggestions for a Fairer Future*, 46 HOFSTRA L. REV. 799, 800 (2018). The source explains:

It used to be such that a federal judge would appoint her sentence for twenty years and then the Parole Commission would cut it to seven. Aware of this, the judge, then annoyed, would sentence the next defendant to sixty years so it would only be cut to twenty, but that time the Parole Commission fooled her and only cut it to thirty. For whatever it was, it was not straightforward in the federal system.

Id.

64. See Michael E. Smith, *Toward a Just and Effective Sentencing System: Agenda for Legislative Reform*, 91 HARV. L. REV. 896, 897 (1978). The source illustrates:

Designed to reduce subjectivity in the parole-granting process and to help moderate sentencing disparities, these guidelines [now used by the United States Parole Commission] reduce the personal characteristics and prior record of a prisoner to a 'salient factor score' which research shows to have some predictive power regarding parole success.

Id.

65. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993) ("The motivating rationale for the movement toward indeterminacy and parole was the rehabilitation of prisoners. Under the rehabilitative model, parole officials' power to determine a sentence's duration was seen both as a valuable incentive to prison inmates to rehabilitate themselves and as a vehicle to permit 'experts' to determine when sufficient rehabilitation had occurred to warrant release from prison."); see Albert W. Alschuler, *Sentencing Reform and Parole Release Guidelines*, 51 U. COLO. L. REV. 237, 238 (1980) (remarking on the change from rehabilitation as the measure of the offender's release date to more objective and transparent standards).

66. See Stith & Koh, *supra* note 65, at 227 (noting three main critiques of the parole system, including unsuccessful attempts at rehabilitation, uncertainty of release dates, and disparities in sentences that were "at odds with ideals of equality and the rule of law"); see also Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1944-45 (1988).

67. See generally Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013).

recognized the need to promote successful reentry.⁶⁸ Officials recognized that offering educational, vocational, and therapeutic programs in their facilities made it easier to manage prison populations.⁶⁹ Idle hands do the devil's work; even today the BOP aims to keep its residents occupied in order to reduce the rate of incidents requiring disciplinary action.⁷⁰ In addition, the BOP continued aiming programs at achieving offenders' successful reentry into society.

In 1984, Congress passed the Sentencing Reform Act ("SRA"), the most significant change to federal sentencing in decades. By then, even some Quakers had turned against the rehabilitative prison model. In the SRA, Congress expressed skepticism about whether prisons were rehabilitating inmates, and even about whether

68. See Gregory L. Hershberger, *The Development of the Federal Prison System*, 43 FED. PROBATION 13, 21 (1979).

Correctional rehabilitation programs and their increasing sophistication were challenged in the mid-1970's by academicians, researchers and practitioners who pointed out the bankruptcy of results obtained from traditional rehabilitation programming. . . . Accordingly, in 1975 the medical model of corrections in the Federal Bureau of Prisons was de-emphasized. In its place is a balanced philosophy of rehabilitation, retribution, deterrence, and incapacitation. This change in philosophy by the Bureau publicly acknowledged that the prison exists for purposes other than treatment, a recognition long absent from American corrections. Although this change altered the overall philosophy of the Bureau, few substantive changes have been observed in program areas. Programs remain essentially the same as before with the primary difference being that inmate participation is now voluntary.

Id.

69. See PRESIDENT'S COMM'N ON L. ENF'T & ADMIN. JUST., *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 174–76 (1967), <https://tinyurl.com/wbfmn69a> [<https://perma.cc/GL7K-JSEY>]. See also Kevin N. Wright, *Prison Environment and Behavioral Outcomes*, 20 J. OFFENDER REHAB. 93, 102–03, 109 (1993) ("A second policy suggestion emanating from the results is to increase institutional support for self-advancement and self-improvement. . . . Support was found to be important on both an organizational level, prisons with more support had fewer problems, and an individual level, inmates who perceived themselves as getting support experienced fewer adjustment problems.").

70. Researchers continue to analyze the extent to which prison programing may reduce misconduct in prison. See generally DUWE, *supra* note 21 (reviewing the available evidence on whether participation in various programs reduces incidents of prison misconduct and post-release recidivism); FED. BUREAU OF PRISONS, *DIRECTORY OF NATIONAL PROGRAMS* (2017), <https://tinyurl.com/597682tm> [<https://perma.cc/62WN-6ZTW>] (listing available programs and empirical support for them, including whether they have been shown to facilitate institutional adjustment and reduce incidents of misconduct).

rehabilitation should be a goal of punishment at all.⁷¹ Among other things, the SRA abolished parole in the federal system.⁷² That meant greater transparency and certainty in sentencing. The sentence the judge pronounced in open court would be the sentence the offender served, minus a modest amount of time off for good behavior up to a maximum of about 15 percent of the sentence imposed.⁷³ In the end, although the SRA essentially rejected rehabilitation as a purpose of imprisonment, a defendant's need for rehabilitation could still be considered when determining non-custodial aspects of the sentence, such as conditions of supervised release or probation.⁷⁴

In the FSA, Congress did not re-embrace rehabilitation as a purpose of imprisonment, but it did increase the incentives to participate in evidence-based programming. Program participants can now receive additional time off their sentence in exchange for their

71. See Vitiello, *supra* note 55, at 1015. The source provides:

For example, Senator Kennedy wrote in 1978 that “[s]entencing in America today under a scheme dominated by a rehabilitative philosophy is a national scandal. Every day our system of sentencing breeds massive injustice.” Kennedy’s statement echoed the strong indictment found in the radical Quaker document *Struggle for Justice*. Despite the Quakers’ early role in establishing the rehabilitative model in America, the authors wrote that “[a]fter more than a century of persistent failure, this reformist prescription is bankrupt.”

Id. (footnotes omitted) (first quoting Edward M. Kennedy, *Introduction to Symposium on Sentencing, Part I*, 7 HOFSTRA L. REV. 1, 1 (1978); and then quoting STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 8 (1971)).

72. See 18 U.S.C. §§ 3551(b), 3559, 3581–83 (describing types of sentences that can be imposed on an individual and limiting avenues for modifying a sentence once imposed); *Barber v. Thomas*, 560 U.S. 474, 482 (2010) (discussing the replacement of parole with determinate sentencing).

73. See 18 U.S.C. § 3624(b) (setting a maximum good-time-off credit of 54 days for each year of imprisonment).

74. See, e.g., *Tapia v. United States*, 564 U.S. 319, 334–35 (2011) (holding that a court may not lengthen a term of incarceration in order to promote rehabilitation). In spite of the SRA’s rejection of the rehabilitative model and the Supreme Court’s prohibition, some judges and even defense attorneys still cling to the notion that prison can be rehabilitative. Some federal judges take great care to recommend that the Bureau of prisons assign the defendant to specific programs for the purpose of rehabilitation. See generally PROGRAM STATEMENT, *supra* note 24 (detailing the Bureau of Prisons’ procedures for responding to judicial recommendations regarding whether a defendant should serve their sentence in a specific location and/or participate in specific programs). See also *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 247 (3d Cir. 2005) (“Congress specifically delineated factors to be taken into account by the BOP in determining where an inmate is placed. Worthy of special mention is the recommendation of the sentencing judge. United States District Judges take their sentencing responsibilities very seriously and are familiar with the various BOP institutions and programs. Their recommendations as to the execution of sentences are carefully thought out and are important to them. The significance of this aspect of the sentencing process is highlighted by the acknowledgment of the regional counsel of the BOP at oral argument that the BOP follows judicial recommendations in approximately 85–90 percent of all cases.”).

participation. Adopting an evidence-based practice ensures that programming decisions are based on “approaches demonstrated to be effective through empirical research rather than through anecdote or professional experience alone.”⁷⁵ Evidence-based programming within the BOP is programming that is effective at reducing the risk of recidivism once the BOP releases a person from prison.⁷⁶ In creating these incentives, Congress seems to have realized that safe and productive reentry is necessary and that progress towards it ought to be made in the setting immediately preceding reentry—that is, prison.

Does the new emphasis on in-prison programming represent a resurging view of rehabilitation as a purpose of imprisonment in the prison context? Arguably, yes; this is because people in prison can receive substantial discounts from their sentences when they participate in programs which BOP officials and others believe will cause them to desist from criminal activity upon release. The principal difference between this form of early release and parole is that parole operated under vague standards centering the offender’s release on a parole board’s subjective belief that the offender was sufficiently remorseful to desist from future criminal conduct once set free. In the FSA, Congress purported to rely on evidence demonstrating the effectiveness of recidivism-reducing programs to enable early release based on the accrual of time credits.

II. THE FIRST STEP ACT’S RECIDIVISM-REDUCING MEASURES

A. *Overview of the FSA*

Of the three aforementioned executives—Obama, Trump and Biden—President Trump ushered in the most sweeping changes to federal sentencing. At the end of 2018, Congress passed and Trump signed the FSA into law, which marked the most significant federal sentence reform since 1984. The Act reduced mandatory minimum sentences for most federal drug offenders facing recidivist enhancements. It also clarified that the stacking provisions in 18 U.S.C. § 924(c) prohibiting possession or use of a firearm in relation to drug trafficking offenses or a crimes of violence applies only to true recidivists, not to offenders merely convicted of multiple counts in the same indictment. The statute requires that the mandatory minimum

75. *Evidence-Based Practices (EBP)*, NAT’L INST. OF CORR., <http://tinyurl.com/mr3a5knj> [<https://perma.cc/L2CB-G5CV>] (last visited Jan. 20, 2024).

76. *See Evidence-Based Recidivism Reduction (EBRR) Programs and Productive Activities (PA)*, FED. BUREAU OF PRISONS, <http://tinyurl.com/2k37pbxp> [<https://perma.cc/WEY6-YGYM>] (last visited Jan. 20, 2024).

penalty for a violation be served consecutive to the sentence for the underlying crime of violence or drug trafficking offense. It also requires that the penalties increase five-fold for subsequent violations, from a mandatory consecutive 5 years to a mandatory consecutive 25 years. Before the Act, defendants could face decades in prison if charged with multiple counts for multiple violations in the same indictment.⁷⁷ For example, if a defendant were charged with three counts of violation of 924(c), he or she would face a 5-year term plus two 25-year terms, for a total of 55 years consecutive to the underlying count. After the FSA's enactment, the same defendant would face three 5-year consecutive terms, for a total of 15 years.

B. *The FSA's Recidivism-Reducing Measures*

While many reformers welcomed decreases in mandatory minimums, much of the FSA applies to the federal Bureau of Prisons.⁷⁸ While reductions in mandatory minimums arguably can reduce sentences for “violent” offenders, or at least offenders convicted of possessing firearms while committing certain crimes, when it comes to recidivism-reducing programming, Congress excludes numerous offenders from receiving the full benefit of programming based on the offense of conviction.

The Act requires the BOP to develop a risk/needs assessment tool for prisoners.⁷⁹ It incentivizes prisoners to participate in evidence-based, recidivism-reducing programs by increasing the time credits they receive, resulting in earlier release from prison. Eligible people receive up to 10 additional days off their sentence for every

77. *Former Federal Judge Regrets 55-Year Marijuana Sentence*, ABC NEWS (Feb. 18, 2015, 12:22 PM), <https://tinyurl.com/4un4xxay> [<https://perma.cc/N9AP-576E>]. The case of Weldon Angelos, a 24-year-old sentenced to 55 years in prison after a confidential informant claimed he brought a gun to each of three marijuana sales, galvanized opposition to the law's harsh result, with the judge who sentenced Angelos expressing his regret. *Id.*

78. *See generally* JAMES, *supra* note 3. Aside from requiring the BOP to develop a risk assessment tool and implement recidivism-reducing programming, the First Step Act made changes to conditions of confinement. *Id.* at 4. Reforms include ensuring prisoners are incarcerated within 500 miles of their home in order to facilitate family visitation, ending the practice of shackling women during childbirth, and forbidding solitary confinement for juveniles, among other changes. *Id.* at 17–21.

79. 18 U.S.C. § 3631(a) (requiring the Attorney General to “develop and release publicly on the Department of Justice website a risk and needs assessment system” within 210 days after enactment of the Act). The BOP released the first version of its risk/needs assessment tool, the Prisoner Assessment Tool Targeting Estimated Risk and Needs (“PATTERN”), in July 2019. *See FSA Update*, FED. BUREAU OF PRISONS (Jan. 15, 2020, 5:30 PM), <http://tinyurl.com/26xncxsb> [<https://perma.cc/2FF8-DT2C>]; *see also The First Step Act's Risk Assessment Tool*, URBAN INST. (Apr. 30, 2021), <https://tinyurl.com/u8vbpd69> [<https://perma.cc/92VP-B5RQ>] (demonstrating an interactive version of PATTERN).

30 days of program participation. However, only some prisoners can receive additional time credits intended to incentivize participation. Those convicted of certain crimes cannot receive this benefit, even though the programs are designed to reduce the risk to the public. These crimes “are generally categorized as violent, or involve terrorism, espionage, human trafficking, sex and sexual exploitation, repeat felon in possession of a firearm, or high-level drug offenses.”⁸⁰

The list of statutes in the FSA excluding certain people from receipt of additional time credits is extensive. There are 68 subparagraphs detailing exclusions in the Act. The Act excludes offenders convicted of all kinds of crimes including espionage, treason, assisting an undocumented noncitizen to enter the United States unlawfully, threatening the president, and repeated domestic assault. In addition to the list found in the First Step Act, the Bureau of Prisons uses other criteria to exclude offenders from programming or other reforms ostensibly aimed at reducing recidivism and enhancing public safety.⁸¹

Notably, Congress’ list of disqualifying offenses is far longer than the list of offenses considered violent for the BOP’s risk/needs assessment tool.⁸² The Violent Offense Codes for PATTERN Risk Assessments lists offenses the common person would consider violent, such as the use of explosives, child abuse, assault, slavery, peonage, racketeering, and national security offenses.⁸³ It also includes drug offenses where death or bodily injury occurs. By comparison, Congress included, among other crimes, immigration offenses, failure to register as a sex offender, and all drug trafficking related to fentanyl on its list of offenses disqualifying one from earning time credits for participating in recidivism-reducing programs.⁸⁴

80. *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, <https://tinyurl.com/5e96e2he> [<https://perma.cc/AP78-5SDK>] (last visited Oct. 6, 2023).

81. See LARS TRAUTMAN, RIGHT ON CRIME, ADDRESSING STAFFING CHALLENGES IN FEDERAL PRISON 10 (2022), <http://tinyurl.com/mrydpuvz> [<https://perma.cc/3A5T-PD59>]. Trautman argued:

[The BOP should] approve home confinement for additional low-risk individuals; its current policy restricts this option unnecessarily, such as through a blanket bar on anyone with a prior violent offense on their record—a policy that may appear logical on its face but fails to account for the possibility that such an offense is especially antiquated or minor and the individual involved rehabilitated.

Id. (citations omitted).

82. *Violent Offense Codes for PATTERN Risk Assessment*, BD. OF PRISONS, <https://tinyurl.com/nu6yneym> [<https://perma.cc/44HZ-5Z5A>] (last visited Sept. 29, 2023).

83. See *id.*

84. See First Step Act of 2018, Pub L. No. 115-391, 132 Stat. 5194 (2018) (codified at 18 U.S.C. § 3632(d)(4)(D)) (listing prisoners ineligible for Evidence-Based Reduction Program Incentives and Productive Activities Rewards).

While there is probably widespread agreement among the general public that certain crimes are serious and violent—for example, murder, armed robbery, and assault causing serious bodily injury—the level of harm involved in some of the other listed offenses is far lower. Even if all agreed that helping an undocumented noncitizen previously convicted of a theft to reenter the country was as serious as murder, it would still be surprising to learn that such offenders are *not* permitted to receive programming aimed at reducing the risks of future harm they may pose to society.

Limiting early release and other lenient reforms to non-violent offenders makes great political sense.⁸⁵ No elected official wants the political liability resulting from a violent crime committed by an offender who benefitted from a more lenient sentence or an early release obtained due to a reform that that same elected official previously supported.⁸⁶ Studies of federal offenders released from prison and followed for eight years have shown that non-violent offenders have lower recidivism risks (as measured by rearrest, reconviction, and reincarceration) than violent offenders.⁸⁷ However, excluding so-called violent offenders from programming opportunities can achieve only limited success, and the focus is short-sighted.⁸⁸ Excluding violent offenders will result in limited, if any, programming for them given the realities of scarce resources

85. Andrew D. Leipold, *Is Mass Incarceration Inevitable?*, 56 AM. CRIM. L. REV. 1579, 1599–600 (2019). Leipold states:

Meaningful change also will be hard because our commitment to reducing the size of prisons may not be matched by our willingness to take the political risks needed to make this happen. This is most clearly seen in the treatment of violent crimes. No jurisdiction has yet proposed that the prison population as a whole be reduced in a sweeping, across-the-board manner. For example, no state has proposed that all current sentences be shortened by 10 percent, or that all sentences authorized by statute be reduced by 5 percent, regardless of the crime of conviction. Instead, the dominant prison reduction efforts have focused on those convicted of non-violent crimes.

Id.

86. Even absent such an unfortunate event, politicians still weaponize sentencing reform. Mehmet Oz, who ran as a Republican for senate in Pennsylvania, falsely accused his Democratic opponent of “wanting to release one-third of dangerous criminals back into our communities.” See Tom Kertscher, *In Pennsylvania Senate Race, Mehmet Oz Distorts John Fetterman’s Stance on Releasing Prison Inmates*, POLITIFACT (July 21, 2022), <https://tinyurl.com/3xwfpbtbu> [<https://perma.cc/NVD8-UURL>].

87. See, e.g., U.S. SENT’G COMM’N, *RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW* 15–17 (2016), <http://tinyurl.com/msk2hxx7> [<https://perma.cc/8WCV-EPPP>].

88. See, e.g., Nana A Landenberger & Mark Lipsey, *The Positive Effects of Cognitive-Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective Treatment*, 1 J. EXPERIMENTAL CRIMINOLOGY 451, 471 (2005). The article notes:

and competing interests within the BOP.⁸⁹ It will also result in less research about effective alternatives that reduce violent offenders' recidivism risk. When applied within the prison context, these limitations create additional stressors for staff as they struggle to manage incarcerated people of varying security levels and keep the so-called violent offenders gainfully occupied. If evidence-based prison programming reduces recidivism risk, programming should focus on the offenders who pose the greatest risk of reoffending frequently and in the ways most harmful to society.

The additional time-credit system at least gives the appearance of objectivity, transparency, and predictability. However, none of these adjectives describe what Congress enacted. The FSA's exclusion criteria are not objective because Congress excluded broad categories of people from eligibility for additional time credits. The exclusions are not based on social science evidence demonstrating that recidivism-reducing programming is less effective for those people. The approach is not transparent because the BOP does not regularly release data about what programs they offer to whom and how effective those programs are. Finally, the approach is not predictable. When Congress makes inclusionary or exclusionary lists in criminal statutes, those lists tend to expand toward harsher outcomes for offenders. The BOP's flawed implementation of the time-credit calculations means program participants cannot count on timely release as a reward. Even before the FSA, people in BOP custody could not count on being released on time. The FSA's numerous and detailed exclusions will only exacerbate that problem.

[T]he effects of CBT [cognitive behavioral therapy] were greater for offenders with higher risk of recidivism than those with lower risk, contrary to any presumption that higher risk offenders might be less amenable to treatment. . . . [T]he best results occur when higher-risk offenders receive more intensive services that target criminogenic needs (e.g., criminal thinking patterns) using cognitive behavioral and social learning approaches.

Id.

89. Chronic staffing shortages also hamper access to potentially beneficial programming. For an overview of the BOP's staffing challenges, see TRAUTMAN, *supra* note 20, at 7.

If a staffing shortage forces a facility to choose between employees essential to the day-to-day operations of a facility, such as correctional officers, and those with long-term programmatic responsibilities, such as educators, short-term security and operations needs will prevail. . . . The loss of programming can have significant consequences inside and outside of a facility. Indeed, this served as one of the primary motivations behind the First Step Act's increase in anti-recidivism programs—initiatives whose successful implementation would be placed in jeopardy by any staff shortages.

Id. (citations omitted).

C. *Possible Rationales for Exclusions*

With regard to violent offenders, retribution typically serves as the primary purpose of punishment. When a crime—particularly one committed intentionally—results in serious bodily injury or death, many accept the notion that the offender should pay with an extended loss of liberty. No magic or objective basis exists for determining the exact length of sentence a violent offender deserves. A mix of anger towards and fear of the perpetrator can prevent the public from wanting to extend mercy or leniency toward such an offender.

Incapacitation also plays a vital role in sentencing violent offenders. Lacking an understanding of what caused the violence and lacking the ability to prevent it as well, society relies on prisons to incapacitate a person by rendering further commission of crime physically impossible. Society does not know how long offenders should be incapacitated because no one knows with confidence how lengthy a term of incarceration is necessary before they will abide by the law upon release.

Finally, deterrence also serves as a purpose of punishment, regardless of whether punitive sentences successfully deter people or not. Evidence suggests deterrence only occurs when offenders are likely to be caught, which is not true for most crimes.⁹⁰ Nevertheless, the notion that potential punishment deters would-be offenders from committing violent crimes⁹¹ gives some a false sense of comfort about imposing long sentences on violent offenders.⁹²

For example, we threaten harsh punishment for illegal gun possession under the mistaken belief that this deters would-be criminals.⁹³ In some jurisdictions, billboards proclaim harsh punishment

90. U.S. DEP'T OF JUST., NAT'L INST. OF JUST., *FIVE THINGS ABOUT DETERRENCE* 1 (2016), <http://tinyurl.com/ytancwt5> [<https://perma.cc/LZ2R-3U3Q>] [hereinafter *FIVE THINGS ABOUT DETERRENCE*].

91. See Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 114 (2018) (describing policymakers' attempts to improve public safety using slogans like "getting tough," "sending a message," and "three strikes and you're out").

92. See *FIVE THINGS ABOUT DETERRENCE*, *supra* note 90, at 1. The report provides: Research shows clearly that the chance of being caught is a vastly more effective deterrent than even draconian punishment. . . . [P]rison sentences (particularly long sentences) are unlikely to deter future crime. Prisons actually may have the opposite effect: Inmates learn more effective crime strategies from each other, and time spent in prison may desensitize many to the threat of future imprisonment. . . .

Id.

93. *Id.* ("Laws and policies designed to deter crime by focusing mainly on increasing the severity of punishment are ineffective partly because criminals know little about the sanctions for specific crimes. More severe punishments do not 'chasten' individuals convicted of crimes, and prisons may exacerbate recidivism.").

for weapons offenses.⁹⁴ Project Exile was a program in which the United States DOJ sponsored billboards threatening a five-year mandatory minimum in federal prison for possessing a firearm as part of a drug deal, referring to violations of 18 U.S.C. § 924(c).⁹⁵ However, few defendants facing criminal charges knew about the billboard, and fewer still altered their behavior because of it. Project Exile produced no apparent indicators of success.⁹⁶ Mandatory minimums for drug offenses are well known but often viewed as a mere business risk; these minimums have done little to reduce the number of drug offenders or the availability of illicit drugs.⁹⁷

While incapacitation ostensibly prevents incarcerated offenders from committing crimes, two-thirds of state offenders⁹⁸ and nearly half of federal offenders⁹⁹ re-offend upon release. Not all formerly incarcerated people commit violent crimes, but ordinary citizens would presumably prefer that they commit no crimes. Promoting public safety should be the goal, and to meet that goal, some of the worst offenders—most of whom will be released someday¹⁰⁰—require

94. See Jordan Renfro, ‘Gun Crime = Prison Time’ Billboard Part of District Attorney General’s Public Awareness Campaign, CLARKSVILLE NOW (Mar. 21, 2023, 4:00 PM), <https://tinyurl.com/2x34teu7> [<https://perma.cc/Y9MH-PHYL>]; see also Nicquel Terry, *N.J. Billboard Campaign Aims to Deter Crime*, USA TODAY (Mar. 11, 2014, 7:32 AM), <https://tinyurl.com/9539zpbz> [<https://perma.cc/Q6ZN-Q95T>].

95. The Department described Project Exile as “[a]n extensive public outreach and media campaign to educate citizens about lengthy Federal prison sentences for gun crimes and to maximize deterrence.” See *Project Exile*, U.S. Attorney’s Office – Eastern District of Virginia, OFF. JUV. JUST. & DELINQ. PREVENTION <https://tinyurl.com/3z778msj> [<https://perma.cc/2W98-8CYA>] (last visited Oct. 4, 2023); see generally Tex. Off. of Att’y Gen., *Texas Exile Update: Gun Crime Means Hard Time*, 8 CRIM. L. UPDATE 18 (2001), <https://tinyurl.com/yckrr5zf> [<https://perma.cc/Y6CK-EFMP>].

96. See Carl Bialik, *In The Shadow Of Exile*, FIFTYTHREE, <https://tinyurl.com/54dw98cm> [<https://perma.cc/Z6BK-X25W>] (last visited Jan. 22, 2024) (describing the program and its dubious impact in Rochester, New York).

97. See *Federal Drug Sentencing Laws Bring High Cost, Low Return*, PEW CHARITABLE TRS. (Aug. 27, 2015), <https://tinyurl.com/59sv99tn> [<https://perma.cc/3KV3-H97M>] (discussing the decrease of illicit drug prices and the increase in illegal drug use that has accompanied mandatory minimums for drug trafficking offenses).

98. MATTHEW R. DUROSE & LEONARDO ANTENANGELI, BUREAU OF JUST. STATS., *RECIDIVISM OF PRISONERS RELEASED IN 34 STATES IN 2012: A 5-YEAR FOLLOW-UP PERIOD (2012-2017)*, at 1 (2021), <http://tinyurl.com/3aanb6dv> [<https://perma.cc/R59B-HM3S>].

99. U.S. SENT’G COMM’N, *RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW* 15 (2016), <https://tinyurl.com/2m3pprtv> [<https://perma.cc/9SS8-MNZF>] [hereinafter *RECIDIVISM AMONG FEDERAL OFFENDERS*] (finding that 49.3 percent of the individuals studied were rearrested within eight years of release, 31.7 percent were reconvicted, and 24.6 percent were reincarcerated).

100. U.S. SENT’G COMM’N, *LIFE SENTENCES IN THE FEDERAL SYSTEM* 2, 3 (2022), <http://tinyurl.com/2p8x5sdy> [<https://perma.cc/L5CA-LDG7>] (noting that during fiscal years 2016 through 2021, 0.2 percent of the total federal offender population were sentenced to life imprisonment, and 0.2 percent received de facto life sentences (those exceeding 470 months in the Commission’s analysis)).

programs that successfully reduce the risk they pose to public safety upon release.

Studies vary on whether violent offenders pose a greater risk of recidivism than non-violent offenders. Several studies by the United States Sentencing Commission have shown that federal offenders convicted of a violent offense in federal court or who have a violent offense in their past recidivate at higher rates and do so sooner after release than offenders who were neither convicted of a violent offense nor have a violent offense in their background.¹⁰¹ In contrast, studies by the National Institute of Justice have shown that state offenders convicted of violent offenses have lower recidivism rates than other offenders.¹⁰²

Congress should not exclusively and unvaryingly base the possibility of early release on the risk of recidivism. Congress may have elected to exclude offenders convicted under certain statutes because it finds giving such offenders time-off incentives repugnant given the nature of their offenses. In other words, for some offenders, other purposes of punishment beyond rehabilitation may take precedence. Incapacitation may become especially important because of the motivation for the crime or the level of sophistication involved. Retribution and specific or general deterrence may take precedence because the nature of the crime involves threats to America's security and a high level of planning.

The FSA excludes those convicted of crimes such as gathering or delivering defense information to aid a foreign government,¹⁰³ genocide,¹⁰⁴ assassinating, kidnapping, or assaulting the president or

101. See U.S. SENT'G COMM'N, *RECIDIVISM OF VIOLENT OFFENDERS RELEASED IN 2010*, at 20 (2022), <http://tinyurl.com/4jbrcjxu> [<https://perma.cc/3HSJ-2Y48>]; see also U.S. SENT'G COMM'N, *RECIDIVISM OF FEDERAL FIREARMS OFFENDERS RELEASED IN 2010*, at 23 (2021), <https://tinyurl.com/yd3c6jzr> [<https://perma.cc/VYZ9-Z58Y>].

102. See generally MARIEL ALPER ET AL., U.S. DEP'T OF JUST., *2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014)* (2018), <https://tinyurl.com/3pw67zcf> [<https://perma.cc/7NBX-CU8X>]. The report notes:

During the first year following release, the percentage of prisoners released for a property offense who were arrested for any type of offense (including violent, property, drug, or public order offenses) was higher than the percentage of prisoners released for a drug or violent offense. This general pattern was maintained across the 9-year follow-up period.

Id. at 9. Further, although “[p]risoners released for a violent offense were less likely to have been arrested for any type of crime than prisoners released for a property (88%) or drug (84%) offense,” they were “more likely to have been arrested for a violent offense.” *Id.* at 11.

103. 18 U.S.C. § 794.

104. *Id.* § 1091.

presidential staff;¹⁰⁵ torture;¹⁰⁶ and treason.¹⁰⁷ For offenses related to terrorism, the offender's risk of future recidivism may be immaterial because the offense itself is so destructive or repugnant. Alternatively, one may harbor reasonable doubts about whether standard recidivism-reduction programs can effectively treat these offenders. Turning them away from crime would require re-education and reprogramming to reverse firmly held anti-social and anti-American beliefs. It is hard to imagine Dzhokhar Tsarnaev, the Boston marathon bomber,¹⁰⁸ developing remorse for his crimes because of his participation in a BOP jobs training program.

The FSA may also exclude certain offenses for reasons other than recidivism risk or skepticism about the effectiveness of recidivism-reduction methods. The nature of a crime itself may be such that the common person would consider it to be very serious. Awarding time-off to individuals convicted of such crimes for their participation in a recidivism-reducing program—even an effective program—would not be politically popular. Offenses in this category might include assault with intent to murder a spouse or intimate dating partner,¹⁰⁹ retaliating against a federal official by injuring a family member,¹¹⁰ or the sexual exploitation of children.¹¹¹

D. Non-Violent Crime Exclusions

Other exclusions are less easily justified if the true goal is to enhance public safety by making recidivism-reducing programs available to those who most need them. For starters, there is an exclusion for individuals convicted of committing certain immigration-related crimes.¹¹² Lawmakers may justify excluding persons convicted of bringing a noncitizen into the United States for an immoral purpose, such as prostitution, because the average voter would likely view the early release of such persons unfavorably. However, the rationale for

105. *Id.* § 1751.

106. *Id.* § 2340A.

107. *Id.* § 2381.

108. Dzhokhar and his brother Tamerlan Tsarnaev remained fugitives for several days after the bombing of the Boston Marathon, which killed or maimed dozens. *See Cops Recall Deadly Shootout with Boston Bombing Suspects*, NBC News (Mar. 16, 2015, 11:34 AM), <https://tinyurl.com/4f6w57uf> [<https://perma.cc/4HSY-45V9>]. The brothers engaged police with gunfire and bombs before Tamerlan was killed and Dzhokhar was captured. *Id.*

109. 18 U.S.C. § 113(a).

110. *Id.* § 115.

111. *Id.* § 2251.

112. *Id.* §§ 3632(d)(4)(D)(ix)–(lxi) (excluding from eligibility for time credits people convicted of crimes related to aiding certain noncitizens in entering the United States and importation of a noncitizen into the United States for immoral purposes, respectively).

other exclusions is less clear. A violation of 8 U.S.C. § 1327 involves helping a noncitizen previously convicted of an aggravated felony reenter the United States. Notably, to be convicted of this offense, a defendant does not need to know that the noncitizen whom they assisted had been convicted of an aggravated felony.¹¹³ The crime is committed by simply helping an undocumented noncitizen with an aggravated felony enter the country, regardless of one's personal knowledge of that felony. It is unclear what aspects of this offense render a person unworthy of programming and other incentives aimed at reducing recidivism, especially considering the number of crimes that constitute aggravated felonies.

The term "aggravated felony" includes many non-violent offenses,¹¹⁴ such that assisting a person convicted of an aggravated felony to illegally reenter the United States does not necessarily pose a risk to public safety. Non-violent offenses constituting aggravated felonies include drug trafficking,¹¹⁵ theft where the term of imprisonment is at least one year,¹¹⁶ running an illegal gambling business,¹¹⁷ money laundering where the funds involved exceed \$10,000,¹¹⁸ fraud or deceit where the victim's losses exceed \$10,000,¹¹⁹ tax evasion where the government's losses exceed \$10,000,¹²⁰ counterfeiting or altering a passport,¹²¹ counterfeiting or forging vehicle identification numbers,¹²² and failure to appear in court for a felony for which a sentence of five years or more may be imposed.¹²³ The FSA thus excludes anyone convicted of helping an undocumented noncitizen who committed one of those crimes, even if they did not know of the noncitizen's conviction.

The FSA also addresses deportable noncitizens more generally. Deportable noncitizens are highly likely to be deported from the country, although some slip through the cracks. Either way, it may not be the U.S. government's responsibility to invest in recidivism reduction for these offenders. In a world of limited resources, it is reasonable to allow those offenders' countries of origin to worry

113. *United States v. Lopez*, 590 F.3d 1238, 1254 (11th Cir. 2009).

114. 8 U.S.C. § 1101(a)(43).

115. *See id.* § 1101(a)(B). President Obama's clemency initiative focused exclusively on offenders convicted of drug trafficking, so the administration presumably considered that group largely non-violent. *See id.*

116. *See id.* § 1101(a)(G). This will include any felony theft on the federal level and many felony thefts on the state level.

117. *See id.* § 1101(a)(43)(J).

118. *See id.* § 1101(a)(43)(D).

119. *See id.* § 1101(a)(43)(M)(i).

120. *See id.* § 1101(a)(43)(M)(ii).

121. *See id.* § 1101(a)(43) (P)(i).

122. *See id.* § 1101(a)(43)(R).

123. *See id.* § 1101(a)(43)(Q).

about public safety for their citizens while focusing on our own citizens' public safety. However, the Act does not exclude deportable noncitizens from earning additional credit for participating in prison programs. Instead, deportable noncitizens are simply not allowed to apply any time credits earned.¹²⁴ A separate provision requires the BOP to conduct deportation proceedings for such noncitizens as early as possible in the service of their sentences.¹²⁵

Undoubtedly, some exclusions result from political maneuverings and quid pro quos. Many senators care more about or believe their constituencies care more about certain types of crime. However, rather than focusing on whom the FSA should exclude from receiving the full benefit of these programs, Congress and other decision-makers would do better to figure out what programs have been proven to work based on evidence and experience, and to target those programs at prisoners who may pose increased risks to the public.

E. Gang Membership Exclusion

One group that the FSA should not exclude is gang members. The BOP previously offered a Shock Incarceration Program, enacted by Congress in 1990 and colloquially known as boot camp, to eligible participants sentenced to between 12 and 30 months in prison. The program was conditional upon each candidate's consent and on the sentencing judge's approval at the time of sentencing or after consultation with the BOP.¹²⁶ For up to the first six months of their term of imprisonment, program participants were required to:

- (1) Adhere to a highly regimented schedule that provides strict discipline, physical training, hard labor, drill, and ceremony characteristic of military basic training; and
- (2) Participate in appropriate job training and educational programs (including literacy programs) and drug, alcohol, and other counseling programs.¹²⁷

Successful participants could have up to six months cut from their sentence.

In 2005, the BOP ended the program, citing the cost and the program's ineffectiveness. A 1996 study by the BOP Office of Research and Evaluation concluded that successful participants had rearrest rates similar to those of non-participants who served their sentences

124. See 8 U.S.C. § 1101(a)(43)(E)(i).

125. See *id.* § 1101(a)(43)(E)(ii).

126. See U.S. SENT'G GUIDELINES MANUAL § 5F1.7 (U.S. SENT'G COMM'N 2018); 18 U.S.C. § 4046.

127. 18 U.S.C. § 4046(b)(1)–(2).

in a conventional prison setting.¹²⁸ At best, prison boot camps' results are mixed. Researchers working on behalf of the Department of Justice's Office of Community-Oriented Policing Services performed a meta-analysis of 32 research studies evaluating the effectiveness of 43 boot camp programs, all but 3 of them in the United States:

The results indicate that on average the recidivism rates for offenders, including both adults and juveniles, released from boot-camps were highly similar to the recidivism rates for offenders released from prison or jail. . . . In short, the evidence suggests that boot-camps, in general, do not produce a reduction in future offending relative to the typical criminal justice system sanctions.¹²⁹

Recognizing that boot camp programs vary in what they offer offenders beyond military-style training (including drug treatment, additional counseling, or other rehabilitation opportunities), the researchers concluded that "the extant evidence suggests that the military component of boot camps is not effective in reducing post-boot-camp offending."¹³⁰ Other studies suggest that although these programs do not reduce recidivism rates within the first year of release, participants have fewer disciplinary issues while in prison.¹³¹

128. MILES D. HARER & JODY KLEIN-SAFFRAN, BUREAU OF PRISONS, EVALUATION OF POST-RELEASE SUCCESS FOR THE FIRST 4 CLASSES GRADUATING FROM THE LEWISBURG INTENSIVE CONFINEMENT CENTER 1 (1996), <http://tinyurl.com/259wz8mj> [<https://perma.cc/38M2-RBE5>]. The authors reported:

Evaluation results for the first four classes graduating from the Lewisburg Intensive Confinement Center (ICC) demonstrate that placement in the ICC achieves the same post-release success rate as does placement in a conventional prison. Lewisburg ICC graduates who were transferred from the general prison population into the program were rearrested at a 13.0 percent rate during the first two years in the community . . . , while Lewisburg ICC graduates who entered the program directly from the court were rearrested at a 13.9 percent rate. Rates for these two groups are not statistically different from the 13.8 percent adjusted rate for a group of similar program eligible inmates, who did not participate in the ICC program and instead completed their full prison term.

Id.

129. DAVID B. WILSON ET AL., EFFECTS OF CORRECTIONAL BOOT-CAMPS ON OFFENDING: A CAMPBELL COLLABORATION SYSTEMATIC REVIEW 10 (2005), <https://tinyurl.com/346x7xh4> [<https://perma.cc/49BS-RLE5>].

130. *Id.* at 14. *See also* LARRY KARAKI, U.S. DEP'T. OF JUST., SHOCK INCARCERATION—AN ALTERNATIVE FOR FIRST OFFENDERS? (1989), <https://tinyurl.com/4dwpmcmb> [<https://perma.cc/HVW7-53U6>]. In general, shock incarceration is popular with the public, elected officials, and many criminal justice professionals, even though its effectiveness in achieving correctional goals has not been proven. *Id.* at 7. Notably, this study was published before Congress enabled the Bureau of Prisons' shock incarceration program.

131. *See, e.g.*, Doris T. Wells, *Boot Camps: Mixed Results*, 65 CORR. TODAY 142, 142 (2003).

In contrast to the ineffectiveness of boot camp programs aimed at youthful adult offenders, Homeboy Industries, started by a Roman Catholic priest in Los Angeles,¹³² has proven very effective in reducing recidivism rates among gang members. Unlike boot camps, the program provides job training and social services to “formerly gang involved and previously incarcerated men and women.”¹³³ Daily activities for the “homies” (HBI trainees) might include “attending a class such as Computer Basics, Bridge to College, Building Healthy Relationships, Anger Management, or Parenting, and perhaps having a one-on-one appointment with a mental health counselor and a tattoo removal session.”¹³⁴ A DOJ review found the program effective:

Evaluation findings suggest that participation in HBI appears to lead to a significant decrease in criminal acts and disengagement from gang activity. Four services were strongly associated with positive outcomes on several HBI client goals: (1) alcohol and drug rehabilitation, (2) anger management and domestic violence, (3) mental health services, and (4) tattoo removal. From the viewpoints of youth who voluntarily came to HBI for help in getting out of gang life and succeeded in making this transition, five key services were deemed most critical to their success: (1) ending gangbanging and replacing it with positive activities, including jobs; (2), establishing a new identity; (3) improved parenting and family relationships; (4) overcoming drug and alcohol addiction; and (5) establishing plans for a future.¹³⁵

While the Homeboy Industries model has not been implemented or studied in a prison context, it is worth replicating. It is not altogether surprising that this group of offenders does not respond positively to strict hierarchy, rule-following, and harsh consequences. It makes sense to examine whether such offenders would respond better to psychological counseling to treat past traumas they have experienced and to provide assistance in forming positive relationships with their loved ones and others who do not identify as gang members.¹³⁶ This approach would be consistent with social science

132. *Homeboy Industries*, U.S. DEP'T. OF JUST. NAT'L. GANG CENTER (2021), <https://tinyurl.com/49fmhfxm> [<https://perma.cc/GV6G-GT7N>] (“Homeboy Industries (HBI), established by Father Gregory Boyle, S.J., has evolved into a model program of gang intervention services for inner-city youth, offering alternatives to gang violence in one of the toughest areas in Los Angeles.”).

133. *See id.*

134. *See id.*

135. *See id.*

136. *See generally* Michelle Arciaga Young & Victor Gonzalez, *Getting Out of Gangs, Staying Out of Gangs: Gang intervention and Desistence Strategies*, 8 NAT'L GANG CTR. BULL. 1 (2013), <http://tinyurl.com/yz2uunzc> [<https://perma.cc/5YU6-SFLF>] (reviewing research on factors influencing members to leave gangs).

research conducted by the Justice Department's National Institute of Corrections and other research organizations which indicates that cognitive behavioral therapy is effective in reducing recidivism and especially effective for the worst offenders.¹³⁷

There are other programs, most notably in education, that significantly reduce recidivism risk in the prison context. A study of 60 people incarcerated in North Carolina state prisons showed that those who received their associate or bachelor's degree in prison had significantly lower recidivism rates than those who did not.¹³⁸

F. Drug Trafficking Exclusions

Perhaps Congress' most baffling decision was to exclude certain drug offenders from the benefits of recidivism reduction programming. Offenders convicted of crimes "relating to manufacturing or distributing a controlled substance . . . for which death or serious bodily injury resulted from the use of such substance" are excluded from receiving additional time credits.¹³⁹ Convictions for drug distribution resulting in death are still relatively rare but are increasing because of the prevalence of fentanyl analogs, which in most cases are far more potent than pharmaceutical-grade analgesics.¹⁴⁰ To be

137. See generally HARVEY MILKMAN & KENNETH WANBERG, U.S. DEP'T OF JUST., COGNITIVE BEHAVIORAL TREATMENT: A REVIEW AND DISCUSSION FOR CORRECTIONS PROFESSIONALS (2007), <https://tinyurl.com/5n96tftx> [<https://perma.cc/W8NE-HKCL>].

138. Dennis J. Stevens & Charles S. Ward, *College Education and Recidivism: Educating Criminals is Meritorious*, 48 J. CORR. EDUC. 106, 106 (1997). See also James E. Visian & Lisa Ouimet Burke, *The Effect of College Programming on Recidivism Rates at the Hampden County House of Correction: A 5-Year Study*, 52 J. CORR. EDUC. 160, 160 (2001) ("[A] college eligible inmate . . . is 21.9 percent less likely to recidivate within five years following release if he or she completes at least one 3-credit college course."); Hayne Yoon, *Back to School: A Common-Sense Strategy to Lower Recidivism*, VERA INST. OF JUST. (Sep. 19, 2019), <https://tinyurl.com/2pe6hr4r> [<https://perma.cc/9PK2-HPTK>] ("Few evidence-based reforms have as much untapped potential as postsecondary education in prison. Incarcerated people who participate in such programs are 48 percent less likely to recidivate than those who do not. The odds of recidivism decrease as incarcerated people achieve higher levels of education. These findings are based on a comprehensive study recently updated by the RAND Corporation, which analyzed rigorous research published from 1980 through 2017"). See also RECIDIVISM AMONG FEDERAL OFFENDERS, *supra* note 99. This study found that of prisoners released in 2005, "about one-third (34.3%) did not complete high school, while most (65.7%) completed at least high school, including some offenders (75%) who were college graduates." *Id.* at 9. Although age and criminal history are the strongest predictors of recidivism, "[e]ducation levels are also associated with different rates of recidivism. Offenders with less than a high school diploma had the highest recidivism rates (60.4%), followed by high school graduates (50.7%) and those with some college (39.3%). College graduates had the lowest rates (19.1%)." *Id.* at 24.

139. See 18 U.S.C. § 3632(d)(4)(D)(lviii).

140. See Maurice Wilde et al., *Metabolic Pathways and Potencies of New Fentanyl Analogs*, 10 FRONTIERS PHARMACOLOGY 1, 1 (2019).

convicted of distribution of a controlled substance resulting in death, it need not be determined that the defendant intended the death of the victim. The drugs the defendant distributed must merely serve as the but-for cause of the victim's death.¹⁴¹ Some cases the government has prosecuted under this provision involve incidents where multiple drug users share drugs, and one dies.¹⁴² A death caused by a person having an addiction who is actively using drugs at the time of the offense hardly seems to be a circumstance repugnant to notions of rehabilitation. Nevertheless, such a circumstance would preclude the prisoner from receiving the full benefits of recidivism-reducing programs.

The FSA also contains a provision barring receipt of full benefits for those convicted of trafficking heroin or methamphetamine if the sentencing judge found them to have been an “organizer, leader, manager, or supervisor of others in the offense,”¹⁴³ as well as anyone convicted of trafficking in fentanyl or fentanyl analogs¹⁴⁴ regardless of whether they played a leadership role. Methamphetamine has been the most commonly trafficked drug in federal courts in recent years, and rates of fentanyl cases are rising dramatically. However, there is no evidence-based reason to bar these offenders from benefitting from recidivism-reducing programs. A U.S. Sentencing Commission study found that of drug trafficking offenders released in 2010 and followed for 8 years, “[d]rug trafficking offenders who received an aggravating role adjustment were rearrested at a lower rate than offenders not receiving an aggravating role adjustment (40.6% versus 48.3%).”¹⁴⁵ Without a publicly available countervailing study, it is difficult to make an evidence-based argument against extending additional time credits to drug traffickers who received an aggravating role adjustment.

Drug trafficking offenders overall had recidivism rates similar to all other offenders (47.9 percent compared to 50.4 percent) but took longer to recidivate than all other offenders (23 months compared to 16 months) and had fewer rearrests (2 compared to 3).¹⁴⁶ Drug

141. *Burrage v. United States*, 571 U.S. 204, 211 (2014).

142. Eric Kay's case garnered national attention because of the victim, Los Angeles Angels pitcher Tyler Skaggs, who choked to death on his own vomit after sharing pills containing fentanyl in a hotel room with Kay. See Assoc. Press, *A Former L.A. Angels Employee Gets 22 Years in Tyler Skaggs' Overdose Death*, NPR (Oct. 12, 2022, 12:30 PM), <https://tinyurl.com/muuwayps> [<https://perma.cc/8MVV-FFGQ>].

143. 18 U.S.C. § 3632(d)(4)(D)(lxv).

144. *Id.* § 3632(d)(4)(D)(lxvi).

145. U.S. SENT'G COMM'N, *RECIDIVISM OF FEDERAL DRUG TRAFFICKING OFFENDERS RELEASED IN 2010*, at 35 (2022), <https://tinyurl.com/2jkzxn7> [<https://perma.cc/6YXP-UT7X>].

146. See *id.* at 23–24.

traffickers sentenced to fewer than 6 months in prison had a rearrest rate of 40.4 percent compared to a rate of 42.3 percent for all other offenders sentenced to less than 6 months in prison. Likewise, drug traffickers sentenced to 10 years or more in prison had a rearrest rate of 48.4 percent compared to a rearrest rate of 57.0 percent for all other offenders.¹⁴⁷ Further, U.S. Sentencing Commission studies show similar recidivism rates between drug trafficking offenders who serve their entire sentence and those released early after receiving the retroactive benefit of sentence reductions.¹⁴⁸ Finally, even career drug-trafficking offenders have recidivism rates similar to drug-trafficking offenders who lack the career offender designation.¹⁴⁹

The decision to exclude certain drug traffickers from receiving time credits is also unexpected because the BOP's drug rehab programs have been proven effective. The programs are available to prisoners with documented drug abuse problems, not just those convicted of drug offenses. A recent study by the Sentencing Commission concluded that the BOP's drug treatment programs effectively reduce recidivism.¹⁵⁰ Graduates¹⁵¹ of the residential drug treatment program—the more intensive of the BOP's two drug programs—recidivated at a rate of 48.2 percent compared to eligible prisoners who did not participate, who recidivated at a rate of 68 percent.¹⁵² Even graduates of the less intensive, non-residential treatment program recidivated at lower rates (49.9 percent) than eligible non-participants.¹⁵³

The BOP excludes certain people, including sex offenders and those who “pose a significant threat to the community,”¹⁵⁴ from eligibility to participate in the drug rehab program. Also, people must be able to read and write to participate fully, and the presence of a learning disability can make participation impossible. People who

147. *Id.* at 36.

148. See KIM STEVEN HUNT & ANDREW PETERSON, U.S. SENT'G COMM'N, *RECIDIVISM AMONG OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2007 CRACK COCAINE AMENDMENT 14–15* (2014), <https://tinyurl.com/bdfezw4m> [<https://tinyurl.com/bdfezw4m>].

149. U.S. SENT'G COMM'N, *REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 40–41* (2016), <https://tinyurl.com/hr7vrr2f> [<https://perma.cc/TZN8-FKZZ>].

150. See generally U.S. SENT'G COMM'N, *RECIDIVISM AND FEDERAL BUREAU OF PRISONS PROGRAMS: DRUG PROGRAMS PARTICIPANTS RELEASED IN 2010* (2022), <https://tinyurl.com/ycy6ckc6> [<https://perma.cc/U52W-4PET>].

151. The Commission's report uses the term “completers.” See generally *id.*

152. *Id.* at 5.

153. *Id.*

154. *Id.* at 11.

pose a significant threat to the community are not excluded from the non-residential program. It is unclear whether the residential program's higher effectiveness is due to its higher intensity, the exclusion of those who might pose a greater risk of recidivism, or some combination of those or other factors.¹⁵⁵ However, the exclusions leave certain offenders—such as those with any history of weapons possession—with fewer, less intensive rehabilitative options.

G. Exclusion of Sex Offenders

Another excluded group under the FSA is those who fail to register as sex offenders.¹⁵⁶ Perhaps Congress grouped those convicted of failure to register with other dangerous sex offenders. However, testimony before the U.S. Sentencing Commission about what length of supervised release should apply to failure to register offenders suggests that they should receive far shorter terms of supervision than sex offenders because failure to register in most cases is a rule-breaking offense rather than a true sex offense.¹⁵⁷ “The common findings across the studies suggest that failure to register is not in any way related, either [in a] causative fashion or correlated, with sexual recidivism” and “is not related to sexual deviance.”¹⁵⁸ The exclusion of these offenders seems a clear example of excluding offenders based on erroneous public perceptions rather than robust social science research.

155. See generally *id.*, *supra* note 150 (describing eligibility criteria and analyzing the programs' effectiveness in reducing recidivism).

156. See 18 U.S.C. § 3632(d)(4)(D)(xxxviii).

157. See U.S. SENT'G COMM'N, PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL SENTENCING GUIDELINES 242 (Mar. 13, 2014), <https://tinyurl.com/yn2y2ky2> [<https://perma.cc/JL6T-BWGS>] (testimony of Dr. Kristen Zgoba, Supervisor of Research and Evaluation at the New Jersey Department of Corrections).

There's concern over failure to register, understandably, because most people presume that failure to register means that a sex offender has an intent, some sort of malintent that they intend to go underground to abscond with the hopes of continuing to have more victims. However, as I stated previously, the supposition has not really panned out in the research. What we have found is that the majority of sex offenders over numerous studies, over numerous states, both federal and state research, that most failure to register offenders are not willful violators, that most of them are ordinary parole supervision violations, many of them are probation violations, or very similar to them.

Id.

158. *Id.* at 244.

H. *Administrative Complexities*

These exclusions appear to lack supporting evidence and divert needed time and attention away from devising and operating recidivism-reducing programs. These exclusions also make it less likely that even people who can earn extra credit will do so. In the first place, the BOP's interpretation of statutory language about time credit has been the subject of litigation since the enactment of the SRA, which dictated that people in prison could receive a time credit of up to 54 days for each year served. The BOP interpreted that provision to equate to about 45 days per year instead, and the Supreme Court upheld that interpretation.¹⁵⁹ In the FSA, Congress amended the relevant statute to reinstate the 54 days per year credit, consistent with the SRA's original intent.¹⁶⁰ In the FSA, Congress appears not to have applied any lessons learned from the SRA experience, given that the FSA's time credit provisions are even more complicated to administer.

Administering the FSA's rules on time credits involves a significant amount of the BOP's staff time. BOP staff members at the Designation and Sentence Computation Center in Grand Prairie, Texas, must program the various exclusions in the FSA and any exclusions or exceptions based on BOP regulations into their systems.¹⁶¹ Then, through the BOP's inmate locator service online, incarcerated people and the public need to be informed about what credits have been applied to every individual's records and their resulting release date.

A recent article by a prominent formerly incarcerated person details the difficulties in implementing the Act's aforementioned provisions. The BOP's programmed calculator produced errors, resulting in some people who had already been released to community confinement in halfway houses having to return to prison.¹⁶² The BOP's failure to correctly calculate sentences is nothing new, as detailed in a Department of Justice Inspector General report in 2016.¹⁶³ However, the FSA needlessly compounds that pre-existing problem.¹⁶⁴

159. *Barber v. Thomas*, 560 U.S. 474, 492 (2010).

160. *See* First Step Act of 2018, Pub. L. No. 115-391, § 102(b)(1) (amending 18 U.S.C. § 3624(b)(1) accordingly).

161. *Sentence Computations*, FED. BUREAU OF PRISONS, <https://tinyurl.com/2smu66k4> [<https://perma.cc/PHD2-YKNS>] (last visited Jan. 24, 2024).

162. Walter Pavlo, *Bureau of Prisons' Failure to Communicate First Step Act*, FORBES (Oct. 15 2022, 9:55 AM), <http://tinyurl.com/yurmja4n> [<https://perma.cc/DBW6-M2D9>].

163. *See generally* U.S. DEP'T OF JUST. OFF. OF INSPECTOR GEN., REVIEW OF THE FEDERAL BUREAU OF PRISONS' UNTIMELY RELEASES OF INMATES (2016), <https://tinyurl.com/bddtna3y> [<https://perma.cc/6LBV-7L5W>] (detailing early- and late-release errors by the BOP).

164. Even before the BOP got to the stage of properly entering time credits, there were complications to implementing the FSA. The first risk assessment the

In the FSA, Congress may have given the BOP more than it can responsibly administer in the short term. A DOJ Inspector General advisory memorandum detailed the steps the BOP must take and failed to take in order to implement new policies and procedures. First, the BOP must negotiate policies with the BOP employees' national union. Failure to negotiate with the union "stalled the development of more than 30 BOP policies, about half of which were created or revised in response to the First Step Act."¹⁶⁵ The Inspector General's analysis found that as of November 2021, nearly three years after the FSA was passed:

[T]he BOP has not applied earned time credits to any of the approximately 60,000 eligible inmates who may have completed evidence-based recidivism reduction programs or productive activities because a rule that would codify the BOP's procedures for time credits has not been finalized and the BOP must complete policy negotiations on its time credits policy.¹⁶⁶

While the complications in the FSA's time credit provisions cannot be blamed for this failure, they almost certainly contribute to delaying receipt of time credits due.

III. A BETTER APPROACH

First, a better approach would be a more straightforward approach. While it will likely take years for the BOP to work through its administrative shortcomings, if it ever does, it seems simply unrealistic to expect a smooth implementation of an exclusionary list as long as the FSA's bars on additional time credits. The list is not based on social science research, so its benefit to the public is unclear. Even if the list had a justification other than political expedience, its adoption should still be weighed against the potential harm to people in prison deemed entitled to additional time credits. It does not appear

BOP devised in order to determine eligibility for programs produced significant racial disparities that disadvantaged non-white people. See Carrie Johnson, *Flaws Plague a Tool Meant to Help Low-Risk Federal Prisoners Win Early Release*, NPR (Jan. 26, 2022, 5:00AM), <https://tinyurl.com/3pdm5a4f> [<https://perma.cc/97BH-SNN9>]. The Sentencing Commission's criminal history score is far simpler to determine and when combined with age of the offender is a very good predictor of recidivism risk. It's unclear how much more predictive power the BOP's additional criteria add to the model. See *id.*

165. Press Release, U.S. Dep't of Just. Off. of Inspector Gen., DOJ OIG Releases Management Advisory Memorandum on the Impact of the Failure to Conduct Formal Policy Negotiations on the BOP's Implementation of the FIRST STEP Act and Closure of OIG Recommendations (Nov. 16, 2021), <https://tinyurl.com/hanfez5w> [<https://perma.cc/Q9B8-JFAF>].

166. *Id.*

that such a cost/benefit analysis has occurred here. If it had, Congress might have (rightly) applied the BOP's existing rules on time credits. An incarcerated person who breaks prison rules can have his or her time credits revoked as a disciplinary action. Arguably, those existing rules are sufficient to reduce the risks posed by violent offenders; if they violate prison rules more often, they will lose time off awards, and if they follow the rules, that could be an indication of intent and ability to follow the rules outside the prison context as well.

Second, Congress should hew more closely to expert bodies of its own creation and within the DOJ's social science arm. The Sentencing Commission and the Justice Department publish information through a bi- or non-partisan process respectively. Both serve as clearinghouses for data. Congress and the president can insulate themselves from political backlash by deferring to such entities, which are better able to withstand the throes of electoral politics and remain mission-focused. We rely on other expert bodies for policy-making of the utmost importance. The mandate of the Federal Reserve to ensure a high employment rate while minimizing inflation is one example that hits close to home for many Americans. While expert bodies receive tremendous criticism, absent congressional action to disband them, they continue to function. To this end, the degree of the agency's independence is critical. The greater their independence, the more public criticism they can withstand, so the run-of-the-mill executive branch agency might not be independent enough.

Finally, the FSA crystallized a desire among some judges for a second-look opportunity. The Act allowed incarcerated people to file their own motions for compassionate release. Before the Act, only the director of the BOP could file a motion for compassionate release after conducting its assessment of the person's circumstances. The U.S. Sentencing Commission, fulfilling its statutory duty, issued a policy statement defining what constitutes "extraordinary and compelling" circumstances justifying compassionate release. In 2013, a report by the Inspector General of the Bureau of Prisons laid bare many problems with the BOP's program administration. The BOP lacked "clear standards on when compassionate release [was] warranted, resulting in ad hoc decision making."¹⁶⁷ Further, the BOP had not established "formal timeliness standards for reviewing requests," "effective procedures to inform inmates about the program," or "a system to track all requests, the timeliness of the review process, or whether decisions

167. U.S. DEPT. OF JUST. OFF. OF INSPECTOR GEN. THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM i (2013), <http://tinyurl.com/yc4va9p6> [<https://perma.cc/HKX8-KB49>].

made [were] consistent with each other or with BOP policy.”¹⁶⁸ The combination of enabling incarcerated people to file their own motions and the onset of the COVID-19 pandemic increased the number of compassionate release filings exponentially.¹⁶⁹

Enabling defendants to file compassionate release motions without waiting on the BOP to do it on their behalf also enabled judges to take a second look at sentences they had imposed years—sometimes decades—before. In a limited number of cases, judges applied broad criteria, such as non-retroactive changes to mandatory minimum penalties combined with an incarcerated person’s personal circumstances and behavior in prison, to reduce sentences.¹⁷⁰ Judges also consulted the Sentencing Commission’s guidance on compassionate release and weighed public safety factors.¹⁷¹ Although recidivism among the group benefitting from compassionate release cannot reasonably be studied until several years after their release, Congress should consider a second-look proposal similar to the one approved by the American Law Institute in 2011 and added to its Model Penal Code, and the 2016 proposal by the congressionally mandated Colson Task Force on Federal Corrections in 2016.¹⁷²

With the help of expert agencies such as the National Institute of Justice and the U.S. Sentencing Commission, a second-look provision can articulate data-driven criteria to be used as consistent guidance in the court’s exercise of discretion. Congress could require that agencies devise transparency rules, report decisions, and regularly collect data so that the public and elected officials know what judges are doing on their behalf. This model may not be easily replicated in states, where judges are more often subject to retention elections, but life tenure in the federal system insulates judges from political fallout. Nonetheless, collecting and reporting data on releasees’ recidivism rates can support state legislatures interested in exploring this option.

168. *Id.* at ii–iii.

169. In March 2020, there were 44 compassionate release motions filed, and in July 2020, there were 1,530 motions filed. *See* U.S. SENT’G COMM’N, COMPASSIONATE RELEASE: THE IMPACT OF THE FIRST STEP ACT AND THE COVID-19 PANDEMIC 17 fig.2 (2022), <https://tinyurl.com/2zzkjpg3> [<https://perma.cc/AL87-GL28>].

170. *See id.* at 33–34 (discussing courts’ findings that reductions in mandatory minimum penalties and an incarcerated person’s rehabilitation were factors supporting compassionate release).

171. *See id.* at 32 (demonstrating that “courts regularly cited other reasons within or comparable to the Commission’s policy statement” and “rarely cited reasons not described in the Commission’s policy statement”).

172. *See* Margaret Love, *Federal Task Force Relies on MPC: Sentencing*, AM. L. INST. (Jan 28, 2016), <https://tinyurl.com/3v5bn542> [<https://perma.cc/5P5R-P3GX>].

CONCLUSION

No proposal is without its difficulties and challenges. Nevertheless, in the FSA, Congress fell far short of the mark if what the people want is for offenders who will eventually be released from prison to desist from crime. One threshold limitation may be prison itself. To some extent, the FSA's reforms run counter to the SRA's rejection of rehabilitation as a purpose of imprisonment.¹⁷³ Rehabilitation is a purpose of sentencing, but it should be achieved through non-imprisonment options, such as special conditions of supervised release or probation.¹⁷⁴ In reality, prisons are brutal places.¹⁷⁵ There is little or no privacy,¹⁷⁶ excessive exposure to physical danger,¹⁷⁷ and limited access to productive activities.¹⁷⁸ In short, it is not a place to get

173. See 18 U.S.C. § 3582(a). The statute provides:

The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

Id.

174. In *Tapia v. United States*, the Supreme Court held that a sentencing court is not permitted to lengthen a term of incarceration in order to facilitate participation in rehabilitative programs. *Tapia v. United States*, 564 U.S. 319, 335 (2011).

175. See, e.g., *Prison Conditions*, EQUAL JUST. INITIATIVE, <https://tinyurl.com/y25mzddf> [<https://perma.cc/6BQE-YRBM>] (last visited Jan. 25, 2024) (detailing problems of violence, abuse of power by officials, and denial of medical care in prisons).

176. See K.C. CARCERAL & MICHAEL G. FLAHERTY, *THE CAGE OF DAYS: TIME AND TEMPORAL EXPERIENCE IN PRISON* 100–01 (2022). To describe the indignities of prison, the authors quote Fyodor Dostoevsky's *The House of the Dead*:

“Besides the loss of freedom, besides the forced labor, there is another torture in prison life, almost more terrible than any other—that is compulsory life in common.”

... “I could never have imagined, for instance, how terrible and agonizing it would be never once for a single minute to be alone for the ten years of my imprisonment. At work to be always with a guard, at home with two hundred fellow prisoners; not once, not once alone!”

Id. (quoting FYODOR DOSTOYEVSKY, *THE HOUSE OF THE DEAD* 20, 9 (Grove Press 1957) (1862)). See also *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (holding that prisoners have no Fourth Amendment right to privacy in their personal effects).

177. See Nazish Dholakia, *Prisons and Jails Are Violent; They Don't Have to Be*, VERA INST. (Oct. 18, 2023), <http://tinyurl.com/swma5j6u> [<https://perma.cc/P3ZQ-93RE>] (“Jails and prisons, often overcrowded and understaffed, are frequently dangerous, dehumanizing, and traumatizing places where violence is largely ‘unavoidable.’”).

178. See Shon Hopwood, *How Atrocious Prisons Conditions Make Us All Less Safe*, BRENNAN CTR. FOR JUST. (Aug. 9, 2021), <http://tinyurl.com/mw9ppdkx> [<https://perma.cc/S4D7-L7QS>] (“Part of the reason our prisons are so violent is due to the idleness that occurs in them. As prison systems expanded over the last four decades, many states rejected the role of rehabilitation and reduced the number of available rehabilitation and educational programs.”).

well.¹⁷⁹ While empirical studies show that the BOP's residential and non-residential drug treatment programs reduce recidivism,¹⁸⁰ the effectiveness of other popular programs has not been proven.¹⁸¹ Participation in the BOP's Occupational Education Programs and Federal Prison Industries was not shown to have a statistically significant effect on recidivism rates after controlling for other offender and offense characteristics relevant to recidivism rates.¹⁸² Providing programming may reduce violence within the prison setting, which is an important goal. However, it also may provide cover for our collective dysfunction, softening the reality that we are simply warehousing people¹⁸³ and making the prospect of sentencing them to years or decades in prison seem more palatable.

179. See generally Christy Visser & John Eason, *Changing Prisons to Help People Change*, in BROOKINGS & AM. ENTERPRISE INST., A BETTER PATH FORWARD FOR CRIMINAL JUSTICE (2021), <http://tinyurl.com/mt6m58v6> [<https://perma.cc/JYF5-6ATG>] (cataloguing some of the difficulties people in prison face).

180. See generally U.S. SENT'G COMM'N, RECIDIVISM AND FEDERAL BUREAU OF PRISONS PROGRAMS: VOCATIONAL PROGRAM PARTICIPANTS RELEASED IN 2010 (2022), <https://tinyurl.com/4uwtvzr> [<https://perma.cc/X7S5-QNWX>] [hereinafter VOCATIONAL PROGRAM PARTICIPANTS RELEASED IN 2010].

181. The BOP's Approved Programs Guide, dated July 2021, includes a list of evidence-based programming as well as a list of "productive activities" which presumably have not been empirically shown to reduce recidivism. U.S. DEPT. OF JUST., FED. BUREAU OF PRISONS, FIRST STEP ACT APPROVED PROGRAMS GUIDE 36–46 (2021), <http://tinyurl.com/ypydb9jr> [<https://perma.cc/2AFF-BVQR>].

182. See VOCATIONAL PROGRAM PARTICIPANTS RELEASED IN 2010, *supra* note 180, at 5.

183. See MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 93 (1973).
