

The First Step Act: A Preliminary Review

by Raheem Williams



CURE

**Center for
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Introduction

The First Step Act (FSA) is a bipartisan criminal justice reform law that was signed by President Trump in December 2018. The law aimed to improve criminal justice outcomes, and reverse mass incarceration trends without compromising public safety. The FSA sought to accomplish these with incentives, reforming confinement, and changes to corrections and sentencing¹.

After nearly 5 years since then President Trump signed the FSA into law, the impacts of the law are still being debated and challenged from across the political spectrum. Conservative politicians such as Florida Governor (and presidential candidate) Ron DeSantis have attacked the law as a jailbreak program, Trump-aligned Republicans are defending the law², and progressives are claiming the law hasn't reduced the prison population fast enough³.

This report cannot adjudicate a correct position to take on the FSA due to the complexity of attitudes towards criminal justice reforms. For example, some beneficiaries of the FSA have re-offended since release. However, that may not be enough to substantiate the claims made by opponents of the law. Similarly, progressives who judge the law on the reductions in the federal prison population may place less emphasis on the recidivism rates when judging the legislation. In short, whether the law is successful or not will depend largely on the biases of those interpreting the data. Ultimately judgment is subjective and values-based.

Our report seeks to explain how the law is supposed to work and contextualize crime, trends in federal incarceration, and recidivism related to the FSA. The reader can draw their conclusion based on the values they choose to emphasize. This report is primarily derived from terminology and data used by the U.S. Department of Justice (DOJ). It's important to understand that the FSA is not inclusive of the entire federal prison population. This analysis is restricted to inmate releases associated with the FSA.

Reducing Recidivism

The FSA requires the Attorney General to develop a risk and needs assessment system to assess the recidivism risk of all federal prisoners and to place prisoners into programs to reduce this risk. The law stipulates that the system must provide guidance on the type, amount, and intensity of recidivism reduction programming each prisoner receives. It requires the Bureau of Prisoners to assist inmates in applying for welfare benefits and government identification. Additionally, the FSA created guidance for wardens of prisons and community-based facilities to enter into recidivism-reducing partnerships with community-based organizations to provide recidivism-reduction programming. The efficacy of these programs is discussed in further detail below⁴.

Sentencing Reforms

The law modifies penalties for some federal offenses by changing the mandatory minimum sentences for some drug traffickers with prior drug convictions. Having a single prior conviction that triggers a mandatory minimum is reduced from a 20-year mandatory minimum to 15 years. A mandatory life-in-prison sentence is reduced to a 25-year mandatory minimum for offenders with multiple prior offenses. The FSA allows those with longer sentences for crack cocaine relative to powder cocaine to petition a federal court. It also allows courts to sentence low-level, nonviolent drug offenders with minor criminal histories to less than the required mandatory minimum for an offense⁵.

Confinement & Correctional Reforms

The FSA requires prisoners to be housed as close to their primary residence as possible, and to the extent practicable. It allows prison officials to place some elderly and terminally ill prisoners in home confinement to serve the remainder of their sentences. Inmates who complete recidivism reduction programming and productive activities can earn time credits that will qualify them for placement in home confinement or a residential reentry center. The law made it easier for federal inmates to earn more good time credit for every year of their imposed sentence. Ineligible prisoners are generally those categorized as violent, or involved in terrorism, espionage, human trafficking, sex, and sexual exploitation. Additional excluded offenses are repeat felons in possession of a firearm, or high-level drug offenses⁶.

Federal Incarceration Trends

The federal prison population peaked in 2013 at 219,298 inmates and started to decline well before the passage and implementation of the First Step Act reaching 177,214 in 2017 and 159,090 in 2022. The most pronounced drop came in 2020 during the Covid 19 pandemic when the Federal Bureau of Prisons (BOP) recorded a net decline of 21,652 prisoners⁷. Although aligned with the passage of the FSA, the decline is not consistent with the FSA releases recorded on the Attorney General's FSA annual reports for the same period. Similarly, the DOJ recorded zero expedited federal prison releases for 2020 (but 37,700 from state prisons)⁸. This data incongruence makes it difficult to determine the cause of the decline.

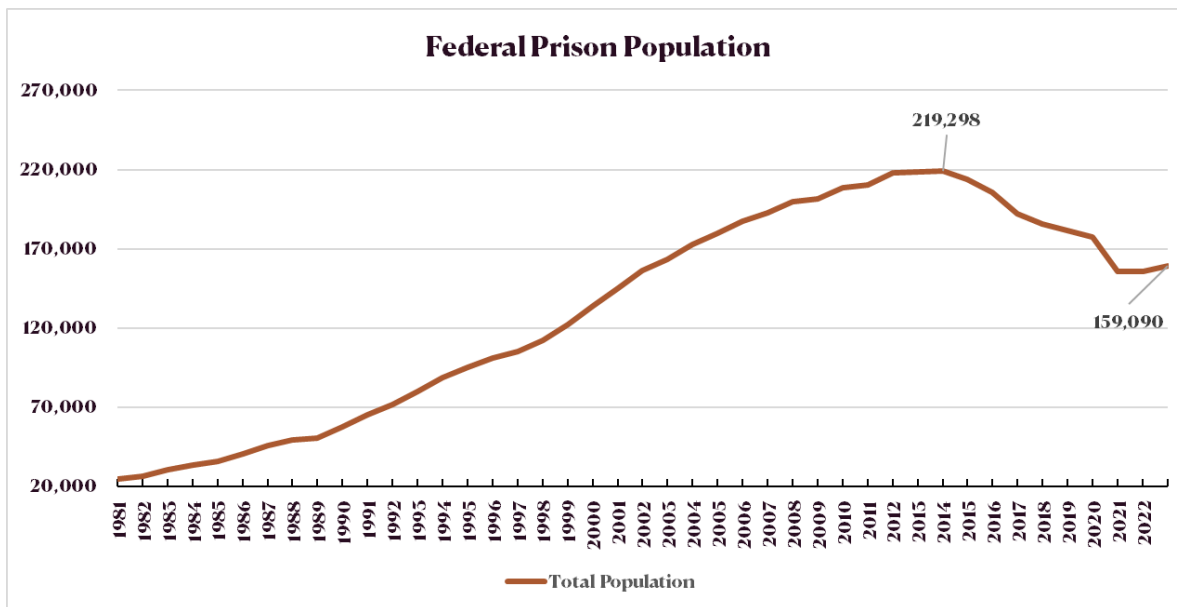


Figure 1 Federal Bureau of Prisons https://www.bop.gov/about/statistics/population_statistics.jsp

Overall, it's impossible to tell if the reduction in the federal prison population had a nationwide impact on the commission of crimes because there's no reliable way to track nationwide crime trends. The Federal Bureau of Investigation's (FBI) Uniform Crime Report (UCR) attempts to track nationwide crime statistics, but many law enforcement agencies simply don't report their data. The UCR is a widely used tool for tracking crime statistics in the United States. However, it is not without its limitations and issues. UCR participation is voluntary for law enforcement agencies, and not all agencies choose to participate. This can lead to incomplete or skewed data, as some areas might be underrepresented or excluded entirely from the statistics⁹. Even among participating agencies, there may be discrepancies in how crimes are classified and reported, leading to inconsistencies in the data. This can make it difficult to accurately compare crime rates between different jurisdictions.

The UCR's data collection process can be time-consuming, resulting in delays in reporting crime statistics. This can hinder the ability to respond quickly to changing crime trends. Even if reporting was mandatory, some crimes, particularly those that may involve victims who are hesitant to report to

law enforcement, (e.g., sexual assault, domestic violence), might be underreported, leading to an incomplete picture of crime rates.

First Step Act Recidivism Data

| Institution Security Level | 2018-2020 FSA Releases ¹⁰ | 2020-2022 FSA Releases ¹¹ | 2022-2023 FSA Releases ¹² | Total FSA Releases | FSA Total Recidivism |
|----------------------------|--------------------------------------|--------------------------------------|--------------------------------------|--------------------|----------------------|
| Minimum | 2679 | 3,499 | 17,659 | 23,837 | 5.4% |
| Low | 2369 | 3,208 | 8,003 | 13,580 | 15.4% |
| Medium | 1850 | 2,454 | 3,611 | 7,915 | 34.0% |
| High | 333 | 517 | 644 | 1,494 | 45.0% |
| Total Releases | 7231 | 2,447 | 20,239 | 29,917 | 12.4% |

According to the 2023 First Step Act Annual Report, recidivism is defined as a return to police custody at the local, state, or federal level. However, the data in the report is not presented as cohorts of releases. This makes it impossible to tell how long after release a return to reoffending occurs. Although an individual's risk of recidivism decreases with time, the relationship is inverse for a given cohort as more time means more opportunities for law enforcement interactions. Reporting recidivism rates as collective regardless of the year of the prisoner's release could subject the data to some manipulation.

As of the 2023 First Step Act Annual Report, 29,917 inmates have been released from federal prison due to the First Step Act. The vast majority (17,659) of these releases came from prisons classified as minimum-security institutions over the last year. As expected, the recidivism rate for this population is relatively low at 5.4%. Conversely, the number of FSA releases from high-security facilities is substantially lower, at 644, and predictably the recidivism rate for this group is substantially higher at 45%. Although the overall recidivism rate has declined from 15.9% in 2022 to 12.4% in 2023, this is basically from the dilutive effect some many recent releases. The number of total FSA releases skyrocketed from a total of 9,769 by mid-2022 to 29,917 in April 2023. However, only a small share of these releases came from high-security prisons¹³.

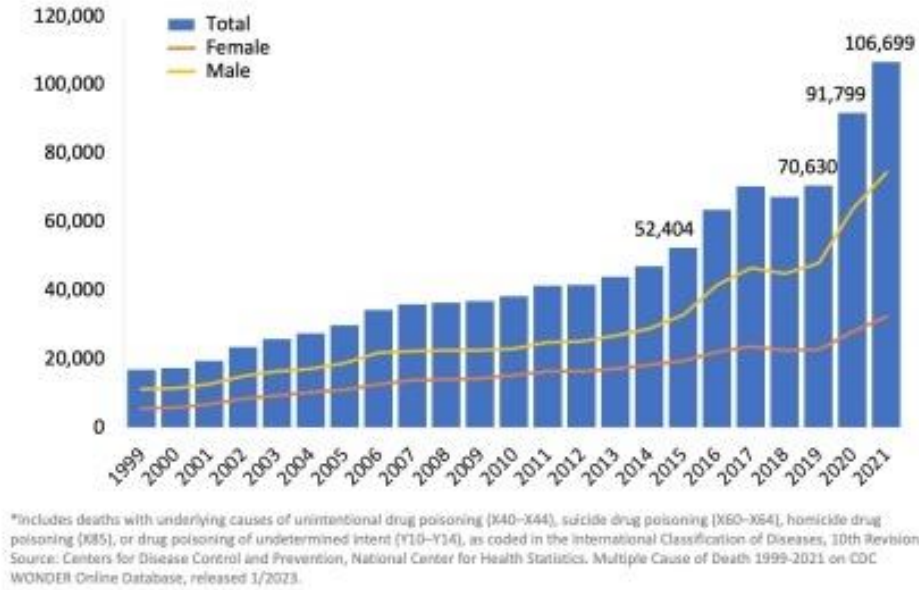
| Primary Offense of Conviction | 2023 FSA Releases | Program 2023 Recidivism rate |
|--------------------------------|-------------------|------------------------------|
| Drugs | 17341 | 13% |
| Weapons/Explosive | 2581 | 24% |
| Homicides/Aggravated Assault | 277 | 24% |
| Burglary/Larceny | 1600 | 9% |
| Counterfeit /Embezzlement | 182 | 6% |
| immigration | 654 | 17% |
| Fraud/bribery/Extortion | 5673 | 4% |
| Sex Offenses | 652 | 25% |
| National Security | 16 | 6% |
| Robbery | 536 | 27% |
| Miscellaneous | 229 | 9% |
| Continuing Criminal Enterprise | 0 | 5% |
| Number of Inmates | 29744 | 12% |

When breaking down the releases by offense category, we see another trend. There is a massive increase in drug offenders being released, which is unsurprising. A huge driver behind state and national-level criminal justice reform is the backlash to our decades-long drug war. Many in the public support being more lenient on non-violent drug offenders. Although this policy position isn't inherently wrong, there's a massive disconnect. A 2016 Pew poll found that 61 % of Americans believe prisons hold too many drug offenders¹⁴. However, the bulk of the American prison populations at the state and federal levels are **not** non-violent drug offenders¹⁵.

The belief amongst the general public that most or many incarcerated drug offenders are just neighborhood drug dealers is a myth. Criminal justice data and metrics often don't account for plea bargains. Plea bargains allow criminals to plead guilty to lower-level crimes to avoid lengthy and costly trials. This usually benefits the criminal by reducing the amount of total time served and the severity of the crimes on their official record, and it also saves time and money for the authorities who are often overwhelmed by the pure volume of cases that present. Regardless of how one feels about the ethics of plea bargains, it's widely known that such deals are common and frequent features of criminal justice. A DOJ study found that non-violent drug offenders were more likely to violently re-offend than violent drug offenders¹⁶.

The aforementioned makes it unwise to assume all nonviolent offenders are not violent people. Similarly, low recidivism rates in DOJ's FSA data are obfuscated by the massive recent releases. It's simply too early to tell the total impact of these policies.

Figure 1. National Drug-Involved Overdose Deaths*, Number Among All Ages, by Gender, 1999-2021



Another question to consider is the ethical concerns about being more lenient toward drug dealers as America struggles to curb the opioid crisis. Since 1999, the number of drug overdoses in America has skyrocketed to epic proportions. The perceived probability of being caught and serving time in prison is a crime deterrent – especially for those who have experienced incarceration. Although the exact role of these factors is intensely debated in the literature, there’s just as much risk in being too lenient on drug offenders as there is in being too punitive^{17, 18}.

Conclusion

Several challenges are present when performing an analysis of the FSA. The most salient of these are data lags, inconsistent reporting intervals, and separating the impacts of state-level policies on criminal behavior and incarceration policy. At this time, it would be premature to conclude the FSA program has been successful. The data needed to substantiate such a claim simply doesn't exist yet. Similarly, declaring the program a failure would be a presumptuous interpretation of the available evidence. The limitations of the recidivism data reported by the Attorney General's office make it impossible to differentiate between recent releases and earlier releases.

Likewise, claims that the FSA is a jailbreak program may be a crude interpretation of low-risk release; however, it's an interpretation that has merit. Under the Biden administration, the number of releases has skyrocketed but few of these involve inmates doing time for violent offenses in the traditional sense.

There was a spike in homicides nationwide after the FSA was passed. This could simply be coincidence and correlation does not necessarily equate with causation. Much of this spike occurred during the COVID-19 pandemic, after George Floyd was killed in Minneapolis, and during a shift in nationwide criminal justice policy.

It's too early to tell how this story ends. We may need to take a closer look at how the discretionary provisions in the FSA are applied by different presidential administrations and how changes in state criminal justice policies may impact federal data. Criminals may not be thinking very much about how crimes are treated under state versus federal law. Their actions could be impacted more by the climate in their local communities and the degree to which criminal behavior is tolerated or subjected to serious consequences in those communities.

About the Author

Raheem Williams is a policy analyst at the Center for Urban Renewal and Education (CURE). He has worked for several liberty-based academic research centers and think tanks. Raheem taught Intro to Microeconomics at North Dakota State University before joining the Reason Foundation's Pension Integrity Project. At Reason, he worked on pension reform in Florida, North Dakota, and North Carolina. As a writer, Raheem covers tax and social policy.



His work has appeared in the *Orlando Sentinel*, *South Florida Sun Sentinel*, *The Federalist*, *The Forum of Fargo-Moorhead*, *Duluth News Tribune*, *The Advocate* (Baton Rouge), *The Center Square*, and the *Conservative Review*.

Raheem has served as a Koch Fellow in 2014, the inaugural Policy Director for the North Dakota Young Republicans in 2018, a Republican Leadership Initiative Fellow in 2018, a 2019 America's Future Foundation Writing Fellow, a current member of the Louisiana Advisory Board for the U.S. Commission on Civil Rights, and a member of New Orleans Federalist Society. Williams is a 2023 Fellow of American Conservatism and Governing at the Manhattan Institute. Raheem is a Senior Fellow at Do No Harm, a medical ethics advocacy group.

Raheem Williams received his B.A. in Economics from Florida International University and his M.A. in Financial Economics from the University of Detroit Mercy.

Appendix A.) Source: BOJ Statistics:

https://www.bop.gov/about/statistics/population_statistics.jsp;#old_pops

| Federal Prison System Population Actuals | | |
|---|------------------|-------------------------------|
| FY | Total Population | Net Change from Previous Year |
| 1980 | 24,640 | |
| 1981 | 26,313 | 1673 |
| 1982 | 30,531 | 4218 |
| 1983 | 33,216 | 2685 |
| 1984 | 35,795 | 2579 |
| 1985 | 40,330 | 4535 |
| 1986 | 46,055 | 5725 |
| 1987 | 49,378 | 3323 |
| 1988 | 50,513 | 1135 |
| 1989 | 57,762 | 7249 |
| 1990 | 64,936 | 7174 |
| 1991 | 71,508 | 6572 |
| 1992 | 79,678 | 8170 |
| 1993 | 88,565 | 8887 |
| 1994 | 95,162 | 6597 |
| 1995 | 100,958 | 5796 |
| 1996 | 105,443 | 4485 |
| 1997 | 112,289 | 6846 |
| 1998 | 122,316 | 10027 |
| 1999 | 133,689 | 11373 |
| 2000 | 145,125 | 11436 |
| 2001 | 156,572 | 11447 |
| 2002 | 163,436 | 6864 |
| 2003 | 172,499 | 9063 |
| 2004 | 179,895 | 7396 |
| 2005 | 187,394 | 7499 |
| 2006 | 192,584 | 5190 |
| 2007 | 200,020 | 7436 |
| 2008 | 201,668 | 1648 |
| 2009 | 208,759 | 7091 |
| 2010 | 210,227 | 1468 |
| 2011 | 217,768 | 7541 |

| | | |
|------|---------|--------|
| 2012 | 218,687 | 919 |
| 2013 | 219,298 | 611. |
| 2014 | 214,149 | -5149 |
| 2015 | 205,723 | -8426 |
| 2016 | 192,170 | -13553 |
| 2017 | 185,617 | -6553 |
| 2018 | 181,698 | -3919 |
| 2019 | 177,214 | -4484 |
| 2020 | 155,562 | -21652 |
| 2021 | 155,826 | 264 |
| 2022 | 159,090 | 3264 |

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- ⁶ Ibid.
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