

# THE FIRST STEP ACT: CRIMINAL JUSTICE REFORM AT A BIPARTISAN TIPPING POINT

## I. INTRODUCTION

On December 21, 2018, President Donald J. Trump signed into law the Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act or the FIRST STEP Act.<sup>1</sup> Based on Congressional Budget Office estimates, thousands of prisoners would be immediately impacted by the retroactive provisions of the FIRST STEP Act and as many as 53,000 prisoners could be affected over the next ten years.<sup>2</sup> The FIRST STEP Act was passed with broad bipartisan support<sup>3</sup> and represents a significant departure from the “tough-on-crime” politics which have dominated the political discourse since President Lyndon B. Johnson, a Democrat, first pushed Congress to enact laws which institute harsher punishments and called for a larger law enforcement presence to combat “crime in the streets.”<sup>4</sup> The broad bipartisan support the FIRST STEP Act garnered is the continuation of an ongoing state-level wave of criminal justice reforms<sup>5</sup> and may be the “tipping point”<sup>6</sup> for additional federal and state criminal justice system reforms.<sup>7</sup>

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1. S.756 - First Step Act of 2018 115th Congress (2017-2018) <https://www.congress.gov/bill/115th-congress/senate-bill/756/actions>.

2. Sentence and Prison Impact Estimate Summary S. 1917, The Sentencing Reform and Corrections Act of 2017

(Data analysis conducted on August 3, 2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/August 2018 Impact Analysis for CBO.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/August%202018%20Impact%20Analysis%20for%20CBO.pdf); Time, The Bipartisan Criminal-Justice Bill Will Affect Thousands of Prisoners. Here's How Their Lives Will Change, Gina Martinez, Dec.20, 2018, <http://time.com/5483066/congress-passes-bipartisan-criminal-justice-reform-effort/>

3. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) 360 to 59 <https://www.congress.gov/bill/115th-congress/house-bill/5682/actions>.

4. *Justice in America*, *supra* note 1; Lyndon B. Johnson, *Special Message to the Congress on Law Enforcement and the Administration of Justice*, THE AM. PRESIDENCY PROJECT (Mar. 08, 1965) <https://www.presidency.ucsb.edu/documents/special-message-the-congress-law-enforcement-and-the-administration-justice>; *see also* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor Symposium: Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparity in the Criminal justice system*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 833 (2013) (“President Nixon created the Drug Enforcement Administration and announced an all-out war on the menace” of drugs.”); Ronald Reagan, *Radio Address to the Nation on Crime and Criminal Justice Reform*, THE AM. PRESIDENCY PROJECT (Sept. 11, 1982), <https://www.presidency.ucsb.edu/documents/radio-address-the-nation-crime-and-criminal-justice-reform> (President Ronald Reagan, gave a radio address in which advocated for making jail sentences more certain to combat a “crime epidemic” gripping the nation, a loss of “faith in our courts and our entire legal system,” and a consensus that courts were not “tough enough on criminals.”); Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. 99–570, 100 Stat. 320721 (codified as amended in scattered sections of U.S.C.) (Congress enacted the ADAA in response to President Ronald Reagan’s calls to be “tough-on-crime.”).

5. *See* KATHLEEN CASEY, IND. TASK FORCE ON PUB. DEF., FINAL REPORT AND RECOMMENDATIONS OF THE REPORTING SUBCOMMITTEE TO THE INDIANA PUBLIC DEFENDER COMMISSION (Aug. 22, 2018), <https://www.in.gov/publicdefender/files/EXECUTIVE%20SUMMARY%20TASK%20FORCE%20>

## II. FIRST STEP ACT

The FIRST STEP Act is divided into six titles which each address different concerns in the criminal justice system. Title I of the FIRST STEP Act is focused on “recidivism reduction” and directs the Attorney General to “develop and release a risk and needs assessment system” which classifies each prisoner’s recidivism risk and determines “the type, amount, and intensity of evidence-based recidivism reduction programs that are appropriate for each prisoner.”<sup>8</sup> The bill defines “evidence-based recidivism reduction programs” as those programs which have been shown by “empirical evidence to reduce recidivism or is based on research indicating that it is likely to be effective in reducing recidivism and is designed to help prisoners succeed in their communities upon release from prison.”<sup>9</sup> The Bureau of Prisons is directed to incentivize prisoners to participate in and complete recidivism reduction programs through, among other incentives, the granting of enhanced phone and visitation privileges, transfer to institutions closer to release residence, and time credits.<sup>10</sup> Prisoners who are serving a sentence for conviction under certain enumerated crimes, including violent felonies, terrorism, and sexual abuse, are ineligible for time credits, but may be granted other incentives to participate in recidivism reduction programs.<sup>11</sup> In addition to the time credits available for participation in recidivism reduction programs, the FIRST STEP Act may also shorten each prisoner’s time-served by retroactively increasing the good-behavior credits earned by a prisoner from 47 days to 54 days per year<sup>12</sup> and increasing the availability of pre-release custody systems, including home confinement with

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REPORT%208-31-18.pdf (Indiana); BRIAN ELDERBROOM ET AL., ASSESSING THE IMPACT OF SOUTH DAKOTA’S SENTENCING REFORMS INVESTMENT INITIATIVE 2 (2016), <https://www.urban.org/research/publication/assessing-impact-south-dakotas-sentencing-reforms-justice-reinvestment-initiative> (South Dakota); Janet Moore, *Democracy and Criminal Discovery Reform after Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1332–33 (2011) (quoting *Berger*, 295 U.S. at 78) (North Carolina); Donald W. Lemons, VIRGINIA SUPREME COURT CHIEF JUSTICE DONALD W. LEMONS CRIMINAL DISCOVERY RULES CHANGE (Sept. 5, 2018) (Virginia); Andrew Denney, *NYC Criminal Justice Reforms Effective in Diverting Offenders, Report Finds*, N.Y. L. J. (Sept. 5, 2018), <https://www.law.com/newyorklawjournal/2018/09/05/nyc-criminal-justice-reforms-effective-in-diverting-offenders-report-finds/> (New York).

6. MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (1st Back Bay pbk. ed. 2002) (Malcolm Gladwell popularized the idea of a tipping point in his book “The Tipping Point: How Little Things Can Make a Big Difference.” Gladwell identifies a tipping point as “the moment of critical mass, the threshold, the boiling point” for a “mysterious” sociological changes.).

7. The National Law Journal, Andrew Denney, Dec. 26, 2018, *Beyond the First Step: Big Law Partners and Former Federal Judges Discuss the Importance of Expansive Criminal Justice Reform*, <https://www.law.com/nationallawjournal/2018/12/26/beyond-the-first-step-big-law-partners-and-former-federal-judges-discuss-the-importance-of-expansive-criminal-justice-reform/>.

8. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) §3632(a).

9. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) §3635(1).

10. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) §3632(d).

11. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) §3632(d)(4)(D).

12. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) § 102(b) (amending 18 U.S.C. § 3624(b)(1) which provides for “up to” 54 days of credit, but in practice Bureau of Prisons only allows 47 days of credit).

electronic monitoring and residential reentry facilities.<sup>13</sup> These provisions could lead to the immediate release of individuals who are currently incarcerated.<sup>14</sup>

Title II of the FIRST STEP Act allows qualified law enforcement to carry concealed firearms on the outside of the secure perimeter of the prison, store firearms in vehicle lockboxes, and directs prisons to provide secure locations to store firearms.<sup>15</sup>

Title III of the FIRST STEP Act prohibits the use of certain restraints on prisoners during the period of pregnancy, labor, and postpartum recovery.<sup>16</sup>

Title IV of the FIRST STEP Act includes significant sentencing reforms. Section 401 amends The Controlled Substances Act to define “serious drug felony” and “serious violent felony” so as to restrict the application of prior drug felony sentencing enhancements.<sup>17</sup> In addition, Section 401 reduces the minimum sentences which must be imposed when sentencing enhancements do apply.<sup>18</sup> Section 401 also reduces the sentence imposed under the “three strikes” rule from a life-sentence to a 25-year minimum sentence.<sup>19</sup> Finally, Section 401 amends the Controlled Substances Import and Export Act by restricting its applicability by changing the requirement of a “felony drug offense” to a “serious drug felony or serious violent felony” and reduces the minimum term of imprisonment from 20 years to 15 years.<sup>20</sup> All provisions of Section 401 “shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.”<sup>21</sup>

Section 402 expands the availability of the judicial “safety valve” that can be used by sentencing judges to impose sentences below any

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13. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) § 102(g).

14. Sentence and Prison Impact Estimate Summary S. 1917, The Sentencing Reform and Corrections Act of 2017

(Data analysis conducted on August 3, 2018), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/August\\_2018\\_Impact\\_Analysis\\_for\\_CBO.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/prison-and-sentencing-impact-assessments/August_2018_Impact_Analysis_for_CBO.pdf).

15. Title II Sec. 202 § 4050(b).

16. Title III Sec. 301 § 4322.

17. Title IV Sec. 401(a)(1) (amending 21 U.S.C. 802 § 102 to include definition of “serious drug felony” which is any conviction for a qualifying “serious drug offense” crime listed in 18 U.S.C. 924(e)(2)) (requiring the defendant to have actually received a sentence of more than 12 months, as opposed to the prior requirement that a sentence of 12 months or more “could have been imposed”).

18. Title IV Sec. 401(a)(2)(A)(i) (reducing minimum sentence from 20 years to 15 years).

19. Title IV Sec. 401(a)(2)(A)(ii) (amending the Controlled Substances Act 21 U.S.C. 841(b)(1)) § 401(b)(1) and reducing minimum sentence after two or more prior convictions for certain felonies from a life-sentence to a minimum of 25 years).

20. Title IV Sec. 401(b) (amending the Controlled Substances Import and Export Act 21 U.S.C. 960(b) § 1010(b)).

21. Title IV Sec. 401(c).

statutory minimum sentences which may apply.<sup>22</sup> Prior to the FIRST STEP Act, the “safety valve” was only available to those defendants who under the Sentencing Guidelines have no more than one criminal history point, but the FIRST STEP Act makes the “safety valve” available to those with no more than four criminal history points.<sup>23</sup> Section 402 “shall apply only to a conviction entered on or after the date of enactment of this Act” and does not, therefore, apply retroactively to those already serving a sentence.<sup>24</sup>

Section 403 clarifies the application of Section 924(c) which, prior to the enactment of the FIRST STEP Act, allowed for the imposition of an enhanced mandatory minimum sentence when a gun was used in the commission of a “second or subsequent” conviction.<sup>25</sup> Courts interpreted the “second” conviction language to include concurrently charged offenses.<sup>26</sup> The clarification restricts the application of the gun sentencing enhancement to those situations in which the defendant has been convicted of a “prior” gun violation.<sup>27</sup> Section 403 “shall apply to any offense that was committed before the date of enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment,” but does not apply retroactively to those already serving a sentence.<sup>28</sup>

Section 404 of the FIRST STEP Act makes retroactive the provisions of the Fair Sentencing Act of 2010, which reduced the disparity in the sentences imposed for crack cocaine versus powder cocaine.<sup>29</sup> Section 404 applies retroactively and prisoners convicted prior to the enactment of the Fair Sentencing Act of 2010 may be granted a sentence reduction at the court’s discretion based on ‘motion of the defendant, the Director of the Bureau of Prisons, the attorney for the Government, or the court.’<sup>30</sup>

Title V of the FIRST STEP Act provides a mechanism for funding, monitoring, and evaluating the effectiveness of juvenile and adult programs established under the FIRST STEP Act and the Second Chance Reauthorization Act of 2018.<sup>31</sup>

Finally, Title VI of the FIRST STEP Act makes miscellaneous modifications and amendments to existing laws, including placing prisoners

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22. Title IV Sec. 402(a) (amending 18 U.S.C. 3553).

23. Title IV Sec. 402(a); *see also* Brandon Sample, First Step Act: A Comprehensive Analysis, Dec. 19, 2018, <https://sentencing.net/legislation/first-step-act>.

24. Title IV Sec. 402(b).

25. Title IV Sec. 402(a) (amending 18 U.S. Code § 924(c)(1)(a)).

26. Title IV Sec. 402(a) (amending 18 U.S. Code § 924(c)(1)(a)).

27. Title IV Sec. 403(a)–(b).

28. Title IV Sec. 403(b).

29. Title IV Sec. 404 (Fair Sentencing Act of 2010 (Public Law 111–220; 124 Stat. 2372)).

30. Title IV Sec. 404(b).

31. Title V Sec. 501–08; H.R.1593 - Second Chance Act of 2007, Public Law No: 110-199 (04/09/2008).

within 500 miles of the prisoner's primary residence,<sup>32</sup> placing low-risk prisoners in home confinement,<sup>33</sup> facilitating reentry for terminally ill prisoners,<sup>34</sup> facilitating a prisoner's acquisition of identification documents prior to release,<sup>35</sup> expanding opportunities for prison employment,<sup>36</sup> providing evidence-based treatment for opioid and heroin abuse,<sup>37</sup> providing free tampons and sanitary napkins,<sup>38</sup> and prohibiting juvenile solitary confinement except when the "juvenile's behavior poses a serious and immediate risk of physical harm."<sup>39</sup>

### III. THE PATH TO PASSAGE

A version of the FIRST STEP Act was first introduced as a bill in the United States Senate on March 29, 2017 and a different version was introduced in the United States House of Representatives on May 7, 2018.<sup>40</sup> The House version passed with broad bipartisan support on May 22, 2018,<sup>41</sup> but the Senate version languished and was not brought to a vote by Senate Majority Leader Mitch McConnell until December 18, 2018.<sup>42</sup> Senator McConnell's reluctance was based in large part on the opposition of Senator Tom Cotton of Arkansas and Senator McConnell's fear that bringing the bill to a vote would cause "serious rifts within the Republican caucus."<sup>43</sup> While supporters of the bill believed that the bill would garner 70 votes in the Senate, Senator Cotton, an attorney who served in the Army J.A.G. Corps in Afghanistan, discouraged Senator McConnell from bringing the bill to a vote because Senator Cotton believes that the under-incarceration which the FIRST STEP Act would create could destabilize the United States.<sup>44</sup> President Donald J. Trump initially expressed a reluctance to support the FIRST STEP Act based on a fear, encouraged by Senator Cotton, that President Trump "could suffer

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32. Title VI Sec. 601.

33. Title VI Sec. 602.

34. Title VI Sec. 603; 34 USC 60541: Federal prisoner reentry initiative Section 231(g).

35. Title VI Sec. 604.

36. Title VI Sec. 605.

37. Title VI Sec. 606.

38. Title VI Sec. 611.

39. Title VI Sec. 613.

40. Actions Overview H.R.5682 — 115th Congress (2017-2018) <https://www.congress.gov/bill/115th-congress/house-bill/5682/actions>.

41. H.R.5682 - FIRST STEP Act 115th Congress (2017-2018) 360 to 59 <https://www.congress.gov/bill/115th-congress/house-bill/5682/actions>.

42. S.756 - First Step Act of 2018, 115th Congress (2017-2018), Actions Overview, <https://www.congress.gov/bill/115th-congress/senate-bill/756/actions>.

43. Vox, The First Step Act, Congress's criminal justice reform bill, explained, German Lopez Dec. 11, 2018, <https://www.vox.com/future-perfect/2018/12/3/18122392/first-step-act-criminal-justice-reform-bill-congress>

44. Nick Gas, Politico, May 19, 2016, Sen. Tom Cotton: U.S. has 'under-incarceration problem,' <https://www.politico.com/story/2016/05/tom-cotton-under-incarceration-223371>.

his own Willie Horton moment if he backed the bill” if a released prisoner went on to commit a crime.<sup>45</sup>

However, President Trump’s son-in-law and advisor, Jared Kushner, who is considered the “driving force” behind the bill, continued to exert pressure on both Senator McConnell and President Trump by modifying the bill to build a greater consensus.<sup>46</sup> Mr. Kushner’s enthusiasm for criminal justice reform is thought to have originated in the experience of watching his father serve 14 months in “federal prison for tax evasion, witness tampering, and making illegal donations.”<sup>47</sup> Liberal CNN host Van Jones and Democratic House Representative Hakeem Jeffries both recognized and linked Mr. Kushner’s authentic commitment to criminal justice reform to Mr. Kushner’s personal experience with his father’s incarceration.<sup>48</sup> Mr. Kushner’s efforts to build pressure on President Trump and Senator McConnell focused on building a broad coalition of support from Republican and Democratic members of Congress and the Senate, media personalities, political mega-donors, and criminal justice system participants.<sup>49</sup>

Mr. Kushner exerted his influence on the President by enlisting individuals to whom the President listened to voice their support for the bill.<sup>50</sup> Mr. Kushner spoke with 21st Century Fox CEO Rupert Murdoch, his son Lachlan Murdoch, and former Whitehouse spokesperson and now Fox Chief Communications Officer, Hope Hicks, to encourage them to

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45. Jerry Diamond & Alex Rogers, CNN, How Jared Kushner, Kim Kardashian West and Congress drove the criminal justice overhaul, <https://www.cnn.com/2018/12/18/politics/criminal-justice-overhaul/index.html>; *see also* John Sides, IT’S TIME TO STOP THE ENDLESS HYPE OF THE ‘WILLIE HORTON’ AD THE WASHINGTON POST: MONKEY CAGE (2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/?utm\\_term=.2a2df3442dde](https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/06/its-time-to-stop-the-endless-hype-of-the-willie-horton-ad/?utm_term=.2a2df3442dde).

46. Jerry Diamond & Alex Rogers, CNN, How Jared Kushner, Kim Kardashian West and Congress drove the criminal justice overhaul, <https://www.cnn.com/2018/12/18/politics/criminal-justice-overhaul/index.html>.

47. Annie Karni, New York Times, The Senate Passed the Criminal Justice Bill. For Jared Kushner, It’s a Personal Issue and a Rare Victory, Dec. 14, 2018, <https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html>; AL.COM June 7, 2017, Leada Gore, [https://www.al.com/news/index.ssf/2017/06/father\\_of\\_trump\\_son-in-law\\_jar.html](https://www.al.com/news/index.ssf/2017/06/father_of_trump_son-in-law_jar.html).

48. Jeremy Diamond and Alex Rogers, Dec. 21, 2018, How Jared Kushner, Kim Kardashian West and Congress drove the criminal justice overhaul, <https://www.cnn.com/2018/12/18/politics/criminal-justice-overhaul/index.html>; <https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html>.

49. Jerry Diamond & Alex Rogers, CNN, How Jared Kushner, Kim Kardashian West and Congress drove the criminal justice overhaul, <https://www.cnn.com/2018/12/18/politics/criminal-justice-overhaul/index.html>.

50. Annie Karni, New York Times, The Senate Passed the Criminal Justice Bill. For Jared Kushner, It’s a Personal Issue and a Rare Victory, Dec. 14, 2018, <https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html>; Politico, Eliana Johnson & Burgess Everett, Dec. 14, 2018, Kushner deploys conservative media campaign for his agenda, <https://www.politico.com/story/2018/12/14/jared-kushner-criminal-justice-reform-congress-fox-news-1063496>.

support the bill.<sup>51</sup> A Fox press release in support of the bill was the culmination of Mr. Kushner's effort to obtain the support of Fox which "was interpreted as a clear sign that Fox News hosts would not attack the bill."<sup>52</sup> Mr. Kushner also appeared on the Fox News show *Hannity*, to signal to President Trump, Senator McConnell, and President Trump's base that even the "hard-right" supported the FIRST STEP Act.<sup>53</sup> Mr. Kushner also enlisted the support of Matt Drudge, the proprietor of the Drudge Report, a reliable conservative news aggregator website, to post multiple positive stories about the bill in a prominent location on the website.<sup>54</sup>

Before and beyond the efforts of Mr. Kushner, the bill was supported by diverse groups who hold significant sway with both Democratic and Republican politicians, including the Democratic leaning American Civil Liberties Union<sup>55</sup> and the Republican leaning Right on Crime supported by the Republican mega-donor Koch brothers.<sup>56</sup>

Spurred by the encouragement of his advisor and son in law, Jared Kushner, President Trump voiced his support for the legislation and ultimately persuaded Senator McConnell to bring the bill to a vote in the Senate where it passed 87 to 12.<sup>57</sup>

#### IV. TIPPING POINT

Malcolm Gladwell popularized the idea of a tipping point in his debut 2000 book "The Tipping Point: How Little Things Can Make a Big Difference."<sup>58</sup> Gladwell defines a tipping point as "the moment of critical

51. Statement from Fox News Supporting First Step Act, Dec. 6, 2018, <https://www.21cf.com/news/21st-century-fox/2018/statement-from-fox-supporting-first-step-act/>.

52. Statement from Fox News Supporting First Step Act, Dec. 6, 2018, <https://www.21cf.com/news/21st-century-fox/2018/statement-from-fox-supporting-first-step-act/>; Politico, Eliana Johnson & Burgess Everett, Dec. 14, 2018, Kushner deploys conservative media campaign for his agenda, <https://www.politico.com/story/2018/12/14/jared-kushner-criminal-justice-reform-congress-fox-news-1063496>.

53. Annie Karni, New York Times, The Senate Passed the Criminal Justice Bill. For Jared Kushner, It's a Personal Issue and a Rare Victory, Dec. 14, 2018, <https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html>.

54. Politico, Eliana Johnson & Burgess Everett, Dec. 14, 2018, Kushner deploys conservative media campaign for his agenda, <https://www.politico.com/story/2018/12/14/jared-kushner-criminal-justice-reform-congress-fox-news-1063496>.

55. ACLU How the FIRST STEP Act Moves Criminal Justice Reform Forward, Charlotte Resing, Dec. 3, 2018, <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward>.

56. Randy Petersen, Dec. 7, 2018, Right on Crime, <http://rightoncrime.com/2018/12/no-need-to-wait-law-enforcement-already-supports-first-step-act/>.

57. The New York Times, Annie Karni, Dec. 14, 2018, The Senate Passed the Criminal Justice Bill. For Jared Kushner, It's a Personal Issue and a Rare Victory, <https://www.nytimes.com/2018/12/14/us/politics/jared-kushner-criminal-justice-bill.html>; CNN, Jeremy Diamond and Alex Rogers, Dec. 21, 2018, How Jared Kushner, Kim Kardashian West and Congress drove the criminal justice overhaul, <https://www.cnn.com/2018/12/18/politics/criminal-justice-overhaul/index.html> (passing the bill in the Senate 87 to 12).

58. See generally MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (1st Back Bay pbk. ed. 2002).

mass, the threshold, the boiling point" for a "mysterious" sociological changes.<sup>59</sup> Criminal justice reform has been proposed at different times since the 1980s, but few meaningful federal or state reforms were implemented until the mid-2000s. In the mid-2000's, politicians on both sides of the aisle at the state level and Democratic politicians at the federal level have supported criminal justice reform. Research shows that people tend to underestimate the coercive power of situations to trump people's norms and preferences.<sup>60</sup> Mr. Kushner used the coercive power of successful criminal justice reforms in those "laborator[ies]" of democracy,<sup>61</sup> the states, and the persuasive power of media personalities and mega-donors who pervade the discourse in Washington, to nudge criminal justice reform over the tipping point.

After the FIRST STEP Act was signed into law, Brooke Rollins, Assistant to the President for Strategic Initiatives, was interviewed by the far-right website Breitbart News.<sup>62</sup> Mrs. Rollins stated that the White House modeled the FIRST STEP Act on "prison reform legislation in Republican-run states that focused on "increase[ing] public safety."<sup>63</sup> Mrs. Rollins positioned Republican efforts in opposition to Democratic-run state efforts that "focused on decreasing incarceration" and led to an increase in property crimes.<sup>64</sup> While increasing public safety has been an ongoing theme adopted by President Trump,<sup>65</sup> Rollin's statement to Pres-

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59. See generally *Id.*

60. Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 CHI.-KENT L. REV. 1537, 1566 (2000).

61. *New State Ice Co. v. Liebmann*, 285 US 262, 311 (1932).

62. Breitbart News, White House: Prison Reform Bill Proves 'We Can Come Together as a Country,' Joel B. Pollack, Dec. 19, 2018, <https://www.breitbart.com/politics/2018/12/19/prison-reform-first-step-act-bipartisanship/>. See generally Politico, Bannon steps down from Breitbart News, Michael Calderone, Jason Schwartz, & Alex Isenstadt, Jan. 9, 2018, <https://www.politico.com/story/2018/01/09/bannon-steps-down-from-breitbart-news-329603> (Former Chief White House Strategist Steve Bannon was the executive chairman of Breitbart News until he stepped down in Jan. 2018.).

63. Breitbart News, White House: Prison Reform Bill Proves 'We Can Come Together as a Country,' Joel B. Pollack, Dec. 19, 2018, <https://www.breitbart.com/politics/2018/12/19/prison-reform-first-step-act-bipartisanship/>.

64. Breitbart News, Study: Proposition 47 'Prison Reform' Increased Property Crimes by 9%, Chriss W. Street, June 13, 2018, <https://www.breitbart.com/local/2018/06/13/prison-reform-study-proposition-47-decriminalization-increased-property-crimes-by-9/> ("Prop 47 reduced shoplifting, grand theft, receiving stolen property, check forgery, check fraud, and writing bad checks where the loss does not exceed \$950 from felonies to misdemeanors. The measure also downgraded the personal use of most illegal drugs from a felony to a misdemeanor."). *But see* UCI News, Proposition 47 not responsible for recent upticks in crime across California, UCI study says, Mar. 7, 2018, <https://news.uci.edu/2018/03/07/proposition-47-not-responsible-for-recent-upticks-in-crime-across-california-uci-study-says/> ("When we compared crime levels between these two California's, they were very similar, indicating that Prop. 47 was not responsible for the increase.").

65. See President Donald J. Trump's State of the Union Address, THE WHITE HOUSE, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/>; Federal Interagency Council on Crime Prevention and Improving Reentry, THE WHITE HOUSE, <https://www.whitehouse.gov/presidential-actions/federal-interagency-council-crime-prevention-improving-reentry/>; President Donald J. Trump Proclaims April 2018 as Second Chance Month, THE WHITE HOUSE, <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-april-2018-second-chance-month/>.



ident Trump's base on Breitbart News belies the criminal justice reform actions taken in the states which are positioned differently depending on the state's political leanings, but largely perform the same function.<sup>66</sup>

Republican politicians, and the states which they control including deep red states like Indiana,<sup>67</sup> South Dakota,<sup>68</sup> and North Carolina,<sup>69</sup> have enacted policies, passed statutes, and conducted research aimed at traditional Republican platform issues including Constitutional protections, family preservation, increasing public safety, and cost reductions. Measures enacted by Democratic-led states incorporate many of the same issues as the Republican controlled states but also seek to reform the areas of the criminal justice system which impact poor and historically disadvantaged populations.<sup>70</sup>

The breadth of the concerns across the political spectrum that are addressed by FIRST STEP Act are seen as necessary to ensure passage of criminal justice reform in the deeply divided federal government.<sup>71</sup> Based on the success of certain state level approaches that have garnered partisan and bipartisan support, the most important factors needed to facilitate passage of federal criminal justice reform are the following: (1) reforms must not endanger or give the appearance of endangering public safety; and (2) reforms must strengthen, or at least not weaken, constitutional protections for all citizens, including poor and historically disadvantaged citizens.

However, in the current political climate, these factors are not sufficient to ensure passage of criminal justice reform measures. Historically, earmarks served as a means to build consensus for a bill, but with the

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66. See Texas Public Policy Foundation, Derek M. Cohen, May 27, 2018, Prison Reform is Worth Fighting for in the Senate, <https://www.texaspolicy.com/prison-reform-is-worth-fighting-for-in-the-senate/> (comparing the FIRST STEP Act to the criminal justice reforms enacted in Texas in 2005 which "expanded alternatives to incarceration, such as drug courts and mental health treatment"); Roberta Hertzberg & Rob Bonta, CALIFORNIA COULD LEAD THE WAY ON CRIMINAL JUSTICE REFORM. FIRST THE LEGISLATURE MUST DO AWAY WITH CASH BAIL THE SACRAMENTO BEE (2018), <https://www.sacbee.com/opinion/op-ed/soapbox/article217018410.html> (passing reform of the cash bail system with Senate Bill 10 which sought to strike the "right balance between safety and justice" in abolishing what was called "predatory, for-profit money bail system").

67. See KATHLEEN CASEY, INDIANA TASK FORCE ON PUBLIC DEFENSE 11 (2018), <https://www.in.gov/publicdefender/files/EXECUTIVE%20SUMMARY%20TASK%20FORCE%20REPORT%208-31-18.pdf>.

68. BRIAN ELDERBROOM ET AL, ASSESSING THE IMPACT OF SOUTH DAKOTA'S SENTENCING REFORMS JUSTICE REINVESTMENT INITIATIVE 3 (2016).

69. Janet Moore, *Democracy and Criminal Discovery Reform after Connick and Garcetti*, 77 BROOK. L. REV. 1329, 1378 (2011).

70. Madison Park, CALIFORNIA ELIMINATES CASH BAIL IN SWEEPING REFORM CNN (2018), <https://www.cnn.com/2018/08/28/us/bail-california-bill/index.html?no-st=1536116407>; Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor Symposium: Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparity in the Criminal Justice System*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821-852, 833 (2013).

71. *Supra* I.

enactment of disclosure requirements and bans,<sup>72</sup> the use of earmarks has significantly decreased as a means of building consensus. As was the case with the FIRST STEP Act, without the support of those individuals, like Mr. Kushner, who are able to enlist the support of media personalities, political mega-donors, hard-left and hard-right organizations, and innumerable other influencers, any efforts at criminal justice reform may languish in Congress based on the objections of vocal opposition from individuals like Senator Cotton.

#### V. CONCLUSION

Passage of bipartisan federal legislation with the scope of the FIRST STEP Act has become a rarity in Washington, but individuals who are authentically committed to their efforts can facilitate passage of divisive legislation. To ensure passages, committed individuals must influence the legislative process to construct a bill that appeals to all stakeholders, allows politicians to claim a success for their respective bases, and enlist a compelling group of media personalities and influencers who can overcome the objections of hard-left and hard-right objectors.

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72. Megan S. Lynch, May 21, 2015, "Earmark Disclosure Rules in the House: Member and Committee Requirements" (PDF), Congressional Research Service (CRS), 7, <https://fas.org/sgp/crs/misc/RS22866.pdf>; Raymond Hernandez, Feb. 4, 2011, "District Liked Its Earmarks, Then Elected Someone Who Didn't". The New York Times, <https://www.nytimes.com/2011/02/05/nyregion/05earmarks.html>, (disclosing earmarks began in 2009 and Congress imposed a temporary, yet enduring, ban on earmarks in 2010)

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