

## Barr Could Steer First Step Act Off Course

By **Lara Yeretsian** (January 27, 2019, 8:02 PM EST)

For an administration dedicated to law and order, the First Step Act<sup>[1]</sup>, signed into law by President Donald Trump on Dec. 21, 2018, was a welcome surprise. The new criminal justice reform law significantly liberalizes the federal system by providing credits and rehabilitation to help federal prisoners get out early, thereby reducing prison overcrowding.

Granted that the federal prison population accounts for less than 200,000 of the 3.1 million incarcerated nationwide, it nevertheless signifies an acknowledgment at the highest levels that the system is broken and needs to be fixed.

The federal criminal justice system is finally moving in the same direction as state and local jurisdictions, which have responded to overcrowding and recidivism with reforms such as reduced prison sentences, defelonization of drug offenses and marijuana legalization. The new prevailing wisdom is that we're actually safer when criminals get out earlier and are better prepared to reenter society. That this monumental change happened on this president's watch, with strong bipartisan support, is nothing short of miraculous.

The evidence for rehabilitation and early release programs is incontrovertible. A 2015 report<sup>[2]</sup> estimated that higher levels and lengths of incarceration explained a mere 0 to 7 percent of the crime drop since the 1990s; other research pegs the drop at about 10 to 25 percent.<sup>[3]</sup> Releasing people from prison earlier doesn't lead to more crime: holding them longer may actually increase crime rates.<sup>[4]</sup> Education programs — wonder of wonders — do, in fact, reduce recidivism.<sup>[5]</sup>

The First Step Act gets it right:

- It reduces the disparity between crack cocaine and powder cocaine sentences by making retroactive the reforms of the Fair Sentencing Act of 2010.<sup>[6]</sup> This change could impact as many as 2,600 federal inmates.
- It expands the "safety valve" used by judges to avoid handing down mandatory minimum sentences and eases "three strikes" to give people with three or more convictions 25 years, instead of life. It further limits the use of gun enhancements that can add decades to prison sentences for drug offenders.
- Well-behaved inmates will be able to earn more "good time credits" — 54 days per year incarcerated, up from 47 — cutting their prison sentences by an additional week for each year in prison.
- Inmates will get "earned time credits" by participating in a wider range of vocational and rehabilitative programs, and those credits can help them earn earlier releases to halfway houses or home confinement.<sup>[7]</sup>
- Prison conditions will just be better, with many inmates being placed closer to their families and pregnant women no longer being shackled.



Lara Yeretsian

It's about time.

But there's a fly in the ointment. Attorney general nominee William Barr, who would oversee implementation of the First Step Act, is categorically against reform. Forget the evidence: Barr supports mass incarceration and "tough-on-crime" policies. As deputy attorney general and attorney general from 1990 to 1993, he helped implement the Crime Control Act of 1990,[7] which escalated the war on drugs, and he supported the U.S. Department of Justice's report "The Case for More Incarceration." [8]

In a 1992 letter, Barr argued that "there is no better way to reduce crime than to identify, target and incapacitate those hardened criminals who commit staggering numbers of violent crimes" and called on the country to build more jails and prisons.

Given his past criminal justice agenda, Barr's oversight of the First Step Act could render it almost ineffectual. He would be responsible for developing the underlying needs and risk assessment system, as well as the evidence-based programs to support that system. Within the law's first 210 days, it would be up to Barr to publicly release the system that will be used by the Department of Justice to determine the recidivism risk of prisoners in the intake process, classifying prisoners as low, medium or high risk.

The system is to be used to determine the type and amount of evidence-based recidivism reduction programming appropriate for each prisoner, to reassess their recidivism risk on a periodic basis, and to reassign them to programs as appropriate so they have an opportunity to achieve meaningful rehabilitation and earn credits toward early release.[9]

The vehicle may be on the road, but Barr in the driver's seat could steer a course far different than the act's authors envisioned. Through internal policies, he could shape the law's implementation to favor more punitive outcomes.

Recall how former Attorney General Jeff Sessions rescinded the Obama-era Smart on Crime initiative, which gave prosecutors discretion to reserve stiff mandatory minimum sentences for defendants convicted of the most violent and serious crimes, via a 2017 memorandum ordering federal prosecutors and law enforcement officials to disregard direction from the Obama administration and to file serious charges that typically result in mandatory minimums.

Similarly, Barr's policies could require prosecutors to file the most serious charges and seek mandatory minimum sentences in borderline cases for which a reform-minded attorney general would push for more lenient sentences and greater access to rehabilitation. Barr's policies could push law enforcement to focus effort on offenses likely to meet the most serious risk levels, obviating access to good time credits and early release. Such policies would add to the number of federal prison inmates and make it more difficult for inmates to get into rehabilitation and early release programs.

In other words, the forward progress promised by the First Step Act could be seriously stalled. As attorney general, Barr would oversee a law whose words would not change but whose spirit could be crippled. The First Step Act's budget is a mere \$50 million per year through 2023, not sufficient to support radical change. Should Barr be confirmed as attorney general, his two-year report to Congress on the implementation and impact of the First Step Act[10] could be one troubling document to read.

---

*Lara Yeretsian is a criminal defense attorney and principal of Yeretsian Law. She worked on the legal teams defending Michael Jackson, Scott Peterson and other high-profile criminal prosecutions.*

***"Perspectives" is a regular feature written by guest authors on access to justice issues. To pitch article ideas, email [expertanalysis@law360.com](mailto:expertanalysis@law360.com).***

*The opinions expressed are those of the author and do not necessarily reflect the views of the organization, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for*

*general information purposes and is not intended to be and should not be taken as legal advice.*

[1] HR 5682, First Step Act <https://www.congress.gov/bill/115th-congress/house-bill/5682/text>

[2] "What Caused the Crime Decline?" Oliver Roeder, Lauren-Brooke "L.B." Eisen, Julia Bowling, Feb. 12, 2015 <https://www.brennancenter.org/publication/what-caused-crime-decline>

[3] "Weighing Imprisonment and Crime: 9 experts explore the relationship between prisons and crime rates," Pew Trusts, Feb. 10, 2015  
<https://www.pewtrusts.org/en/research-and-analysis/articles/2014/09/weighing-imprisonment-and-crime>

[4] "Reasonable Doubt: A New Look at Whether Prison Growth Cuts Crime," David Roodman, Sept. 25, 2017 <https://www.openphilanthropy.org/blog/reasonable-doubt-new-look-whether-prison-growth-cuts-crim>

[5] "How Effective Is Correctional Education, and Where Do We Go from Here? The Results of a Comprehensive Evaluation," Lois M. Davis, Jennifer L. Steele, Robert Bozick, Malcom V. Williams, Susan Turner, Jeremy N. V. Miles, Jessica Saunders, Paul S. Steinberg  
[https://www.rand.org/pubs/research\\_reports/RR564.html](https://www.rand.org/pubs/research_reports/RR564.html)

[6] Fair Sentencing Act of 2010, S. 1789, Public Law No: 111-220 (Aug. 3, 2010)  
<https://www.congress.gov/bill/111th-congress/senate-bill/1789>

[7] S. 3266, Crime Control Act of 1990  
<https://www.congress.gov/bill/101st-congress/senate-bill/3266>

[8] "The Case for More Incarceration," U.S. Department of Justice Office of Policy and Communications Office of Policy Development, 1992  
<https://www.ncjrs.gov/pdffiles1/Digitization/139583NCJRS.pdf>

[9] 18 USC Chapter 229, § 3632

[10] 18 USC Chapter 229, § 3634