

**REPORT ON LEGISLATION  
BY THE TASK FORCE ON MASS INCARCERATION AND  
COMMITTEE ON FEDERAL COURTS**

**“FIRST STEP ACT”**

**I. INTRODUCTION**

The First Step Act is bipartisan criminal justice legislation that aims to reform federal sentencing. The New York City Bar Association (“the City Bar”) supports core elements of the legislation, including: the proposed expansion of the “safety valve” provision in drug cases; reducing mandatory minimum sentences based on prior felony convictions; limiting the use of so-called “stacking” for people charged with a first offense; making retroactive the Fair Sentencing Act of 2010, which reduced the sentencing gap between crack and powder-cocaine offenses; and prohibiting the use of restraints on pregnant and postpartum women. The City Bar urges Congress and President Trump to make key provisions of the legislation’s safety valve, prior felony and stacking provisions retroactive, thereby ensuring truly meaningful progress in addressing our nation’s mass incarceration crisis. We believe that the First Step Act is a step in the right direction, but there is more to be done to address the full scope of the impact of mass incarceration, and we urge continued bipartisan efforts be taken to address remaining concerns.

The City Bar, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The City Bar includes among its membership lawyers in virtually every area of law practice, including many present or former federal prosecutors as well as many lawyers who represent defendants in criminal cases. The City Bar’s Federal Courts Committee is charged with responsibility for studying and making recommendations regarding substantive and procedural issues relating to the practice of civil and criminal law in the federal courts. The Task Force on Mass Incarceration is made up of leaders of not-for-profit institutions, academics, defense attorneys, prosecutors and other experts and criminal law practitioners. The Task Force examines ways to reduce mass incarceration in the United States.

The City Bar’s 2015 report, “Mass Incarceration: Seizing the Moment for Reform,” called on Congress and the state legislatures to prioritize reduction of mass incarceration. The proposed reforms included repealing or reducing mandatory minimum sentences, expanding sentencing alternatives to incarceration and the availability of rehabilitative services during and following incarceration to reduce recidivism and better enable individuals to successfully reenter society, and providing opportunities for individuals with

misdemeanor and non-violent felony convictions to seal those records.<sup>1</sup>

The City Bar believes core elements of the First Step Act would reduce mass incarceration and urges Congress to make retroactive the Act's safety valve, prior felony and stacking provisions.

## **II. THE CITY BAR SUPPORTS CERTAIN REFORMS CONTAINED IN THE BILL**

### **a. Safety Valve Expansion**

Existing law contains a “safety valve” exception for federal drug offenses, 18 U.S.C. 3553(f), which permits some defendants convicted of a drug offense to avoid a mandatory minimum sentence even if the drug quantity relevant to their offense would otherwise require imposition of the mandatory minimum. The “safety valve” currently allows people charged with drug offenses who have no more than one criminal history point under the Sentencing Guidelines to qualify for a sentence below the mandatory minimum if they meet certain other criteria.

Section 402 of the First Step Act would expand the safety valve so that people charged with drug offenses who have no more than four criminal history points would qualify, as long as they do not have a prior “3 point” offense or prior “2 point” violent offense. Importantly, this section would also authorize a sentencing judge to waive the prior disqualifying convictions if the judge specifies in writing the reasons why the defendant's criminal history “substantially overrepresents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes.”

The City Bar supports the proposed expansion of the safety valve, and has previously advocated for the waiver approach reflected in this provision, which is consistent with Sentencing Guidelines Section 4A1.3(b). Under current law, a person with prior convictions for one or more minor offenses in the distant past might well be ineligible for safety valve consideration. The First Step Act would enable such people to qualify for a sentence below the mandatory minimum if they otherwise qualify for the safety valve. This provision would be particularly significant to people charged with drug offenses who are subject to a 5-year mandatory minimum sentence for lower-quantity offenses, which the Act does not otherwise reduce or limit. More generally, this provision of the Act would significantly enhance judicial discretion to impose an appropriate sentence. The City Bar urges Congress and the President to give retroactive effect to Section 402.

### **b. Reducing the Impact of Prior Felonies**

Section 401 of the First Step Act would amend the Controlled Substances Act, 21 U.S.C. § 841(b)(1), and the Controlled Substances Import and Export Act, 21 U.S.C. §

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<sup>1</sup>Available at [https://www2.nycbar.org/pdf/report/uploads/Mass\\_Incarceration\\_Seizing\\_the\\_Moment\\_for\\_Reform-20150928.pdf](https://www2.nycbar.org/pdf/report/uploads/Mass_Incarceration_Seizing_the_Moment_for_Reform-20150928.pdf)

960(b)(1), to reduce the enhanced mandatory minimum sentences for a person charged with a drug offense who has a prior qualifying conviction from 20 years to 15 years, and for a person charged with a drug offense who has two or more prior convictions from life imprisonment to 25 years. Further, the Act would limit the application of the enhanced mandatory minimums to a prior “serious drug felony” or “serious violent felony” for which the person actually served a term of imprisonment of more than 12 months.

The City Bar believes that a substantial reduction of mandatory minimum sentences for non-violent drug offenses is necessary and improves proportionality in sentencing for these offenses. We believe that Congress’s focus on reducing mandatory minimums for drug offenses is appropriate, given that drug offenses represent a significant majority of all convictions carrying a mandatory minimum. Mandatory minimums should not be set by reference to the sentence appropriate to the most culpable people, because the result is that the same sentence has to be imposed on many less culpable people. Instead, mandatory minimums should be set by reference to the sentence appropriate to the least culpable people who can be convicted under the statute, because a sentencing judge can always sentence more culpable people to a sentence above the mandatory minimum. We also support the reduction of mandatory minimums for charges beyond non-violent drug charges. Again, the City Bar urges Congress and the President to make Section 401 retroactive.

**c. Limiting “Stacking” for People Charged with a First Offense**

The First Step Act would eliminate the use of so-called “stacking” provisions for people charged with a first offense. Currently, if people are charged with possession or use of a firearm in connection with other federal crimes – typically drug trafficking – their sentences can increase an additional five to 25 years for each offense. By eliminating mandatory stacking of sentences for people charged with a first offense, approximately 60 people per year would avoid draconian sentences. The City Bar urges Congress and the President to make this provision retroactive to the approximately 700 people already serving such draconian sentences.

**d. Applying the Fair Sentencing Act of 2010 Retroactively**

In 2010, the Fair Sentencing Act addressed the sentencing disparity between people charged with offenses for crack and powder-cocaine, but only on a prospective basis. The First Step Act would make these provisions retroactive for individuals who were sentenced prior to August 2, 2010. Any reduction in sentence would be at the discretion of a federal judge but nearly 3,000 people would be eligible for potential resentencing. The City Bar supports making these provisions retroactive.

**e. Prohibiting Restraints During Pregnancy, Labor, and Postpartum Recovery**

Section 301 of the First Step Act would prohibit the use of restraints on people who are incarcerated during the period of pregnancy, labor, and postpartum recovery. The City Bar supports this proposed prohibition.

### **III. CONCLUSION**

The City Bar supports core elements of the sentencing reforms contained in the First Step Act, which can make federal sentencing more just. To more fully address our nation's mass incarceration crisis, however, the City Bar urges Congress and the President to make sentencing-related elements of the Act retroactive. Finally, we are concerned about the Act's over-reliance on risk assessments for reentry-related purposes. Putting so much emphasis on these tools takes away necessary individualized assessment and – because the instruments themselves incorporate historical criminal justice data that can reflect past discriminatory practices – may lead to biases in risk scores and outcome measures. For this reason, it should be a guiding principle that the use of risk assessment tools depends upon the rigorous, regular testing and independent validation of those tools and, under all circumstances, they should be just one factor among many in predicting a person's success in a program.

We believe that the First Step Act is a step in the right direction, but there is more to be done to address the full scope of the impact of mass incarceration, and we urge continued bipartisan efforts be taken to address substantial remaining concerns.

Task Force on Mass Incarceration  
Sean Hecker, Chair

Federal Courts Committee  
Laura Birger, Chair

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