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Session 1 Written Statements Submitted to NIJ

by April 12, 2019

1. #cut50 – Jessica Jackson
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3. FreedomWorks – Sarah Anderson
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6. National Association of Assistant United States Attorneys – Lawrence J. Leiser
7. Urban Institute – Nancy La Vigne

Testimony for United States Department of Justice

Jessica Jackson

Co-Founder and Executive Director, #cut50

April 3, 2019

The Amplification of Racial Disparities via Risk Assessment Tools

The goal of the First Step Act is to prepare men and women in federal prison to come home rehabilitated and job-ready. In order to do so, the Federal Bureau of Prisons must match people in its care to the programs and services best suited to support their rehabilitation. The Earned Time Credit system provides incentive for them to pursue life-changing classes and the Risk and Needs Assessment is the mechanism by which people are matched to the best programs and services for their needs - it also determines who is able to benefit from the REAL incentive of being able to “cash in” credits for transfer to pre-release custody, home confinement, or other community supervision.

Thus, a significant factor in the First Step Act and its success is the proper development and implementation of the Risk and Needs Assessment System.

It is not just the lives and future success of people in the federal prison system that are at stake - nor the safety of the communities to which they will return home to. The American people’s faith and trust in our justice system revolves around DOJ’s ability to properly develop and implement this tool.

As I am sure you will hear from other speakers here today, Risk Assessment Systems have been plagued by mistrust and fear - primarily because of their potential to exacerbate racial disparities in our prison and criminal justice system, which are already far too prevalent.

While these tools do not explicitly include race, socioeconomic status or gender as data-points, the outputs of these tools are undoubtedly influenced by historical racism and discrimination. The solutions are not simple. Profile-based risk assessments use data and mathematical formulas to estimate the likelihood that an individual will engage in future crime. These assessments are used at numerous points of contact with the criminal justice system, including decisions on pretrial release, sentencing, post-conviction release, and levels of community supervision.

It is well documented that racial bias in policing greatly influences who gets arrested – with Black and Brown people being arrested at significantly higher rates than their white counterparts. This bias extends to the data used in risk assessment tools and can create disastrous outcomes. For example, ProPublica examined the risk assessment scores of 7,000 people arrested in Broward County, Florida between 2013 and 2014. The study found that the risk assessment tool that was used had an 80 percent failure rate overall in predicting the probability of a future violent crime. Further, the tool was particularly inaccurate for Black defendants, who were often

incorrectly predicted to be at a higher risk of recidivism than their White counterparts. This means that the tool deemed people as “high risk” far more often than it should have, that it far overestimated recidivism, and that it did so in ways that more negatively impacted Black Americans.

Scientific and technological tools often give the appearance of objectivity while masking the underlying biases within a system.

In order to protect against discrimination and disparity in who benefits from the First Step Act, it is critical that the tool be carefully designed, using best practices, and with the goal of recommending as many people as possible for placement in the programs that put them on track for the greatest success, the most earned time credit and the earliest release.

We understand that there have been some delays in funding and beginning the selection of the Independent Review Commission. We are concerned about missing the deadline given essential role in creating this risk assessment instrument.

When working with the independent researchers and outside experts, the DOJ must create a tool that assesses both **risk and needs** and be responsive to an individual’s development over-time. To be most useful and effective, the tool must also evaluate not only the risk of the participant to the community, the needs of the participant to mitigate that risk, but also the **strengths** of the participant.

First, designers of the tool must look to the Risk-Needs-Responsivity model for guidance in this method. The tool should be designed with the input of independent scientists, risk assessment experts, defense attorneys, directly impacted individuals and other key stakeholders, and the design should be updated over time to reflect new research.

Second, the risk assessment tool must use accurate and reliable data sets – and these data sets should be revisited and reviewed on a regular basis. The tool’s design should include measures of fairness, such as error rate balancing and predictive parity, and should weigh data and variables differently in order to account for the effects of systemic racism and disparity in the criminal justice system upon each data point or question used. For example, if the age of first arrest were a data point, that data point is extremely subject to racial disparity, and so it’s weight should reflect that, and it should be counterbalanced by more heavily weighted, disparity neutral factors.

Third, The tool should be independently validated by a third party and the design and structure of the tool must be made publicly available. This should include detailed information about how the tool was designed and tested, a list of all of the input factors and questions that the tool uses, the weights assigned to each factor, the thresholds and data that are used to determine “low” medium” or ‘high’ risk scores, and the “outcome information” that was used to develop and validate the tool.

Finally, the DOJ and BOP must create solid implementation plan that ensures individuals are periodically re-assessed in accordance with both the letter of the law of the First Step Act as well as best practices in risk assessments.

Our criminal justice system is profoundly flawed. The United States has incarcerated Black and Brown people en-masse for generations. We cannot accept new policies that further entrench outdated and wrong-headed approaches - least of all those that exacerbate racial disparities in the system. Therefore, our efforts today should be focused on public safety but they should also advance racial equity - I believe we can do both. That is why it is essential that this risk and needs assessment be designed with both explicit outcomes – safety and racial equity – at the forefront.

**Testimony of Vikrant Reddy and Jeremiah Mosteller of the Charles Koch Institute
Submitted to the U.S. Department of Justice, Office of Justice Programs, National Institute for Justice
Regarding the development and implementation of a risk and needs assessment system for
the Federal Bureau of Prisons**

Wednesday, April 10, 2019

On behalf of the Charles Koch Institute, we are honored to submit written testimony about the development and implementation of a risk and needs assessment for the Federal Bureau of Prisons to the U.S. Department of Justice.

Introduction

At the Charles Koch Institute, we believe that an effective criminal justice system secures individual liberties and preserves public safety, respects human dignity, restores victims, removes barriers to opportunity, and ensures equal justice for all under the law. One essential component of achieving a justice system characterized by these principles is ensuring that individuals with a criminal record can rejoin their communities and secure a job, housing, and education. Through the First Step Act, Congress adopted reforms which will create a more constructive culture in the federal prison system by expanding access to in-prison programming and incentivizing participation in these programs.

Evidence-Based Risk Assessments

We support the use of validated risk assessments in our justice system because we favor an evidence-based approach to criminal justice and providing decision-makers with the comprehensive information they need to make choices impacting an individual who is in custody of the state. Though risk assessment tools are still being studied by researchers and implemented by practitioners, the weight of the evidence suggests that these tools outperform human judgment alone in determining risk.ⁱ While all risk assessment tools utilize different factors to determine risk and have been successful at different rates, current research provides us with some guidance on how to properly design and implement such tools to ensure they are effective.ⁱⁱ

Predictive Factors of Risk and Recidivism

Any decision to restrict an individual's liberty through the justice system should be made based on individual circumstances and not because of his or her membership within a class or group.ⁱⁱⁱ Utilizing such factors in risk determination raises constitutional, ethical, and even moral concerns.

The three factors which have been found to be most predictive of future crime are antisocial personality traits, pro-criminal attitudes, and social support for crime.^{iv} Other factors which have been found to be weakly or moderately predictive of recidivism include substance abuse, poor family and marital relationships, poor performance or satisfaction at work or school, and lack of involvement in prosocial activities.^v A history of criminal behavior has also been found to be predictive of future crime but its predictive accuracy declines as time passes between the criminal conduct and date of analysis.^{vi}

Best Practices for Use of Risk Assessments

The creation and implementation of a risk assessment tool in our justice system ought to be a collaborative endeavor involving key stakeholders, scholars, and practitioners.^{vii} The design and use of the tool should involve the utmost transparency as to the factors used and the weight given to each factor in determining risk.^{viii} To ensure uniform, consistent application by decision makers, outcomes of the tool's use must be documented and analyzed, deviations from the recommendation should be tracked with the associated justification, and administrators should regularly be re-trained on the proper use of the tool.^{ix} Lastly, the tool should be frequently reassessed based on the data collected, outcomes of use, and the latest research to ensure or improve reliability.^x

Conclusion

The U.S. Department of Justice has been tasked by Congress to design and implement a risk and needs assessment that will be used by the Federal Bureau of Prisons to determine the incentives provided to incarcerated individuals who complete evidence-based prison programming. We urge the National Institute of Justice to consider the conclusions from the research discussed in this written testimony while designing the assessment tool. We also recommend that the Independent Review Commission be comprised of expert scholars and practitioners who can expand upon this body of knowledge and its practical application in our justice system.

In addition to our comments here, we would like to submit for your consideration an article by Dr. John Monahan, the John S. Shannon Distinguished Professor of Law and Professor of Psychology at the University of Virginia, titled "Risk Assessments in Sentencing." While this article is focused on risk assessments tools utilized in sentencing, we nevertheless believe it provides important considerations for the design and implementation of the tool to be used by the Federal Bureau of Prisons.

- ⁱ Kelley Blanchette & Shelley L. Brown, THE ASSESSMENT AND TREATMENT OF WOMEN OFFENDERS: AN INTEGRATIVE PERSPECTIVE (2006); Stephen D. Gottfredson & Don M. Gottfredson, *Accuracy of Prediction Models*, in CRIMINAL CAREERS AND "CAREER CRIMINALS" 212, 247 (Alfred Blumstein et al. eds., 1986); Jon Kleinberg, et al., Human Decisions and Machine Predictions, 133 Q. J. Econ. 237, 240–41 (2018); William M. Grove et al., Clinical Versus Mechanical Prediction: A Meta-Analysis, 12 Psychol. Assessment 19, 19 (2000); Cara Thompson, *Myths & Facts: Using Risk and Need Assessments to Enhance Outcomes and Reduce Disparities in the Criminal Justice System*, National Institute of Corrections (March 2017), <https://s3.amazonaws.com/static.nicic.gov/Library/032859a.pdf>; See also Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 Geo. Wash. L. Rev. 1490 (2018); Tim Brennan, et al., *Evaluating the Predictive Validity of the Compas Risk and Needs Assessment System*, 36 Crim. J. Behav. 21 (2009); But see Megan T. Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303 (2019); Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 Sci. Advances 1, 1 (2018); Douglas Mossman, *Assessing Predictions of Violence: Being Accurate About Accuracy*, 62 J. Consulting & Clinical Psychol. 783, 784 (1994).
- ⁱⁱ See e.g. Sandra G. Mayson, *Dangerous Defendants*, 127 Yale L.J. 490 (2018).
- ⁱⁱⁱ Robert J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 18 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 842–62 (2014); J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1399–402 (2011); Matthew R. Durose, et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Bureau of Justice Statistics at 12 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>; See also John Monahan, *Risk Assessment in Sentencing*, in REFORMING CRIMINAL JUSTICE 77 (Erik Luna Ed. 2017); Richard S. Frase, *Recurring Policy Issues of Guidelines (and non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 Fed. Sent'g Rep. 145, 149 (2014).
- ^{iv} Examples of antisocial personality traits include aggression, irritableness, impulsive behaviors, and adventure seeking. Pro-criminal attitudes include traits such as a rationalization or justification for criminal behavior and negative attitudes towards the law or authority figures. Lastly, social support for crime exists when an individual has friends who are also involved in criminal activity or the individual intentionally or unintentionally experiences isolation from prosocial individuals, among other factors. See Christopher T. Lowenkamp, et al., *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 Psych. Services 87 (2013); Donald A. Andrews & Craig Dowden, *The Risk-Need-Responsivity Model of Assessment and Human Service in Prevention and Corrections: Crime-Prevention Jurisprudence*, 49 Can. J. Criminol. Crim. Justice 439 (2007); See also Heather L. Dyck, et al., *Real-world use of the risk-need-responsivity model and the level of service/case management inventory with community-supervised offenders*, 42 L. Hum Behav. 258 (2018); Donald A. Andrews, et al., *Are the Major Risk/Need Factors Predictive of Both Female and Male Reoffending? A Test With the Eight Domains of the Level of Service/Case Management Inventory*, 56 Int'l J. Offender Ther Comp. Criminology 113 (2012).
- ^v Donald A. Andrews & James Bonta, THE PSYCHOLOGY OF CRIMINAL CONDUCT (4th eds. 2007); Lowenkamp, *supra* note iv; Andrews, *supra* note iv (2012); James Bonta & Donald A. Andrew, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation*, Public Safety Canada (2007), <https://www.pbpp.pa.gov/Information/Documents/Research/EBP7.pdf>.
- ^{vi} R. Karl Hanson, *Reductions in risk based on time offense-free in the community: Once a sexual offender, not always a sexual offender*, 24 Psychol. Pub. Pol'y & L. 48 (2018); Lowenkamp, *supra* note iv; Andrews, *supra* note iv (2012); Megan C. Kurlychek, et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 Crim. Delinquency 64 (2007); Tracey Kyckelhahn & Trishia Cooper, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, United States Sentencing Commission (March 2017), https://www.usc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf; See also Megan Denver, *Evaluating the Impact of "Old" Criminal Conviction Decision Guidelines on Subsequent Employment and Arrest Outcomes*, 54 J. Res. Crime Delinq. 379 (2017).
- ^{vii} Gina Vincent, et al., *Studying Drivers of Risk and Needs Assessment Instrument Implementation in Juvenile Justice*, Office of Juvenile Justice and Delinquency Prevention (2018), <https://www.ojjdp.gov/pubs/251809.pdf>.
- ^{viii} Brandon Garrett, *supra* note i; Danielle Kehl, et al., *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*, Harvard Law School (2017) <https://cyber.harvard.edu/publications/2017/07/Algorithms>; Sarah Picard-Fritsche, et al., *Demystifying Risk Assessment: Key Principles and Controversies*, Center for Court Innovation (2017), https://www.courtinnovation.org/sites/default/files/documents/Monograph_March2017_Demystifying%20Risk%20Assessment_1.pdf.
- ^{ix} Vincent, *supra* note vii; Kehl, *supra* note viii; Grant Duwe & Michael Rocque, *Effects of Automating Recidivism Risk Assessment on Reliability, Predictive Validity, and Return on Investment (ROI)*, 16 Criminology Pub. Pol'y 235 (2017); See also Pamela M. Casey, et al., *Offender Risk & Needs Assessment Instruments: A Primer for Courts*, National Center for State Courts (2014), https://www.ncsc.org/~media/Microsites/Files/CSI/BJA%20RNA%20Final%20Report_Combined%20Files%208-22-14.ashx; Pamela M. Casey, et al., *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, National Center for State Courts (2011), <https://www.ncsc.org/~media/Microsites/Files/CSI/RNA%20Guide%20Final>.
- ^x MODEL PENAL CODE: § 6B.09(1) (AM. LAW INST., Proposed Final Draft 2017); Vincent, *supra* note vii; Casey, *supra* note ix (2014); Casey, *supra* note ix (2011); See eg. Mike Eisenberg, et al., *Validation of the Wisconsin Department of Corrections Risk Assessment Instrument*, The Council of State Governments Justice Center (July 2009), <http://csgjusticecenter.org/wp-content/uploads/2012/12/WIRiskValidationFinalJuly2009.pdf>; Brian J. Ostrom et al., *OFFENDER RISK ASSESSMENT IN VIRGINIA: A THREE-STAGE EVALUATION*, Nat'l Ctr. For State Courts & Va. Criminal Sentencing Comm'n 25 (2002), available at http://www.vcsc.virginia.gov/risk_off_rpt.pdf.

Risk Assessment in Sentencing

John Monahan*

One way to reduce mass incarceration and the fiscal and human sufferings intrinsic to it is to engage in a morally constrained form of risk assessment in sentencing offenders. The assessment of an offender's risk of recidivism was once a central component of criminal sentencing in the United States. In the mid-1970s, however, sentencing based on forward-looking assessments of offender risk was abolished in many jurisdictions in favor of set periods of confinement based solely on backward-looking appraisals of offender blameworthiness. This situation is rapidly changing, however. After a hiatus of 40 years, there has been a resurgence of interest in risk assessment in criminal sentencing. Across the political spectrum, advocates have proposed that mass incarceration can be shrunk without simultaneously jeopardizing the historically low crime rate if we put a morally constrained form of risk assessment back into sentencing.

INTRODUCTION

As the National Research Council recently concluded, the growth in incarceration in the United States since the early 1970s has been “historically unprecedented and internationally unique.”¹ The United States accounts for 5% of the world’s population and 25% of the world’s imprisoned population. Western European democracies have an incarceration rate one-seventh that of the United States. One percent of all American adults—2.3 million people—are currently incarcerated. Nearly 12 million admissions to local jails occur each year. The direct fiscal costs of what has come to be known as “mass incarceration” are widely estimated to be \$80 billion a year.²

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1. NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 2 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

2. See John Monahan & Jennifer Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489 (2016); COALITION FOR PUBLIC SAFETY, www.coalitionforpublicsafety.org.

The broader human costs of mass incarceration, however, are incalculable. The “collateral consequences” of conviction and imprisonment in terms of lifelong restrictions on many forms of employment and housing are stark.³ Even when a specific occupation is not barred to ex-prisoners by statute, the effects of having a criminal record on employability are dramatic. Former prison inmates have vastly higher unemployment rates than non-prisoners, and those who do manage to find employment face a 40% decrease in estimated annual earnings. The effects of a parent’s imprisonment on their children are profound and dire.⁴

I argue here that one way to reduce mass incarceration and the fiscal and human sufferings intrinsic to it is to engage in a morally constrained form of risk assessment in sentencing offenders. It proceeds in four parts. First, I briefly sketch the history of risk assessment in American sentencing and portray the role played by risk assessment in a mixed retributive/utilitarian system of sentencing. Second, I illustrate the uses of risk assessment in several jurisdictions and summarize the current state of the debate among scholars in both law and behavioral science on risk assessment in sentencing. Third, I appraise several different types of potential risk factors for recidivism frequently discussed in the context of sentencing: past crime, demographic characteristics, and psychosocial characteristics. Finally, I offer four specific recommendations regarding the use of risk assessment in sentencing as one means of reducing mass incarceration: (1) employ risk assessment to sentence low-risk offenders to community sanctions or to a shortened period of incarceration; (2) make judicial deference to an offender’s low-risk designation presumptive rather than advisory; (3) do *not* employ risk assessment to increase the time for which high-risk offenders are incarcerated; and (4) charge state sentencing commissions with conducting local empirical validations of any proposed risk-assessment instruments and with vigorously debating the moral and social implications of relying on the risk factors included in those instruments.

I. DESCRIPTION OF EXISTING LAW AND POLICY

A. A BRIEF HISTORY OF RISK ASSESSMENT IN SENTENCING

The most widely used definition of risk assessment describes it as “the process of using risk factors to estimate the likelihood (i.e., probability) of an

3. See Gabriel J. Chin, “Collateral Consequences,” in the present Volume.

4. See JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); COALITION FOR PUBLIC SAFETY, *supra* note 2; see generally Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume.

outcome occurring in a population.”⁵ In the case of sentencing, the “population” consists of convicted offenders and the “outcome” is criminal recidivism. “Risk factors” are simply variables that (1) statistically correlate with recidivism, and (2) precede recidivism in time.

The assessment of an offender’s risk of recidivism was once a central component of criminal sentencing in the United States. In California, for example, indeterminate sentencing—whereby an offender is given a relatively low minimum sentence and a relatively high maximum sentence and is released from prison when he or she is believed no longer to present an undue risk of committing a new crime—was introduced in 1917. In the mid-1970s, however, indeterminate sentencing based on forward-looking assessments of offender risk was abolished in California and in many other American jurisdictions in favor of set periods of confinement based on backward-looking appraisals of offender blameworthiness.⁶

This situation is rapidly changing, however. Remarkably, after a hiatus of 40 years, there has been a resurgence of interest in risk assessment in criminal sentencing in many American states. Across the political spectrum, advocates have proposed that one way to begin dialing down mass incarceration without simultaneously jeopardizing the historically low American crime rate is to put risk assessment back into sentencing. It has recently been estimated that courts in at least 20 states have begun to incorporate risk assessment into the sentencing process “in some or all cases.”⁷

B. THE ROLE OF RISK ASSESSMENT IN A HYBRID SYSTEM OF SENTENCING

Almost all scholars of sentencing distinguish two broad and polar opposite approaches to the allocation of criminal punishment. One of these approaches is usually termed *retributive* and the other *utilitarian*. Adherents of the retributive approach believe that an offender’s moral culpability for crime committed in the past should be the sole consideration in determining his or

5. Helena Kraemer et al., *Coming to Terms with the Terms of Risk*, 54 ARCH. GEN. PSYCHIATRY 337, 340 (1997).

6. See Monahan & Skeem, *Risk Assessment*, *supra* note 2; John Monahan & Jennifer Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning*, 26 FED. SENT’G. REP. 158 (2014); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G. REP. 167 (2014). For discussions of determinate sentencing, see Douglas A. Berman, “Sentencing Guidelines,” in the present Volume; and Erik Luna, “Mandatory Minimums,” in the present Volume.

7. Sonja Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 809 (2014).

her punishment. In the best known retributive theory, known as “just deserts,” offenders should be punished “because they deserve it, and the severity of their punishment should be proportional to their degree of blameworthiness”⁸ for the crimes they have committed in the past, and to nothing else.

In stark contrast, advocates of the utilitarian approach believe that punishment is justified solely by its ability to decrease future criminal acts by the offender or by deterring other would-be offenders from committing—or continuing to commit—crimes.⁹

Many legal scholars have argued that any workable theory of sentencing must address *both* retributive *and* utilitarian concerns, rather than just one of them. The most influential hybrid theory of sentencing is that developed by Norval Morris,¹⁰ which he called “limiting retributivism.” In Morris’s theory, retributive principles can only set an upper (and perhaps also a lower) limit on the severity of punishment, and within this range of what he called “not undeserved” punishment, utilitarian concerns—such as the offender’s risk of recidivism—can be taken into account. Kevin Reitz elaborates:

Here, proportionality in punishment is understood as an imprecise concept with a margin of error, not reducible to a specific sanction for each case. The “moral calipers” available to human beings are set wide, the theory asserts, producing a substantial range of justifiable sentences for most cases. At some upper boundary, we begin to feel that a penalty is clearly disproportionate in severity and, at a lower point, we intuit that it is clearly too lenient. Imagining a generous spread between the two, limiting retributivism would permit utilitarian purposes to determine sentences within the morally permissible range.¹¹

The American Law Institute’s highly-influential Model Penal Code explicitly adopts the hybrid, limiting retributivism approach to criminal sentencing. In particular, a draft provision provides that state sentencing commissions:

shall develop actuarial instruments or processes to identify offenders who present an unusually low risk to public safety. ...

8. RICHARD S. FRASE, *JUST SENTENCING: PRINCIPLES AND PROCEDURES FOR A WORKABLE SYSTEM* 8 (2013). For a discussion of retributive theory, see Jeffrie G. Murphy, “Retribution,” in the present Volume.

9. See generally Daniel S. Nagin, “Deterrence,” in the present Volume; Shawn D. Bushway, “Incapacitation,” in the present Volume.

10. NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1977).

11. Kevin Reitz, *Sentencing*, in *CRIME AND PUBLIC POLICY* 472 (James Wilson & Joan Petersilia eds., 2011) (citations omitted).

When accurate identifications of this kind are reasonably feasible, for cases in which the offender is projected to be an unusually low-risk offender, the sentencing court shall have discretion to impose a community sanction rather than a prison term, or a shorter prison term than indicated in statute or guidelines.¹²

*C. RISK ASSESSMENT IN TWO ILLUSTRATIVE STATES
AND IN THE FEDERAL SYSTEM*

In the words of the Model Penal Code, “On risk assessment as a prison-diversion tool, Virginia has been the leading innovator among American states.”¹³ Pennsylvania is expected to attain similar status in the near future, as planned reforms promoting risk assessment go into effect. Both states’ risk-assessment procedures are summarized here, as well as the risk-assessment procedures currently applied to probationers in the federal system.

1. Virginia

In 1994, the Virginia Legislature required the state’s newly-formed Criminal Sentencing Commission to develop an empirically-based risk-assessment instrument for use in diverting 25% of the “lowest-risk, incarceration-bound, drug and property offenders” to non-jail or prison sanctions such as probation, community service, outpatient substance-abuse treatment, or electronic monitoring.¹⁴ The risk factors included on the original assessment tool developed by the Commission consisted of six types of variables: offense type, whether the offender is currently charged with an additional offense, “offender characteristics” (i.e., gender, age, employment, and marital status), whether the offender had been arrested or confined within the past 18 months, prior felony convictions, and prior adult incarcerations. In 2012, the Commission re-validated its risk-assessment instruments on large samples of eligible drug and larceny/fraud offenders. In these samples, 63% of drug offenders scored in the low-risk group and 37% scored in a higher-risk group, while 43% of the larceny/fraud offenders scored in the low-risk group and 57% scored in a higher-risk group. Recidivism in this research was defined as reconviction

12. MODEL PENAL CODE: SENTENCING § 6B.09(3) (Am. Law Inst., Proposed Final Draft, approved May 24, 2017).

13. *Id.* at 375.

14. Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT’G. REP. 165, 165 (2004); Meredith Farrar-Owens, *The Evolution of Sentencing Guidelines in Virginia: An Example of the Importance of Standardized and Automated Felony Sentencing Data*, 25 FED. SENT’G. REP. 168, 170 (2013). For a discussion such sanctions, see Michael Tonry, “Community Punishments,” in the present Volume.

for a felony offense within three years of release from incarceration. Of drug offenders designated as low risk, 12% recidivated; by comparison, 44% of higher-risk drug offenders recidivated. Of larceny/fraud offenders designated as low risk, 19% recidivated; by comparison, 38% of higher-risk larceny/fraud offenders recidivated.¹⁵

The instruments are administered only to offenders for whom the state's sentencing guidelines recommend incarceration in prison or jail. In addition, offenders must meet certain eligibility criteria (e.g., a criminal history of only nonviolent offenses). If the offender's total score on the instrument is below a given cut-off, he or she is recommended for an alternative, community-based sanction; if the offender's score on the instrument is above that cut-off, the prison or jail term recommended by the sentencing guidelines remains in effect.¹⁶ In fiscal year 2015, among the eligible offenders for whom a risk assessment was conducted, almost half (49%) were assessed as "low risk," and therefore recommended for an alternative community-based sanction. Over one-third (41%) of these jail- or prison-bound offenders who were recommended for an alternative sanction were in fact sentenced to a community-based program by the judge.¹⁷ One reason that a judge would fail to sentence a low-risk offender to a community-based program rather than to incarceration is that a program appropriate for the offender's needs (e.g., drug treatment) does not exist in the offender's home community.

15. VIRGINIA CRIMINAL SENTENCING COMMISSION, 2012 ANNUAL REPORT (2012), <http://www.vcsc.virginia.gov/2012VCSCAnnualReport.pdf>. I am grateful to Meredith Farrar-Owens, the Commission's Director, for her help in obtaining and understanding these data.

16. In 1999, the Virginia Legislature required the Commission to develop a second empirically based instrument, this time in order to identify the *highest* risk rather than the *lowest* risk offenders. More specifically, the Commission developed two largely similar risk assessment instruments for sexually violent offenders, one for rape and one for other types of sexual assault. If the sex offender's score on the instrument exceeds a specified cut-off, the offender's maximum recommended sentence can be increased by as much as a factor of three. I believe that this use of risk assessment to raise sentences clearly violates the limits imposed by the "limiting retributivism" theory of punishment. See *infra* text accompanying note 52.

17. VIRGINIA CRIMINAL SENTENCING COMMISSION, 2015 ANNUAL REPORT (2016), <http://www.vcsc.virginia.gov/2015AnnualReport.pdf>.

2. Pennsylvania

In 2010, the Pennsylvania Legislature enacted a statute that read:

The Commission [on Sentencing] shall adopt a sentence risk assessment instrument for the sentencing court to use to help determine the appropriate sentence within the limits established by law. . . . The risk assessment instrument may be used as an aide in evaluating the relative risk that an offender will reoffend.¹⁸

In response, the Commission on Sentencing developed a risk scale for offenders convicted of offenses of medium severity. The initial scale consisted of eight risk factors: gender, age, county, total number of prior arrests, prior property arrests, prior drug arrests, current property offender, and gravity of the current offense. The Commission validated the risk scale on large samples of offenders. In these samples, 12% of offenders scored in the low-risk group, and 88% scored as higher risk. Recidivism was defined as rearrest for any crime within three years of release from prison. Of offenders designated by the risk scale as low risk, 22% recidivated; by comparison, 56% of higher-risk offenders recidivated. The Commission is now revising its risk scale (e.g., removing “county” as a risk factor) and developing separate risk scales for offenders with differing degrees of offense severity. The formal incorporation of risk assessment in criminal sentencing in Pennsylvania is still pending.¹⁹

3. The federal system

Risk assessment is *not* used to inform sentencing decisions in the federal system. Rather, the Post Conviction Risk Assessment instrument (“PCRA”) is used to inform probation decisions designed to reduce risk—i.e., to identify *whom* to provide with relatively intensive services (namely, higher-risk offenders) and *what* factors to target in those services (e.g., substance abuse, mental illness). When federal probationers are found to violate conditions of probation—including treatment conditions—judges may “revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release . . . without credit for time previously served on postrelease supervision.”²⁰

18. 42 PA. CONS. STAT. § 2154.7(a) (2010).

19. Progress reports are available. See *Risk Assessment Project*, PENNSYLVANIA COMMISSION ON SENTENCING, <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/>. I thank Mark Bergstrom, Executive Director of the Commission, for his help in understanding these data.

20. 18 U.S.C. § 3583(e)(3).

The PCRA is a statistical prediction instrument that was constructed and validated on large, independent samples of federal offenders. Fifteen items are included on the instrument. Each of the items is nested in one of five domains—criminal history (e.g., prior violent arrests), education/employment (e.g., highest level of education, employed at the time of arrest), social networks (e.g., marital status, criminal peers), substance abuse (e.g., current alcohol or drug problem), and attitudes (e.g., antisocial attitudes/values). While under a term of supervision averaging three to four years, 11% of offenders scored by the PCRA as low risk were rearrested for a new crime, while offenders scored by the PCRA as high risk had a rearrest rate of 83% (with offenders scored at intermediate risk being rearrested at rates between these extremes).²¹

II. THE CURRENT STATE OF THE DEBATE ON RISK ASSESSMENT IN SENTENCING

A. THE LEGAL DEBATE

Debates among legal scholars and practitioners on the role of risk assessment in sentencing revolve around two issues. The first relates to sentencing theory. Most sentencing systems and the Model Penal Code ground their prescriptions in the “limiting retributivism” model described above, in which retributive principles set outer limits on the severity of punishment, and within these limits, an offender’s risk of recidivism can be taken into account.

Some prominent legal scholars, however, favor a more unalloyed version of retributivism. There is no role for forward-looking assessments of offenders’ risk of future crime in a purely backward-looking retributive model of sentencing based solely on blameworthiness for crimes already committed. Sonja Starr, for example, refers to the incorporation of risk assessment into sentencing as “evidence-based sentencing” (EBS):

EBS provides sentencing judges with risk scores for each defendant based on variables that, in addition to criminal history, often include gender, age, marital status, and socioeconomic factors such as employment and education. [T]his trend is being pushed by progressive reform advocates who hope it will reduce incarceration

21. Christopher Lowenkamp et al., *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 PSYCHOL. SERV. 87 (2013).

rates by enabling courts to identify low-risk offenders. [These advocates] are making a mistake. As currently practiced, EBS should be seen neither as progressive nor as especially scientific—and it is almost surely unconstitutional.²²

The second issue of legal contention regarding the role of risk assessment in sentencing has to do with whether the risk factors used to assess violence risk are merely “proxies” for race or poverty. Former Attorney General Eric Holder, for example, expressed hesitation about using risk assessment to inform sentencing decisions:

By basing sentencing decisions on static factors and immutable characteristics—like the defendant’s education level, socioeconomic background, or neighborhood—[risk assessments] may exacerbate unwarranted and unjust disparities that are already far too common in our criminal justice system and in our society. Criminal sentences must be based on the facts, the law, the actual crimes committed, the circumstances surrounding each individual case, and the defendant’s history of criminal conduct. They should not be based on unchangeable factors that a person cannot control, or on the possibility of a future crime that has not taken place.²³

Whether evidence-based risk assessment exacerbates, ameliorates, or has no effect on racial or socioeconomic disparities is sentencing, however, is a relative inquiry: risk assessment *compared to what*? If evidence-based risk assessment is compared to judges’ intuitive and subjective consideration of an offender’s likelihood of recidivism in sentencing, then evidence-based risk assessment will emerge as more transparent, more consistent, and more accurate than judicial hunch.²⁴ If evidence-based risk assessment is compared to the use of

22. Starr, *supra* note 7, at 805. See generally John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006); Christopher Slobogin, *Risk Assessment*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* (Joan Petersilia & Kevin Reitz eds., 2012).

23. Eric Holder, Attorney General Eric Holder Speaks at the National Association of Criminal Defense Lawyers 57th Annual Meeting (2014), U.S. DEP’T OF JUSTICE, <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-national-association-criminal-defense-lawyers-57th>. See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007). The “proxy” issue has become much more contentious since the recent publication of Julia Angwin et al., *Machine Bias: There’s Software Used Across the County to Predict Future Criminals. And It’s Biased Against Blacks*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>. In response, see Anthony Flores et al., *False Positives, False Negatives, and False Analyses: A Rejoinder*, 80 FED. PROB. 38 (2016).

24. Monahan & Skeem, *Risk Assessment*, *supra* note 2.

sentencing guidelines that heavily rely on criminal history—the single variable that accounts most dramatically for racial disparity in imprisonment rates²⁵—then the comparative virtues of relying on evidence-based risk assessment begin to become apparent.

B. THE SCIENTIFIC DEBATE

Only one scientific issue generates much controversy in the field of risk assessment: can accurate inferences about an individual person—in this case, about a convicted offender—be drawn from data derived from groups of people (in this case, from groups of convicted offenders)? Some scholars have taken the position that “on the basis of empirical findings, statistical theory, and logic, it is clear that predictions of future offending cannot be achieved, with any degree of confidence, in the individual case.”²⁶

Many other scholars have taken the contrary view, however, arguing that group-based data can be highly informative when making decisions about individual cases. Consider three examples from other forms of risk assessment. In the insurance industry, “until an individual insured is treated as a member of a group, it is impossible to know his expected loss, because for practical purposes that concept is a statistical one based on group probabilities. Without relying on such probabilities, it would be impossible to set a price for insurance coverage at all.”²⁷ In weather forecasting, a wealth of data are available on given events occurring under specified conditions. Therefore, when meteorologists “predict a 70 percent chance of rain, there is measurable precipitation just about 70 percent of the time.”²⁸ Finally, consider the medical analogy: “Suppose a 50-year-old man learns that half of people with his diagnosis die in five years. He would find this information very useful in deciding whether to purchase an annuity that would begin payouts only after he reached his 65th birthday.”²⁹

25. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201 (2009).

26. David J. Cooke & Christine Michie, *Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice*, 34 LAW & HUM. BEHAV. 259, 259 (2010).

27. KENNETH ABRAHAM, *DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY* 79 (1986). Several Supreme Court cases have held that insurers that provide employer-based group insurance may not use sex as a group-based risk factor. “These holdings do not, however, apply to insurance sold in individual markets outside of employment, where sex-based discrimination is generally permitted, especially in the context of life insurance.” KENNETH ABRAHAM & DANIEL SCHWARCZ, *INSURANCE LAW AND REGULATION* 142 (7th ed. 2015).

28. NATIONAL RESEARCH COUNCIL, *IMPROVING RISK COMMUNICATION* 46 (1989).

29. Douglas Mossman, *From Group Data to Useful Probabilities: The Relevance of Actuarial Risk Assessment in Individual Instances*, 43 J. AM. ACAD. PSYCHIATRY & L. 93, 99 (2015).

The debate among scientists on the legitimacy of making individual inferences from group data appears to be subsiding. In the words of two eminent statisticians:

If groups of individuals with high and low propensities for violence recidivism can be distinguished, and courts act upon such distinctions, recidivism will decline to the extent that groups most prone to violence are incapacitated, and infringements upon those least so prone are minimized. And both society and offenders will be better served even if we cannot be sure, based on tight statistical intervals, from precisely which individual offenders this betterment derives.³⁰

III. THE PROCRUSTEAN QUANDARY: WHICH PREDICTIVELY VALID RISK FACTORS TO USE IN SENTENCING?

Abstract jurisprudential debates about the use of risk assessment in sentencing quickly run into a highly practical issue: from a pool of risk factors found to validly predict recidivism, which risk factors are acceptable to include on an assessment instrument? Risk assessment without risk factors would be an incoherent enterprise. The scientific concerns here are straightforward: statistical procedures to establish whether a valid correlation exists between a given risk factor and a given measure of recidivism are uncontroversial, and which comes first—the risk factor or the recidivism—is obvious. Legal, moral, and political concerns are the ones that dominate in choosing, among a set of scientifically valid risk factors, the ones to use in sentencing. More specifically, attributions of blameworthiness not only impose overall limits on *sentence severity*, they also serve as moral constraints on the *type of risk factors* that can be used to assess an offender's likelihood of recidivism.³¹ Consider first the use of prior crime as a risk factor for use in sentencing, then the use of demographic characteristics, and finally the use of psychosocial characteristics.

A. PAST CRIME AS A RISK FACTOR FOR RECIDIVISM

It has long been axiomatic in the field of risk assessment that past crime is the best predictor of future crime. All actuarial risk assessment instruments reflect

30. Peter B. Imrey & A. Philip Dawid, *A Commentary on Statistical Assessment of Violence Recidivism Risk*, 2 STAT. & PUB. POL'Y 25, 40 (2015); see also David L. Faigman, John Monahan & Christopher Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417 (2014); David L. Faigman, Christopher Slobogin & John Monahan, *Gatekeeping Science: Using the Structure of Scientific Research to Distinguish Between Admissibility and Weight in Expert Testimony*, 110 NW. U. L. REV. 859 (2016).

31. Monahan & Skeem, *Risk Assessment*, *supra* note 2.

this empirical truism. The California Static Risk Assessment Instrument, for example, contains 22 risk factors for criminal recidivism, fully 20 of which—all but gender and age—are indices of past crime.³²

The use of past crime is the least controversial risk factor used in sentencing. This is because an offender's prior involvement in crime is taken by many³³ to indicate not only an increased risk that the offender will commit crime in the future, it also aggravates the perception that the offender is blameworthy for the crime for which he or she is being sentenced. That is, "a record of prior offenses bears *both* on the offender's deserts *and* on the likelihood of recidivism."³⁴

The existence of a criminal record is not the only risk factor that reflects an offender's prior involvement in crime. Committing crime while under the influence of drugs, being a member of a criminal gang, or being convicted of the current crime while on legal restraint (i.e., probation, parole, or pre-trial release) all reflect the depth of an offender's engagement in crime and are often used simultaneously to aggravate perceptions of blame for past crime and to increase assessed risk for future crime.³⁵

However, one crucial issue looms over the use of past crime as a risk factor for recidivism. A record of prior criminal arrests and convictions can reflect the differential *involvement* of the members of given groups in criminal behavior, and it can also reflect the differential *selection* of the members of given groups by police to arrest, by prosecutors to indict, and by judges and juries to convict.³⁶ The extent to which the presence of a criminal record signifies differential selection by the criminal justice system rather than differential involvement in criminal behavior is highly contested in debates on risk assessment in sentencing.³⁷ It is noteworthy in this regard that the recently approved Model Penal Code recommends that state sentencing commissions

32. SUSAN TURNER, JAMES HESS & JESSE JANETTA, DEVELOPMENT OF THE CALIFORNIA STATIC RISK ASSESSMENT INSTRUMENT (CSRA) (UCI Center for Evidence-Based Corrections, Nov. 2009), <http://ucicorrections.seweb.uci.edu/files/2009/11/CSRA-Working-Paper.pdf>.

33. Although not by all academics. See Julian V. Roberts, *Punishing Persistence: Explaining the Enduring Appeal of the Recidivist Sentencing Premium*, 48 BRIT. J. CRIMINOLOGY 468, 469 (2008) ("a plausible retributive justification for the recidivist sentencing premium has proved as elusive as the legendary resident of Loch Ness").

34. ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 87 (1976) (emphases added).

35. Monahan & Skeem, *Risk Assessment*, *supra* note 2; Tonry, *supra* note 6.

36. Alfred Blumstein, *On the Racial Disproportionality of United States' Prison Populations*, 73 J. CRIM. L. & CRIMINOLOGY 1259 (1982); Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1 (2008).

37. Jennifer L. Skeem & Christopher T. Lowenkamp, *Risk, Race, and Recidivism: Predictive Bias and Disparate Impact*, 54 CRIMINOLOGY 680 (2016).

“shall give due consideration to the danger that the use of criminal-history provisions to increase the severity of sentences may have disparate impacts on racial or ethnic minorities, or other disadvantaged groups.”³⁸

B. DEMOGRAPHIC CHARACTERISTICS AS RISK FACTORS FOR RECIDIVISM

Three demographic variables are most often discussed as risk factors for recidivism: age, gender, and race.³⁹

1. Age

Few would dispute the conclusion offered by Robert Sampson and Janet Lauritsen to the National Research Council’s Panel on the Understanding and Control of Violent Behavior: “Age is one of the major individual-level correlates of violent offending. In general, arrests for violent crime peak around age 18 and decline gradually thereafter.”⁴⁰ Researchers at the Bureau of Justice Statistics studied the recidivism rates of offenders released from prisons in 30 U.S. states. Eighty-four percent of state prisoners age 24 and younger at release were rearrested for non-traffic offenses within five years, compared with 69% of state prisoners age 40 and older at release.⁴¹

38. MODEL PENAL CODE: SENTENCING § 6B.07 (1)(c) (Am. Law Inst., Proposed Final Draft, approved May 24, 2017).

39. A recent nationally representative survey of the general public on the use of gender, age, and race as risk factors in sentencing concluded, “[w]hile over three-quarters of participants were against using race to determine prison sentences, almost half were open to the possibility of using gender and over three-quarters of the participants were open to the possibility of using age to determine prison sentences.” Nicholas Scurich & John Monahan, *Evidence-Based Sentencing: Public Openness and Opposition to Using Gender, Age, and Race as Risk Factors for Recidivism*, 40 LAW & HUM. BEHAV. 36 (2016).

40. Robert J. Sampson & Janet L. Lauritsen, *Violent Victimization and Offending: Individual-, Situational-, and Community-Level Risk Factors*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 18 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994) (citations omitted).

41. MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010, at 12 (2014), <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

The Pennsylvania Commission on Sentencing recently examined what would happen if age was eliminated from the risk scale it had developed: “[O]ur analyses found that age was the most important demographic factor in predicting recidivism and the removal of that factor would have the most impact on recidivism prediction and scale accuracy.”⁴²

2. Gender

That women commit acts of criminal violence at a much lower rate than men is a staple in criminology and has been known for as long as official records have been kept. The earliest major review of this topic concluded that “sex difference in aggression has been observed in all cultures in which the relevant behavior has been observed. Boys are more aggressive both physically and verbally. ... The sex difference is found as early as social play begins—at age 2 or 2½.”⁴³ Another review concluded that “sex is one of the strongest demographic correlates of violent offending. ... [M]ales are far more likely than females to be arrested for all crimes of violence, including homicide, rape, robbery, and assault.”⁴⁴ Of the persons arrested for committing a violent crime in the United States in 2015, 80% were men and 20% were women.⁴⁵ In terms of recidivism rates, 72% of male state prisoners released in 2005 were rearrested for a violent offense within five years, compared with 61% of female state prisoners.⁴⁶

42. PENNSYLVANIA COMMISSION ON SENTENCING, SPECIAL REPORT: IMPACT OF REMOVING DEMOGRAPHIC FACTORS (2015), <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-ii-reports/special-report-impact-of-removing-demographic-factors/view>; see also John Monahan, Jennifer Skeem & Christopher Lowenkamp, *Age, Risk Assessment, and Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 191 (2017).

43. ELEANOR E. MACCOBY & CAROL N. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 352 (1974).

44. Sampson & Lauritson, *supra* note 40, at 19.

45. *Preliminary Semiannual Uniform Crime Report, January-June 2016*, FEDERAL BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/preliminary-semiannual-uniform-crime-report-january-june-2016>.

46. Durose et al., *supra* note 41, at 11. The rearrest rates for any non-traffic offense within five years after release were 78% for male prisoners and 68% for female prisoners. *Id.*

Regarding violence, it is hard to contest the conclusion of Michael Gottfredson and Travis Hirschi's classic, *A General Theory of Crime*: "gender differences appear to be invariant over time and space."⁴⁷

3. Race

The Bureau of Justice Statistics has reported that "[b]y the end of the fifth year after release from prison, white (73.1%) and Hispanic (75.3%) offenders had lower recidivism rates than black offenders (80.8%)."⁴⁸ However, as Richard Frase has articulated, settled law has taken race off the table for use as a risk factor in sentencing:

Race is really in a class by itself. The history of de jure racial discrimination in the United States, and continuing de facto discrimination, make race a highly "suspect" criterion, especially when it is used to support policies that disfavor minorities and favor whites (which is the most likely scenario in the sentencing

47. MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* 145 (1990); see also Jennifer Skeem, John Monahan & Christopher Lowenkamp, *Gender, Risk Assessment, and Sanctioning: The Cost of Treating Women Like Men*, 40 *LAW & HUM. BEHAV.* 580 (2016). A recent decision of the Wisconsin Supreme Court, *State v. Loomis*, 881 N.W.2d 749 (Wis. 2016), allowed the consideration at the time of sentencing of an actuarial risk assessment instrument—the Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS")—that includes gender, provided that several "cautions" were given:

Specifically, any PSI [Presentence Investigation Report] containing a COMPAS risk assessment must inform the sentencing court about the following cautions regarding a COMPAS risk assessment's accuracy: (1) the proprietary nature of COMPAS has been invoked to prevent disclosure of information relating to how factors are weighed or how risk scores are to be determined; (2) risk assessment compares defendants to a national sample, but no cross-validation study for a Wisconsin population has yet been completed; (3) some studies of COMPAS risk assessment scores have raised questions about whether they disproportionately classify minority offenders as having a higher risk of recidivism; and (4) risk assessment tools must be constantly monitored and re-normed for accuracy due to changing populations and subpopulations.

Id. at 763–64.

48. Durose et al., *supra* note 41, at 13. These recidivism rates refer to rearrest for any non-traffic offense.

context) [R]ace can never be given any formal role in issues of sentencing severity *even if it is found to be correlated with and predictive of risk*.⁴⁹

C. PSYCHOSOCIAL CHARACTERISTICS AS RISK FACTORS FOR RECIDIVISM

In preparation for the development of its own risk scale to be used in sentencing, the Pennsylvania Commission on Sentencing reviewed 29 existing risk-assessment instruments—containing a total of 125 different risk factors. The five risk factors that the Commission categorized as “psychosocial” that were found most frequently on these existing instruments were: whether the offender was currently employed, his or her highest level of education, whether the offender had criminal friends, the degree of social or marital support available to the offender, and whether the offender had a stable residence.⁵⁰ None of these variables is without controversy, since none bears on an offender’s blameworthiness for having committed crime in the past. Michael Tonry has argued that the use of any of these as risk factors for recidivism in sentencing both “systematically disadvantages minority defendants” and “in effect punish[es] lawful life-style choices that in a free society people are

49. Richard S. Frase, *Recurring Policy Issues of Guidelines (and non-Guidelines) Sentencing: Risk Assessments, Criminal History Enhancements, and the Enforcement of Release Conditions*, 26 FED. SENT’G REP. 145, 149 (2014) (emphasis added). Were there any doubts that race is “in a class by itself,” Chief Justice Roberts’ majority opinion in *Buck v. Davis*, 137 S. Ct. 759, 776, 778 (2017), should dispel them: “It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race ... [Buck’s case] is a disturbing departure from a basic premise of our criminal justice system: Our law punishes people for what they do, not who they are.”

50. PENNSYLVANIA COMMISSION ON SENTENCING, INTERIM REPORT 1: REVIEW OF FACTORS USED IN RISK ASSESSMENT INSTRUMENTS (2011), <http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment/phase-i-reports/interim-report-1-review-of-factors-used-in-risk-assessment-instruments/view>; see also Sarah L. Desmarais, Kiersten L. Johnson & Jay P. Singh, *Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings*, 13 PSYCHOL. SCI. 206 (2016). Similarly, a remarkable recent study of over 47,000 released prisoners in Sweden assessed the risk of conviction for a violent felony during the first two years after release. Among the risk factors that emerged in the final validated model were “male sex, younger age, ... violent index (or most recent) offence, previous violent crime, being never married, fewer years of formal education, being unemployed before prison, low disposable income, living in an area of higher neighbourhood deprivation, and diagnoses of alcohol use disorder, drug use disorder, any mental disorder, and any severe mental disorder.” Seena Fazel et al., *Prediction of Violent Reoffending on Release from Prison: Derivation and External Validation of a Scalable Tool*, 3 LANCET PSYCHIATRY 535, 538 (2016).

entitled to make. ... Free citizens are entitled to decide to be married or not ... even if statistical analyses show that being unmarried is correlated with higher rates of offending and reoffending.”⁵¹

RECOMMENDATIONS

I am led to four recommendations regarding the use of risk assessment in sentencing:

1. **Employ risk assessment to sentence nonviolent offenders at low risk of recidivism to community sanctions or to a shortened period of incarceration.** Within the widely-accepted “limiting retributivism” theory, retributive principles can only set outer limits on the severity of punishment, and within the range set by these limits, utilitarian concerns, such as an offender’s low risk of recidivism, can—and I believe should—be taken into account.⁵²
2. **Make judicial deference to a finding of low-risk on a validated assessment instrument presumptive rather than advisory for nonviolent offenders.** The sentencing judge should be required to state on the record a cogent reason whenever he or she disregards the sentence-lowering implications of a low-risk designation. State sentencing commissions should periodically review the “cogency” of these deviations from presumptive deference to empirical findings of low risk.
3. **Do *not* employ risk assessment to lengthen the period for which high-risk violent offenders are incarcerated beyond the range set by retributive considerations.** Procedures such as those in Virginia by which a finding of high risk alone—without any finding of heightened culpability—can triple the sentence otherwise given to those convicted of sex crimes clearly violates the limits imposed by the “limiting retributivism” theory of punishment.
4. **Charge state sentencing commissions with conducting local empirical validations of any proposed risk-assessment instrument and with vigorously debating the moral and social implications of relying on the specific risk factors to be included on the instrument.** In the words of the Model Penal Code, state sentencing commissions “shall develop actuarial instruments or processes to identify offenders who present an

51. Tonry, *supra* note 6, at 171, 173.

52. *Cf. supra* note 16.

unusually low risk to public safety.”⁵³ The moral and social implications of incorporating demographic and psychosocial risk factors on those actuarial instruments should be subject to thorough public deliberation, particularly in terms of any potentially disparate racial or socioeconomic impact. In order for it to be useful in sentencing, “risk assessment must be both empirically valid and perceived as morally fair across groups.”⁵⁴

The use of risk assessment to identify offenders at the low risk of recidivism and to sentence them either to community sanctions or to a shortened period of institutional confinement is hardly a panacea for mass incarceration. Yet as Richard Frase has argued, “with respect to low-risk assessments, can we afford to renounce any major sources of mitigation, given our inflated American penalty scales and overbroad criminal laws?”⁵⁵

53. MODEL PENAL CODE, *supra* note 12, § 6B.09(3). See Francis T. Cullen, Cheryl L. Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S (2011):

Although the evidence is very limited, it is likely that low-risk offenders are most likely to experience increased recidivism due to incarceration. From a policy perspective, it is essential to screen offenders for their risk level and to be cautious about imprisoning those not deeply entrenched in a criminal career or manifesting attitudes, relationships, and traits associated with recidivism.

Id. at 60S (emphasis in original).

54. Skeem, Monahan & Lowenkamp, *supra* note 47, at 582.

55. Frase, *Recurring Policy Issues*, *supra* note 49, at 151.



Statement of Sarah Anderson

Federal Affairs Manager, FreedomWorks

U.S. Department of Justice Listening Session

Development and Implementation of the First Step Act Risk and Needs Assessment

Wednesday, April 3, 2019

On behalf of FreedomWorks' community of more than 5 million grassroots activists, thank you to the Department of Justice for holding these listening sessions. As President Trump expressed during the White House Prison Reform Summit on Monday, his administration is committed to fully implementing the First Step Act, and it is encouraging to see the Department taking serious and affirmative steps to this end.

There are multiple reasons why it is directly in the Department of Justice's best interest to ensure that the risk and needs assessment functions properly and honestly, in keeping with the intention of the law. These are for the sake of public safety, for the sake of the integrity of separation of powers and the role of the executive branch in policy, and for the political sake of ensuring that transformative federal criminal justice reform led by conservatives lives up to its well-deserved expectations.

To achieve this, the risk assessment tool must remain objective, by relying on the dynamic factors utilized in the tool to determine eligibility for "cashing in" time credits without allowing wardens or other correctional officers unilateral veto over their eligibility. Congress fought off this proposed change by a vote of 66-33 on Division II of Sens. John Kennedy (R-La.) and Tom Cotton's (R-Ark.) amendment in the Senate during the vote series on the First Step Act. It is clearly not the intent of Congress to take away the objectivity of the risk assessment tool.

The Department of Justice also must keep the exclusions list from Section 101 of the First Step Act in mind when looking at which offenders fall into which recidivism risk category throughout the periodic risk assessments. We must ensure that offenders who have committed crimes not explicitly excluded from time credits are actually able to lower their risk of recidivism as measured by the tool, lest the tool be rendered useless.

Especially, the risk assessment must not implement a de facto blanket exclusion of those who have committed what could be classified under the "residual clause" of 18 U.S.C. 16(b), for any crimes "that, based on the facts of the offense, involved a substantial risk that physical force against the person or property of another may have been used in the course of committing the offense."

A proposed change to include this blanket exclusion in the bill itself was defeated 62-37 in the Senate on Division III of the Cotton-Kennedy Amendment. Excluding such crimes effectively guts the purpose and functionality of the entire prison reform section of the bill, as virtually any offender could be classified under that language and thus would be fully excluded from earning time credits in any situation. This runs counter to the entire purpose of the risk and needs assessment.

It would be significantly challenging to find regulatory grounds on which to include a blanket exclusion like this into the risk and needs assessment independent of the explicit “ineligible prisoners” list. However, if there is anything that this administration does know from its deregulatory efforts, it is that agency overreach beyond any scope that one could ever reasonably imagine is in fact possible and has been done in the past. That type of overreach should never happen, especially not for this purpose.

The text of the First Step Act specifically states that the risk and needs assessment shall be based on “indicators of progress, and of regression, that are dynamic and that can reasonably be expected to change while in prison.” It is safe to say that the crime itself would not be considered a dynamic factor, as that is a factor which not only cannot be reasonably expected to change, but it cannot, by definition, be changed.

To this point, the Department of Justice needs to actively counter the narratives of those who seek to make the risk assessment less, not more, mobile. The “dynamic” factors language clearly expresses Congress’ intent that those who participate in and successfully complete their programming should be able to lower their risk of recidivism under the assessment. If those who are rehabilitating themselves realize there is no way to reach the required low- or minimum-risk classification for recidivism, they will stop trying to rehabilitate themselves and the legislation will have been undermined.

The Department of Justice should fully embrace the ability of inmates to rehabilitate themselves and serve an increased portion of their sentences in less-restrictive custody when they’ve earned it. This is what was promised in the process of the legislation, which plays into the political factors of achieving something so monumental.

Our president cares massively about keeping his promises to the American people and following through on what he says he will do. We’ve seen this especially in the regulatory space, with double-digit regulations repealed for each new one implemented, far exceeding the goals set. The same approach needs to be taken for prison reform.

President Trump promised prison reform in his 2018 State of the Union address and touted the success of this promise in his 2019 address. Democrats have promised this same thing for the better part of a decade under President Obama, but never followed through. Now that the president has done what liberals never could -- as he has on many issues -- it needs to be made certain that the effects and impact are as promised.

The incentives in the First Step Act need to work, and for this to be possible, the risk and needs assessment must be implemented as quickly as possible while also ensuring quality, the most

important qualities of which are ability to move down the risk categories when reasonable, objectivity based on data for the classification with regard to demographics, and transparency of the tool so people understand why and how the assessment functions as it does.

We have confidence that, with the language in the First Step Act, the intent of the risk and needs assessment is clear. It is the task of the Department of Justice to faithfully implement the laws that Congress passes within its jurisdiction. With an Attorney General who is committed to doing this and a president who treats the issue of criminal justice reform with the passion and seriousness it deserves, it is imperative that the entire Department work toward the same goals.

Reviews of the risk assessment such as the Government Accountability Office audit and the guidance and review of the Independent Review Committee prescribed in the text of the law are good safeguards should the assessment not function as intended. However, the Department of Justice should -- and we have hope that it will -- get this right on the first try.



April 12, 2019

Via Email – Rhea.Walker@ojp.usdoj.gov

David B. Muhlhausen, Ph.D.
Director
U.S. Department of Justice
Office of Justice Programs
National Institute of Justice
810 Seventh Street, NW
Washington, DC 20001

**RE: Written Statement in Response to the Justice Department's Listening Session
on the Development of a Risk and Needs Assessment System for the Federal
Bureau of Prisons pursuant to the First Step Act**

Dear Director Muhlhausen:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), I appreciated the opportunity to participate in a listening session hosted by your office on April 3, 2019. During the session, over a dozen individuals from diverse organizations provided verbal statements about the development of a risk and needs assessment system for the Federal Bureau of Prisons (BOP) under the First Step Act of 2018.¹ For almost 80 years, LDF has used litigation and policy advocacy to promote a criminal justice system that is administered fairly and without regard to race – from arrest through reentry.

Last year, LDF joined 108 organizations in opposing an initial version of the First Step Act because it included only back-end prison reforms and a risk and needs assessment system that could result in racial disparities among those who are identified for recidivism-reduction prison programs.² LDF's advocacy, along with other civil and human rights organizations, however, resulted in a law that also includes front-end sentencing reform provisions. Consequently, according to a White House fact sheet released last week, over 500 individuals who were incarcerated when Congress passed the Fair Sentencing Act of 2010, have been released from prison as a result of sentencing reform provisions in the First Step Act.³ By applying the Fair

¹ Public Law No. 115-391, <https://www.congress.gov/115/bills/s756/BILLS-115s756enr.pdf>, [Hereinafter First Step Act].

² See, Letter from the Leadership Conference on Civil and Human Rights, *et al* to U.S. House of Representative Members dated May, 8, 2018, http://civilrightsdocs.info/pdf/policy/letters/2018/Short_Oppose%20FIRST%20STEP%20Act_5.21.18_FINAL.pdf.

³ The White House, *President Donald J. Trump Is Committed to Building on the Successes of the First Step Act*, Apr. 1, 2019, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/>.

Sentencing Act retroactively, the First Step Act will help ameliorate the glaring racial imbalances produced by the 100:1 sentencing disparity between individuals convicted of crack and powder cocaine offenses.⁴

During last week's listening session, our remarks focused on LDF's consistent concern about the racial impact of the risk assessment tool required by the First Step Act. We now submit this written statement for the record urging DOJ to: 1) as required by law, select and consult with a nonpartisan, nonprofit organization with demonstrated experience in the development of risk and needs assessment systems and 2) support full-funding and creation of prison programs and services that are proven to reduce the reoffending rates of individuals who return to the community from federal prisons.

1. DOJ Must Select and Consult an Experienced Nonpartisan, Nonprofit Organization to Host an Independent Review Committee to Study, Develop and Evaluate an Unbiased & Effective Risk and Needs Assessment System

Title I of the First Step Act requires the Department to use a risk and needs assessment system to determine prisoners' eligibility for rehabilitative programs that would allow them to earn time credits for early release and reduce their likelihood to reoffend. During the legislative process relating to the Act, LDF and other civil rights organizations raised concerns that risk assessment tools often rely upon racially-biased risk factors and inaccurately identify risk. In response to these concerns, the First Step Act requires the Department to consult with an independent review committee (IRC or Committee) as it develops, implements and validates a risk and needs assessment system. The Department must select a nonpartisan, nonprofit organization with "expertise in the study and development of risk and needs assessments tools to host the ... [IRC]."⁵ On April 8, 2019, DOJ selected the Hudson Institute to host the Committee. However, there is little to no evidence the Institute has any demonstrated experience and expertise in the study and development of risk and needs assessments.⁶ Indeed, Senator Mike Lee, a lead cosponsor of the Act, raised concerns about the Department's delay in the selection of the IRC, which should have occurred 30 days after the enactment of the law,⁷ and questioned the selection of the Hudson Institute during the April 10 nomination hearing of Jeffrey Rosen to become the Deputy Attorney General for DOJ.⁸

Specifically, Senator Lee stated that "blowing off the deadline to appoint members of the IRC" and selecting the Hudson Institute, "an opponent of the First Step Act," does not represent "good faith implementation" of the law by the Department. The Senator urged nominee Rosen to

⁴ While the Fair Sentencing Act's reduction of the sentencing disparity to 18:1 was a substantial step in the right direction, any disparity is wholly unjustifiable, and LDF will continue to advocate for elimination of the remaining disparity.

⁵ First Step Act, *supra* note 1 at Sec. 107(b).

⁶ A search of the Hudson Institute's website uncovers only one relevant blog post. See, John P. Walters and David Tell, *Criminal Justice Reform and the First Step Act's Recidivism Reduction Provisions: Preliminary Issues for Policymakers*, The Hudson Institute, Jan. 18, 2019.

⁷ First Step Act, *supra* note 1 at Sec 107(b).

⁸ See <https://www.judiciary.senate.gov/meetings/04/10/2019/nominations>.

select a different organization to host the IRC.⁹ We echo Senator Lee's concerns and urge DOJ officials to identify a nonpartisan, nonprofit organization with demonstrated expertise in the study and development of risk and needs assessment tools as required by the First Step Act.

LDF and others advocated for the IRC because there is ample research showing that risk and needs assessments are often flawed; for example, they could lead to false positives – i.e., persons are identified as high risk but ultimately will not reoffend.¹⁰ Also, the IRC should take proactive steps to address the concern that risk assessment tools often rely on data that is biased and disproportionately impact people of color.¹¹ These imbedded biases, present at every stage of the criminal justice system, result in Black individuals being identified as medium or high risk at higher rates than White individuals who are charged with or commit the same crime.¹²

These disparities are due in part to the fact that risk assessment tools rely on static factors, which do not change, such as number of arrests. Because Black low-income communities are heavily policed, the likelihood of a Black person being arrested and/or experiencing arrests at a younger age is often greater. We note that the First Step Act requires the assessment system to also consider dynamic factors – such as a person's acquisition of new skills and changes in attitude and behavior while incarcerated – that provide individuals an opportunity to progress to a lower risk category over time. But, if static factors – such as a person's criminal history – result in very high-risk scores, it will take longer for dynamic factors to lower risks scores and impact individuals' eligibility for prison programs. Consequently, persons of color who are unlikely to recidivate will remain excluded from the very programs and services meant to support them. These are issues that the IRC, under the leadership of an experienced nonpartisan, nonprofit organization, could help the Department grapple with and rectify.

2. The BOP must support and expand prison recidivism reduction programs

The First Step Act requires the BOP to expand evidence-based recidivism-reduction programs that will meet the needs of individuals who are incarcerated.¹³ Therefore, DOJ must seek adequate funding from Congress and advocate for policies that will expand and create proven rehabilitative programs. For example, this week, members of Congress introduced a bipartisan bill—Restoring Education and Learning Act—which would restore Pell grant eligibility to students who are incarcerated and want to participate in postsecondary education.¹⁴ We know from

⁹ Senate Committee on the Judiciary, *Hearing on the Nomination of Jeffrey A. Rosen to be U.S. Deputy Attorney General*, at 1:02:42 to 1:11:20, April 10, 2019, <https://www.judiciary.senate.gov/meetings/04/10/2019/nominations>

¹⁰ Nathan James, Risk and Needs Assessment in the Federal Prison System, 8-9, Congressional Research Service, July 10, 2018, <https://fas.org/sgp/crs/misc/R44087.pdf>.

¹¹ Julia Angwin et. al, *Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks*, ProPublica, May 23, 2016 (noting that “blacks are almost twice as likely as whites to be labeled a higher risk but not actually re-offend. It makes the opposite mistake among whites: They are much more likely than blacks to be labeled lower risk but go on to commit other crimes”), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>.

¹² Jeff Larson et. al, *How We Analyzed the COMPAS Recidivism Algorithm*, ProPublica, May 23, 2016, <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>.

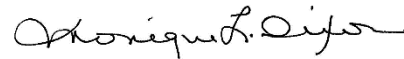
¹³ First Step Act, *supra* note 1 at Sec. 102.

¹⁴ See, U.S. Senator Brian Schatz, *Schatz, Lee, Durbin Introduce Bipartisan Legislation to Restore Educational Opportunities For Those Incarcerated And Improve Public Safety*, Apr. 9, 2019,

research that individuals who obtain a post-secondary degree in prison are less likely to reoffend and more likely to find employment when they return to their communities.¹⁵ The Department should promote and seek funding for this policy and other prison-based programs that help individuals attain education, job skills, lodging, and other needs to prevent recidivism, as it implements the First Step Act.

Thank you for your serious consideration of the concerns and recommendations raised in this statement. Please do not hesitate to contact me at 202-682-1300 with any questions or comments.

Sincerely yours,



Monique L. Dixon
Deputy Director of Policy

<https://www.schatz.senate.gov/press-releases/schatz-lee-durbin-introduce-bipartisan-legislation-to-restore-educational-opportunities-for-those-incarcerated-and-improve-public-safety>. See also, S. 1074, 116th Congress, <https://www.congress.gov/bill/116th-congress/senate-bill/1074?q=%7B%22search%22%3A%5B%22s.+1074%22%5D%7D&s=1&r=1>.

¹⁵ See, Lois M. Davis, *et al*, *Evaluating the Effectiveness of Correctional Education A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, 40 and 47, Rand Corp. and Bureau of Justice Assistance, U.S. Dept. of Justice (2013).



April 12, 2019

David B. Muhlhausen, Ph.D.
Director
National Institute of Justice
Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530

Submitted electronically

**Re: Statement for the Record of The ACLU, Justice Roundtable, and The Leadership Conference
Statement in Response to Department of Justice (DOJ) April 3 and 5 Listening Sessions**

Dear Director Muhlhausen,

On behalf of the American Civil Liberties Union, the Justice Roundtable, The Leadership Conference on Civil and Human Rights¹ and the undersigned organizations, we submit this statement for the record regarding the Department of Justice's (DOJ) Listening Sessions on the development of a risk and needs assessment system as required by the First Step Act of 2018. Many of these organizations attended the listening sessions held on April 3 and 5 and made public statements consistent with the views set forth in this letter.

Transforming the criminal justice system is one of the most important civil and human rights issues of our time. Our organizations have long advocated for policy changes to advance racial justice, equality, and fairness within the criminal justice system and were closely involved in the negotiations and advocacy efforts to advance a criminal justice package that ultimately became The First Step Act. Through that process, we were committed to ensuring that reform would meaningfully address the front-end drivers of mass incarceration (i.e. mandatory minimum sentences), improve the lives of currently incarcerated individuals through increased rehabilitative programming, provide pathways for early release, safeguard against exacerbating existing disparities within the federal system, and ultimately yield a positive impact on as many federal prisoners as possible.

The First Step Act made some modest steps toward these goals, but in order to ensure that the legislation has the greatest positive impact, the Department of Justice must be committed to implementing the bill in a manner consistent with the text of the statute and Congressional intent. Therefore, we urge the Department to ensure that: (1) The NIJ appoints a new and appropriate "nonpartisan nonprofit" organization to host the IRC and select the membership as required by the statute; (2) Neither the Bureau of Prisons (BOP) security classification system nor the current version of PCRA is adopted as a substitute



for the new Risk and Needs Assessment System required by the statute; and (3) The Bureau of Prisons immediately begins providing rehabilitative programming to everyone in federal prison.

1. The Department Must Identify a New Nonpartisan Nonprofit Organization to Host and Appoint the Independent Review Committee Before the Risk and Needs Assessment System Can be Developed.

Title I of The First Step Act is supposed to assist incarcerated individuals in success upon release and to reduce recidivism by providing rehabilitative programming and incentives for early release. The law mandates the use of a risk and needs assessment system in an unconventional and untested manner to determine appropriate programming and ability to receive earned time credits toward early transition to halfway houses, home confinement, or supervised release. This unconventional use, combined with other concerns about risk assessments in general, such as racial biases in risk factors, inaccuracies in identifying risk, and lack of independent testing and validation of tools, gave advocacy groups great concern. Our organizations worked diligently through the legislative process to ensure that the risk and needs assessment system as outlined in the First Step Act would not undermine the overall impact that the legislation could have.² In order to mitigate some of those concerns, the First Step Act required the National Institute of Justice (NIJ) to select a “nonpartisan nonprofit organization with expertise in the study and development of risk and needs assessment tools” to appoint and host an Independent Review Committee (IRC) within 30 days of enactment and to begin implementation of the risk and needs assessment system no later than 210 days after enactment.³ The statute states that the NIJ “shall” first select a nonpartisan nonprofit organization, and that organization “shall” then appoint the IRC’s members. The appointing organization must have “expertise in the study and development of risk and needs assessment tools,” and it must appoint not fewer than six members to the IRC, each of whom shall have expertise in “risk and needs assessment systems.”⁴

On April 8, approximately two and a half months after the IRC was to have been established, NIJ announced the organization it has appointed to appoint and host the IRC: the Hudson Institute. The selection of the Hudson Institute appears to be inconsistent with the requirement that the NIJ appoint “a nonpartisan nonprofit organization with expertise in the study and development of risk and needs assessment tools.” The Hudson Institute is known and described as a “politically conservative” think tank, whose research and analysis promotes global security, freedom and prosperity.⁵ More specifically, its policy work and publications related to “legal affairs and criminal justice” seem to be solely focused on antitrust and national security public policy. There is no evidence on its website, in the form of research publications or otherwise, which remotely suggests the organization has any expertise or experience in the study and development of risk and needs assessment systems.⁶ The only relevant evidence appears to be a single blog post, written on January 18, 2019.⁷ Absent other evidence, the suggestion that the Hudson Institute has “expertise in the study of development of risk and needs assessment tools” strains credulity, especially given the variety and number of organizations that have this exact expertise. Further, the Hudson Institute has selected six members for the IRC, only three of whom may meet the required criteria for membership in the IRC outlined in the statute. The NIJ must immediately appoint a new nonpartisan nonprofit organization with expertise and experience in the study and development of risk and needs



assessments systems to host the IRC and select its members.

Following the selection by the NIJ of a host organization to appoint expert IRC members, Congress next required the IRC to then provide an unbiased and independent review and evaluation of existing risk and needs assessment systems, and best practices with respect to design, testing and validation of these systems.⁸ The law does not permit an alternate to the IRC. The IRC is also responsible for providing recommendations to the Attorney General to inform the final development, adoption and implementation of the new risk and needs assessment system by the BOP.⁹ The law mandates that the Attorney General consult with the IRC to develop risk and needs assessments in order to determine the amount and type of evidence based recidivism programming for each prisoner, and classify individuals into “risk” levels to be used to permit or deny incentives and rewards for successful participation.¹⁰ The law does not allow the Attorney General to review and develop the assessment system independent of the IRC, which is what appears to have happened here.¹¹ This process is key to ensuring that only evidence and unbiased perspectives are used to develop the risk and needs assessment system. Without a truly non-partisan IRC, there is no way to ensure that the risk and needs assessment system created by BOP will operate in a fair and equitable manner.

2. The Department Cannot Use an Existing Tool as a Substitute for the Risk and Needs Assessment System Required by the First Step Act.

The BOP should not attempt to develop its own risk assessment tool internally or use any existing tool it may have at its disposal without consulting the IRC, as it seems to suggest in recent statements. A DOJ official is reported to have said that the Department of Justice “expects to meet the July deadline” because it is “using resources it has on hand to work on the risk assessment tool internally, in the absence of the committee.”¹² And a summary of DOJ policies on the First Step Act, dated February 7, 2019, stated:

At the outset, the Attorney General is required to develop a risk and needs assessment system to evaluate the recidivism of each inmate, who will be classified as presenting a low, medium, or high risk of recidivism. Alternatively, the Attorney General may “use existing risk and needs assessment tools as appropriate.” (If the Attorney General develops a new system, he must do so within 210 days of enactment of the Act, but that deadline may be subject to delay due to the lapse in appropriations that began on December 21, 2018.)

This policy suggests that the DOJ considers using an existing risk and needs assessment tool as a satisfactory substitute for compliance with the First Step Act. But the statute does not permit the Attorney General to independently adopt an existing tool outside the process established by the law. That process requires the Attorney General to consult with the IRC in carrying out each of his duties under sections 3631(b), 3632 and 3633, and requires the IRC to assist the Attorney General in carrying out those duties, including:

- (1) conducting a review of the existing prisoner risk and needs assessment systems in operation on the date of enactment of this Act;



- (2) developing recommendations regarding evidence-based recidivism reduction programs and productive activities;
- (3) conducting research and data analysis on—(A) evidence-based recidivism reduction programs relating to the use of prisoner risk and needs assessment tools; (B) the most effective and efficient uses of such programs; and (C) which evidence-based recidivism reduction programs are the most effective at reducing recidivism, and the type, amount, and intensity of programming that most effectively reduces the risk of recidivism; and
- (4) reviewing and validating the risk and needs assessment system.¹³

The only tool BOP currently uses is its security level classification system, which was primarily designed to assist in housing decisions upon entry into prison, not determine the likelihood that a person will recidivate upon release. Like many risk assessment systems, the BOP's security classification system classifies as "high risk" many people who do not go on to reoffend. In addition, the BOP's system heavily weights static factors such as age, past criminal history, and current offense—factors that cannot change while a person is in prison, therefore making it nearly impossible to lower risk categories in order to receive the new earned time credits. Under this system, males are placed in one of four security levels based on their number of points: minimum (0-11 points); low (12-15 points); medium (16-23 points); high (24+).¹⁴ The maximum base score is 45, with 42 points for the unchangeable factors of age, past criminal history, and current offense, and 3 points for the changeable factors of educational level and substance abuse. Similarly, the PCRA, a tool used by probation officers only to improve the reentry success of people on probation or supervised release in the community,¹⁵ has a maximum score of 18 points, consisting of 9 points for the static factors of criminal history and age at intake, and 9 points for dynamic factors that could potentially change in the community, but many of which cannot change during incarceration.¹⁶

There is no existing tool that does what the First Step Act requires. Among other things, the statute requires development of tools that are both objective and statistically validated based on such factors as indicators of progress and regression and dynamic factors that can change while in prison. Decades of criminology research has shown that the factors that carry the most weight in BOP's classification system and the PCRA are primarily the result of the behavior and decisions of police officers and prosecutors, rather than the individuals or groups that the data is claiming to describe.¹⁷ Because these factors "can exacerbate unjust disparities," the Colson Task Force recommended that risk assessment tools be "employed solely to guide the individualized delivery of treatment and programming to improve reentry success."¹⁸ Likewise, one of the PCRA's creators concluded that use of risk assessments for purposes other than to inform risk reduction efforts, such as determining the length of prison sentences, may "exacerbate racial disparities in incarceration."¹⁹

Using a risk and needs assessment system to determine time credits is novel and untested. State correctional systems typically award time credits based on performance and/or disciplinary record, not a risk assessment.²⁰ Risk assessments alone do not predict the recidivism risk of any person; they only roughly group people into a limited number of categories.²¹ When risk and needs assessment evaluations



are adopted, they are typically used by states to identify programming for people in prison, rather than to award time credits.²²

Dynamic factors (i.e. those that can change over time), such as work history, family ties, and pro-social networks are nearly impossible to change while in prison and therefore make it very difficult for a person to lower his or her risk score during incarceration. Therefore, the use of any existing risk and needs assessments tool would result in a large number of people in prison being unable to earn early release credits from programming by decreasing their risk categories—contrary to the law’s mandate to provide all individuals in prison the incentive and opportunity to actively participate in programming throughout their entire term of incarceration.²³ A needs-based assessment should be used to identify the criminogenic needs of each individual and develop a program of interventions to address those needs to lower the individual’s risk of recidivating and actually help people succeed in their communities upon release, as the law requires.²⁴

In addition, because communities of color are persistently over-policed across the nation and a person’s “criminal history” may not consist of actual criminal convictions, consideration of the static factors used by risk assessment systems bias the results against persons of color. Studies have shown that these tools can produce results that are heavily biased against Black defendants and have a disparate negative impact on Black people because the factors considered and the criminal justice data used by these systems are biased.²⁵ Risk assessments rely on static factors, including criminal history and age at the time of the offense, and dynamic factors, including work history and educational achievement. Both static and dynamic factors tend to correlate with socioeconomic class and race, and studies show that Black people are more likely to be misclassified as high risk than White or Hispanic offenders.²⁶

For these reasons, the BOP security classification and the PCRA are not appropriate substitutes for the risk and needs assessment tools required by the First Step Act. They were not designed to identify the specific criminogenic needs of incarcerated individuals and heavily rely on static factors that would undermine the effectiveness of the system.

3. The Bureau of Prisons must immediately begin providing rehabilitative programming.

The core intent of the First Step Act is to provide rehabilitative and re-entry programming, as well as residential re-entry centers (i.e. halfway houses) and home confinement. The BOP does not currently provide minimally sufficient recidivism reduction programs, nor does it have sufficient halfway house capacity so that those released from prison can successfully transition to the community. Since 2017, BOP has relentlessly cut rehabilitative programming, staff, and halfway houses. There are 25,000 people in federal prison waiting to be placed in prison work programs,²⁷ at least 15,000 people waiting for education and vocational training,²⁸ and at least 5,000 people are awaiting drug abuse treatment.²⁹ There is nowhere near enough programming to help prisoners succeed in their communities upon release and thereby reduce recidivism overall. We therefore urge BOP to begin rebuilding rehabilitative services now.



Further, any savings resulting from the First Step Act should be reinvested in rehabilitative programming so that as many people as possible can improve their lives and benefit from the new earned time credits. We also urge the Department of Justice to ensure that there is no privatization of public functions and to prevent private entities from unduly profiting from incarceration while implementing this legislation. In the end, any positive reform contemplated by the First Step Act is contingent upon sufficient funding to expand and improve evidenced-based recidivism reduction programming, and the availability of halfway house placements and home confinement.

Conclusion

For these reasons, we urge you to: (1) Immediately appoint a new nonpartisan nonprofit organization to host the IRC and select its members; 2) Ensure that the department adheres to the statute and does not use the current BOP security classification system or the PCRA as a substitute for the independently tested and validated risk and needs assessment tool required; and (3) Immediately direct resources to begin expanding rehabilitative programming in all federal prisons as required by the First Step Act. Thank you for your attention to these matters. If you have any questions, please feel free to contact Jesselyn McCurdy, American Civil Liberties Union Washington Legislative Office, Deputy Director at jmccurdy@aclu.org (202) 675-2307 or Sakira Cook, Leadership Conference on Civil and Human Rights, Program Director, at cook@civilrights.org or (202) 263-2894.

Sincerely,

American Civil Liberties Union
Bread for the World
CURE (Citizens United for Rehabilitation of Errants)
Defending Rights & Dissent
Drug Policy Alliance
The Justice Roundtable
Justice Strategies
The Leadership Conference Education Fund
The Leadership Conference on Civil and Human Rights
NAACP
NAACP Legal Defense and Educational Fund
The National Council for Incarcerated and Formerly Incarcerated Women and Girls (The Council)

¹ The American Civil Liberties Union (ACLU) is a nationwide organization working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The Justice Roundtable (Justice Roundtable) is a national coalition of legal, civil rights, criminal justice, human rights and faith-based organizations dedicated to advocating for a fairer federal criminal justice system. The Leadership Conference on Civil and Human Rights (The Leadership Conference) is the nation's oldest and largest civil rights coalition representing people of color, women, children, older Americans, people with disabilities, gays and lesbians, major religious organizations, labor unions, and civil and human rights groups. For almost a half century, The Leadership Conference has led the fight for equal opportunity and social justice.



² Vote "No" on The FIRST STEP Act. 2018. <https://www.aclu.org/letter/vote-recommendation-first-step-act>.

³ FIRST Step Act, Pub. L. No. 115-391, § 107. 2018.

⁴ First Step Act, Sec. 107(b)-(d).

⁵ https://en.wikipedia.org/wiki/Hudson_Institute

⁶ <https://www.hudson.org/topics/101-crime-and-justice>

⁷ Walters, John P. & Tell, David "Criminal Justice Reform and the First Step Act's Recidivism Reduction Provisions: Preliminary Issues for Policymakers," Hudson Institute, Jan. 18, 2019 available at <https://www.hudson.org/research/14776-criminal-justice-reform-and-the-first-step-act-s-recidivism-reduction-provisions-preliminary-issues-for-policymakers>.

⁸ The risk and needs assessment system shall be used to-(1) determine the recidivism risk of each prisoner as part of the intake process, and classify each prisoner as having minimum, low, medium, or high risk for recidivism;(2) assess and determine, to the extent practicable, the risk of violent or serious misconduct of each prisoner; (3) determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to such programming accordingly, and based on the prisoner's specific criminogenic needs, and in accordance with subsection (b);(4) reassess the recidivism risk of each prisoner periodically, based on factors including indicators of progress, and of regression, that are dynamic and that can reasonably be expected to change while in prison;(5) reassign the prisoner to appropriate evidence-based recidivism reduction programs or productive activities based on the revised determination to ensure that- all prisoners at each risk level have a meaningful opportunity to reduce their classification during the period of incarceration to address the specific criminogenic needs of the prisoner; and all prisoners are able to successfully participate in such programs; (6) determine when to provide incentives and rewards for successful participation in evidence-based recidivism reduction programs or productive activities in accordance with subsection (e) (7) determine when a prisoner is ready to transfer into prerelease custody or supervised release in accordance with section 3624; and (8) determine the appropriate use of audio technology for program course materials with an understanding of dyslexia. 18 U.S.C. § 3632 (a) (b).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Roscoe, Ayesha. "3 Months into New Criminal Justice Law, Success For Some And Snafus For Others", *NPR*, Apr. 1, 2019.

<https://www.npr.org/2019/04/01/708326846/3-months-into-new-criminal-justice-law-success-for-some-and-snafus-for-others>.

¹³ First Step Act, Sec. 107(a), (e); see also 18 U.S.C. §§ 3632(a)-(b), 3633.

¹⁴ Program Statement P5100.08, Ch. 5, Pg.2.

¹⁵ See "An Overview of the Federal Post-Conviction Risk Assessment." *Office of the United States Courts, Office of Probation and Pretrial Services*, 2011. Pgs.1-3.

¹⁶ The PCRA is scored as follows: GED or less than high school (1 point); currently unemployed even if a student, homemaker, or retired (1 point); unstable work history over the past 12 months (1 point); current alcohol problem (1 point); current drug problem (1 point); single, divorced, separated (1 point); unstable family situation (1 point); lack of positive pro-social support (1 point); attitude toward supervision and change (1 point). Supervisees are assigned to one of four risk categories based on their number of points: low (0-5 points); low/moderate (6-9 points); moderate (10-12 points); high (13-18 points). See Thomas H. Cohen et al., *Does Change in Risk Matter? Examining Whether Changes in Offender Risk Characteristics Influence Recidivism Outcomes*, 15 *Criminology & Pub. Pol'y* 263, 271-72, 294 (2016); PCRA Officer Section, <http://www.ned.uscourts.gov/internetDocs/jpar/RGK-FSR2014-PCRA%20Officer%20Section.pdf>.

¹⁷ Vote "No" on The FIRST STEP Act. 2018. <https://civilrights.org/resource/vote-no-first-step-act/>

¹⁸ See "Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections." Jan. 2016. Pg.34.

¹⁹ Skeem, Jennifer L. & Lowenkamp, Christopher, "Risk, Race, and Recidivism: Predictive Bias and Disparate Impact", 54 *Am. Soc'y of Criminology* 680, 703-05, 2016.

²⁰ *Ibid.*

²¹ James, Nathan "Risk and Needs Assessment in the Criminal Justice System", *U.S. Congressional Research Service*, No. R44087, June 22, 2015.

²² See e.g., Tex. Gov't Code § 498.002 (classifying inmates' "time-earning category" based on factors other than risk assessment); R.I. Gen. Laws § 42-56-24 (determining amount of sentence credit based on factors other than risk assessment); Okla. Stat. § 57-138 (same); N.C. Gen. Stat. § 15A-1340.18 (same); Ohio Rev. Code Ann. § 2967.193 (same).

²³ 18 U.S.C. §§ 3621(h)(6), 3632(d).

²⁴ See 18 U.S.C. §§ 3633, 3635(3).

²⁵ See, e.g., Skeem, J. & Lowenkamp, C. (2015). Risk, Race & Recidivism: Predictive Bias and Disparate Impact.

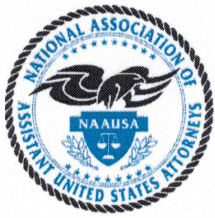
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²⁶ Whiteacre, Kevin. "Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias", 17 *Crim. Just. Pol'y Rev.* 330, 2006.; see also Fennessy, Matthew & Huss, Matthew T., "Predicting Success in a Large Sample of Federal Pretrial Offenders: The Influence of Ethnicity", 40 *Crim. Just. & Behav.* 40. Jan. 2013. 53.

²⁷ See Federal Bureau of Prisons, UNICOR, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp.

²⁸ See "Oversight of the Federal Bureau of Prisons", *U.S. House of Representatives, Com. on the Judiciary, Subcom. On Crime, Terrorism, Homeland Security, and Investigations*. Apr. 17, 2018. Pg.50

²⁹ See Dep't of Justice, Bureau of Prisons, Drug Abuse Treatment Program, 81 *Fed. Reg.* Apr. 16, 2016, 24484, 24488,



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April 12, 2019

David B. Muhlhausen, Ph.D.
Director
National Institute of Justice
Office of Justice Programs
Department of Justice
810 7th Street NW
Washington, DC 20531

Re: Comments for First Step Act "Listening Sessions" on April 3 and 5

Dear Dr. Muhlhausen:

The National Association of Assistant United States Attorneys presents the following comments for your consideration in conjunction with the "listening sessions" held on the First Step Act on April 3 and 5.

We recommend that:

- An inmate's involvement with a 5K or a Rule 35 motion be considered as a factor that lowers the risk of recidivism.
- Relevant federal prosecutors be queried by BOP authorities about an inmate's risk of recidivism or general dangerousness.
- Whether a defendant confessed at the time of arrest should reflect a lower risk of recidivism. A timely (close to the time of arrest) confession, even in the absence of a substantial assistance motion, is an indicator that someone has less of an intention of committing future serious crimes. A timely confession combined with a substantial assistance motion is an even better indicator of that.

Thank you for consideration of these comments. Please contact me should you have further questions.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Lawrence J. Leiser".

Lawrence J. Leiser
President

Statement of Nancy La Vigne, Ph.D.¹
Vice President for Justice Policy
Urban Institute

Listening Session on the First Step Act
April 5, 2019

Director Muhlhausen, Director Hurwitz, Associate Deputy Attorney General Bacon,

Thank you all for the opportunity to speak on the topic of the risk assessment system development and implementation component of the First Step Act.

I am Nancy La Vigne with the Urban Institute, where I direct the Justice Policy Center—a collection of over 50 researchers spanning a wide array of disciplines and expertise. Our portfolio of work includes the management of BJA's Public Safety Risk Assessment Clearinghouse. My colleagues and I have considerable expertise in the use of risk and needs assessment tools at the state and local levels, including developing risk assessment tools for pretrial and correctional populations. But Urban does not have a proprietary tool, nor do we profit from developing them.

I also speak in my capacity as the former executive director of the congressionally mandated, bipartisan Charles Colson Task Force on Federal Corrections. The Task Force's recommendations to Congress, the Attorney General, and the White House included several provisions similar to those found in First Step, including that programs and treatment should be tailored to the risks and needs of each individual and that people housed in BOP should be incentivized to participate in those self-betterment activities.

My remarks today represent not just my own expertise but that of my colleagues. They consist of six key points:

First, developing a risk and needs assessment system is essential to faithful implementation of the First Step Act. The system can guide BOP in making smart decisions about how to assign individuals to the right amount of correctional programming and supervision, thereby promoting individual rehabilitation as well as safety—both in prison and in the community. Development of the system should happen as promptly as practicable because the sooner it gets implemented the sooner people will be incentivized to take part in recidivism-reduction programming best suited to their needs, thus promoting public safety.

Second, and consistent with the research evidence on risk assessment, the system should be customized to—and validated with—the BOP population and reflect BOP's needs. No off-the-shelf or proprietary system is likely to fit the bill, particularly if vendors are reticent to share underlying algorithms for public scrutiny—a requirement in First Step.

Third, to align with the requirements of the First Step Act, the system must detect and measure changes in individual risk and need levels during incarceration (i.e., dynamic factors). It will be difficult to do so, however, if risk assessments are not administered frequently or predictors used in the calculation of risk scores do not change over time (e.g., age at first arrest). To ensure the routine assessment of individual

¹ The views expressed are my own and should not be attributed to the Urban Institute, its trustees, or its funders.

progress, the system must not rely on labor-intensive or time-consuming data collection. Also, BOP must explore the utility of administrative data on in-prison activities like correctional program participation and completion, as well as institutional misconduct.

Fourth, the system's designers must employ strategies to remove bias. Biased outcomes—particularly in accordance with race—are a real threat in two important ways: First, systematic bias can be built into the tool through predictors that are not legally and theoretically relevant; and second, even without those predictors, the tool may not perform equitably across different subpopulations. Empirical solutions to address bias in actuarial decisionmaking have been proposed in other fields and should be fully explored by NIJ and BOP (Berk et al., 2018; Hardt, Price, and Srebro, 2016; Kamiran and Calders, 2012).

Fifth, if the risk assessment system is to be aligned with correctional programs that are evidence-based, BOP should carefully review its own program offerings to ensure that they are evidence based. And to align programming with needs identified through the newly mandated assessment system, BOP must also assess which programs to add or expand to meet those needs. [Relatedly, I'd be remiss not to recognize that the First Step Act is inconsistent with the research evidence (Lowenkamp and Latessa, 2002), providing greater incentives for program participation to low-risk individuals and excluding certain higher risk individuals from earned time credits altogether.]

My **sixth** and last point is essential: we must not overlook the importance of implementation fidelity. Urban's review of state criminal justice reform efforts found that risk assessment tools featured prominently in many of them, but early efforts underestimated that end users need buy in, training, and accountability both to use and apply the tools as intended (Harvell et al., 2016). Toward that end, oversight through both the planned Independent Review Committee and GAO— is critical, and in fact required by law. When considering entities and individuals to host and serve on the committee, please keep both inclusivity and independence in mind. To be credible to the wide array of stakeholders, IRC members should be recognized academic and practitioner experts, represent a variety of perspectives and experiences (including lived experience), and have no monetary interest in the outcome.²

² On April 8th, the IRC host and six committee members were announced. We suggest expanding the committee beyond the named members to include a variety of perspectives, including those with lived experience.

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Session 2 Written Statements Submitted to NIJ

by April 12, 2019

1. Council of State Governments Justice Center – Megan Quattlebaum
2. Federal Public & Community Defenders – David Patton, Amy Baron-Evans, Aamra Ahmad
3. George Mason University Center for Advancing Correctional Excellence! – Faye Taxman
4. JustLeadershipUSA
5. Major Cities Chiefs Association – Art Acevedo
6. National Sheriffs' Association – Jonathan Thompson
7. RAND Corporation – John Hollywood
8. Sentencing Project – Marc Mauer
9. Aleph Institute – Rabbi Y. Weiss
10. National Council for Incarcerated and Formerly Incarcerated Women and Girls – Andrea James
11. Washington State Institute for Public Policy



Justice Center

THE COUNCIL OF STATE GOVERNMENTS

Remarks for the National Institute of Justice FIRST STEP Act Listening Session April 5, 2019

Good morning. I'm Megan Quattlebaum, the director of The Council of State Governments (CSG) Justice Center. We are grateful to have been invited to share our views on the development and implementation of a risk and needs assessment system for the Federal Bureau of Prisons, as is required by the FIRST STEP Act of 2018.

As you may know, CSG is a membership organization—we represent all three branches of government in all 50 states. The Justice Center is CSG's criminal justice-focused arm; we develop research-driven strategies to help our member states increase public safety and strengthen communities.

I do want to begin with one caveat, which is that the CSG Justice Center does not have expertise in the intricacies of the federal prison system in particular. For that reason, my remarks today will focus on what the federal system may be able to learn from the experiences of the states.

Also, while some of what I have to say may be generalizable, I want to be clear that I am speaking specifically today of risk assessment tools like the one contemplated by the FIRST STEP Act; that is, a tool that will be used in a correctional environment to inform programming decisions. When used in other contexts and for other purposes, risk assessment tools may warrant different or additional considerations.

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Over the past 25 years, the evidence has made clear that criminogenic risk and needs assessments provide a blueprint for effective correctional rehabilitation initiatives. Though a criminogenic risk and needs assessment should not be the sole factor in making programming decisions, when properly validated and implemented, such assessments can help corrections organizations provide the types and dosages of services empirically linked to reductions in reoffending.

The evidence also makes clear a few key principles for effective use of risk assessment tools in the correctional context.

- First, we know that it is important to validate risk and need assessment tools to ensure they are accurate across race and gender, as well as for the overall population being assessed.





- Second, we know that accuracy is paramount if we are to provide the right programming to the right people. Accurately assessing participants' risk and dynamic need factors is imperative in determining what responsivity issues may impact their ability to effectively participate in programming, because then those issues may be overcome.
- Third, it is also clear that ongoing coaching and quality assurance practices are necessary for assessment tools to be correctly implemented and to maintain appropriate inter-rater reliability.

Finally, even as we focus on the development of the risk and needs assessment tool, it is also important to remain mindful of the need for Bureau of Prisons facilities to have appropriate and adequate evidence-based recidivism reduction programming available to their populations. The purpose statement of the FIRST STEP Act describes the goal of the legislation as “to provide for programs to help reduce the risk that prisoners will recidivate.” The objective here is thus to utilize assessment as a tool to move people into high quality, appropriate programming, not assessment for assessment's sake.

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Although progress at state level is uneven nationally, state corrections agencies are increasingly recognizing and acting upon the principles I've enumerated. These agencies now assess their programs and services, evaluate how program and service capacity align with the needs of their population, and adjust programming accordingly in order to make the biggest impact on recidivism.

For example, in 2014, the Iowa Department of Corrections (DOC) received funding from the Department of Justice's Bureau of Justice Assistance to engage in a comprehensive process to reduce recidivism through the Second Chance Act Statewide Recidivism Reduction program. In particular, they focused on improving the use of evidence-based practices in their prison programming.

To ensure that all of their programs were adhering to evidence-based correctional practices, Iowa DOC staff conducted an inventory of the more than 200 prison programs across all nine of its facilities. More than one-third of those programs were found to not follow the latest evidence-based practices and thus were defunded over the course of the three-year grant. Iowa reduced their offerings to 33 programs statewide, 89 percent of which have a clear evidence base to support them, and was then able to reallocate staff and resources to expand effective, evidence-informed programming. Going forward, all state facilities are required to submit new programs to a review process to ensure they are evidence-based and



must review programs every year to make certain that they are adhering to evidence-based practices and achieving positive outcomes.

In 2016, based on a CSG Justice Center Justice Program Assessment, the Idaho Department of Correction began to utilize their battery of assessments at intake, including the LSI-R and GAINS assessments, to directly drive streamlined program offerings of five core risk-reduction programs that are available in all facilities. They also trained approximately 1,000 staff members on evidence-based programs, all of which adhere to principles that decrease a person's likelihood of reoffending.

Since 2011, the Ohio Department of Rehabilitation and Correction completes a risk and needs assessment on all people within seven days of their entering incarceration. Supplemental evaluations are completed shortly after the initial assessment, and the person is then placed in his or her parent institution. A case plan is developed in collaboration with the incarcerated person within 30 days of placement, and, if they were assessed as having a moderate- to high-risk of recidivating, a determination is made as to what cognitive programming they may need to lower this risk. Responsivity issues are assessed, and the person may receive other preparatory services prior to their enrollment in cognitive programming, which will occur within the last two years of their incarceration. The department also utilizes a review process to ensure that any cognitive programs offered are appropriate for behavior modification and improve recidivism outcomes.

Since 2008, people entering the Connecticut Department of Correction begin their incarceration at the Walker Assessment Center, where they receive risk and needs, medical, behavioral health, and suicidality assessments. An Offender Accountability Plan is developed with the incarcerated person that includes specific programmatic goals and behavioral expectations, along with a determination of what education, cognitive-behavioral, anger management, behavioral health, and parenting programs may improve recidivism and other behavioral outcomes. Program participation is tracked by computer and feeds into the development of an individual community transition plan.

In 2016, leaders of the Illinois Department of Corrections sought to determine whether treatment programs and services provided in their facilities and the community were evidence-based. To do so, they implemented the "Risk-Needs-Responsivity (RNR) Simulation Tool," which is a web-based tool developed by George Mason University Center for Correctional Excellence used to identify programming needs for people in the justice system within a jurisdiction and guide resource allocation to match programming to risk-need profiles. Using the RNR



Simulation Tool's program assessment, the department was able to identify and discontinue programs that were not grounded in evidence—a cost-effective way to ensure that resources were spent on programs that have the greatest impact.

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In closing, I wish to highlight that the FIRST STEP Act has baked in numerous admirable features of which we hope the Department of Justice, the National Institute of Justice, and the Bureau of Prisons will take full advantage. These include:

- A requirement that the risk and needs assessment tool be reviewed, validated, and publicly released on an ongoing basis, including an ongoing evaluation to determine whether the tool is producing unwarranted disparities.
- A requirement that the risk and needs assessment tool take into account dynamic factors that can reasonably be expected to change while the individual is in prison.
- A requirement that individuals' risk levels be periodically reassessed, not less often than annually.
- A requirement that corrections officers and employees be trained regarding the use of the risk assessment tool and that they demonstrate their competence on a biannual basis.
- A requirement that the Comptroller General audit the use of the risk and needs assessment every two years, including to identify unwarranted disparities.
- A requirement for the formation of an Independent Review Committee that will assist with the development of the risk and needs assessment tool.

This final requirement deserves particular attention. As an organization that operates on the basis of nationwide consensus, we believe that this committee presents the National Institute of Justice with an opportunity to demonstrate to the many constituencies that were engaged in the process of developing the FIRST STEP Act that their views and concerns continue to be considered during the implementation process. While disagreements will no doubt emerge, by engaging these groups in ongoing dialogue, the National Institute of Justice will help to maintain the bipartisan coalition that made the FIRST STEP Act possible. Our 50-state membership will be grateful for your efforts in this regard.

Thank you again for the opportunity to share our views.

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Co-Chairs

David Patton  
Executive Director  
Federal Defenders of New York

Neil Fulton  
Federal Defender  
Districts of North & South Dakota

Jon Sands  
Federal Defender  
District of Arizona

April 5, 2019

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National Institute of Justice  
Office of Justice Programs  
Department of Justice  
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Re: DOJ First Step Act Listening Session

Dear Mr. Muhlhausen:

Thank you for requesting the Federal Public and Community Defenders' views regarding "the development and implementation of a risk and needs assessment system" as required by Title I of the First Step Act, Pub. L. No. 115-391 (2018). The Federal Public and Community Defenders represent the vast majority of defendants in 91 of the 94 federal judicial districts nationwide, and therefore have a particular interest in the First Step Act's successful implementation.

The core purpose of Title I of the First Step Act is to help prisoners succeed in their communities upon release and thereby reduce recidivism. To that end, it requires the Attorney General in consultation with an expert Independent Review Committee to develop and provide to all prisoners evidence-based programming that is designed to help them succeed upon release and that has been shown by empirical evidence to reduce recidivism. *See* 18 U.S.C. §§ 3633, 3635(3).

In addition, the law requires the Attorney General, again in consultation with the expert Independent Review Committee, to develop risk and needs assessment tools to be used for two primary purposes. Most important, the tools "shall" be used to determine the type and amount of evidence-based recidivism reduction programming appropriate for each prisoner based on his or her "specific criminogenic needs," assign each prisoner to such programming accordingly, periodically reassess each prisoner based on dynamic factors that can reasonably be expected to change while in prison, and reassign each prisoner to appropriate programming based on the revised determination. 18 U.S.C. §§ 3632(a)(1), (3)-(5), (b). Secondly, the tools "shall" classify

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prisoners according to four “risk” levels (minimum, low, medium, or high) to be used to determine when to provide incentives and rewards for successful participation in programming including transfer to prerelease custody. 18 U.S.C. § 3632(a)(1), (6)-(7).

The law thus envisions a “system” with two components: (a) individualized and systemwide evidence-based programming, and (b) incentives and rewards for successful participation. The “system” is expected to “ensure” that “all prisoners at each risk level have a meaningful opportunity to reduce their classification during the period of incarceration,” that each prisoner’s “specific criminogenic needs” will be addressed, and that “all prisoners are able to successfully participate in such programs.” 18 U.S.C. § 3632(a)(5).

We have four recommendations today, three regarding compliance with the process Title I of the First Step Act requires for development and implementation of the system, and one regarding the need for rehabilitative programming now. We are concerned that these listening sessions are being held without the participation of the Independent Review Committee, and look forward to providing substantive input on development and implementation of the system when the committee is established.

First, the National Institute of Justice (NIJ) should immediately comply with the process required by law. The law mandates that the process begin with the “establish[ment]” of an Independent Review Committee (IRC) not later than 30 days after enactment, *i.e.*, January 20, 2019. The NIJ “shall” first select a nonpartisan nonprofit organization, and that organization “shall” then appoint the IRC’s members. The appointing organization must have “expertise in the study and development of risk and needs assessment tools,” and it must appoint not fewer than six members to the IRC, each of whom shall have expertise in “risk and needs assessment systems.” First Step Act, Sec. 107(b)-(d).

The Act requires the IRC to have been established by January 20, 2019, but NIJ has not yet selected the organization charged with appointing its members.<sup>1</sup> NIJ should therefore promptly select the organization so that it can appoint the IRC’s members, and the work can begin without further delay.

Second, the Attorney General and all DOJ agencies may only proceed in consultation with the IRC. While the law directs the Attorney General to carry out his duties in consultation with the IRC *and* the Directors of BOP, the Administrative Office of the Courts, Probation and Pretrial Services, the NIJ, and the National Institute of Corrections, 18 U.S.C. § 3631(a), the law does not permit the Attorney General (or any DOJ agency) to review and develop the “system” independently of the IRC. *See* 18 U.S.C. § 3632(a) (requiring Attorney General to “develop” all components of the “system” “in consultation with the Independent Review Committee”); *id.* §

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<sup>1</sup> The 34-day government shutdown from December 22, 2018 to January 25, 2019 does not excuse this delay. Taking the shutdown into account, the IRC should have been “established” (*i.e.*, the nonprofit selected by NIJ and the members appointed by the nonprofit) no later than Monday, February 25, 2019.

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3633 (requiring Attorney General “in consultation with the Independent Review Committee” to review and develop the most effective evidence-based programming).

Section 107 of the Act requires the Attorney General to consult with the IRC in carrying out each of his duties under sections 3631(b), 3632 and 3633, and requires the IRC to assist the Attorney General in carrying out those duties, including:

- (1) conducting a review of the existing prisoner risk and needs assessment systems in operation on the date of enactment of this Act;
- (2) developing recommendations regarding evidence-based recidivism reduction programs and productive activities;
- (3) conducting research and data analysis on—(A) evidence-based recidivism reduction programs relating to the use of prisoner risk and needs assessment tools; (B) the most effective and efficient uses of such programs; and (C) which evidence-based recidivism reduction programs are the most effective at reducing recidivism, and the type, amount, and intensity of programming that most effectively reduces the risk of recidivism; and
- (4) reviewing and validating the risk and needs assessment system.

First Step Act, Sec. 107(a), (e).

In short, the law does not permit the Attorney General or any agency of DOJ to circumvent the IRC or to perform these functions independently. Instead, Congress required the continuous involvement of an IRC composed of experts appointed and hosted by an expert organization. And Congress did so for good reason. Over the continuous objections of bipartisan members and committees of Congress, this administration systematically dismantled existing recidivism reduction programming and re-entry services, openly disavowed the law’s rehabilitative goals, and opposed the bill.<sup>2</sup> Congress added the IRC to prevent political and other non-evidence-based policies from thwarting its intent to reduce recidivism through rehabilitative programming.

Third, the Department should halt any action or plan to circumvent the IRC and other express requirements of the law by using some existing “tool.” A DOJ official is reported to have recently said that the Department “expects to meet the July deadline” because it “is using resources

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<sup>2</sup> See Report on Departments of Commerce and Justice, Science, and Related Agencies Appropriations Bill, 2019, S. Rep. No. 115-275, at 84-88 (2018); *Oversight of the Federal Bureau of Prisons*, U.S. House of Representatives, Com. on the Judiciary, Subcom. On Crime, Terrorism, Homeland Security, and Investigations (Apr. 17, 2018); Letter from Senators Cornyn, Grassley, Whitehouse, Portman, Klobuchar, Franken, Tillis and Schatz to Deputy Attorney General Rosenstein and Director Inch (Oct. 27, 2017); Letter from Senators Booker and Van Hollen to Attorney General Sessions (Apr. 3, 2017); Letter from Hon. Ricardo S. Martinez, Chair, Committee on Criminal Law, Judicial Conference of the United States, to Mark Inch, Director, Federal Bureau of Prisons (Apr. 16, 2018); Letter from Federal Public and Community Defenders Legislative Committee to Senate regarding the First Step Act at 4-7 (Aug. 13, 2018); Letter from E.O. Young, National President, AFGE CPL C-33, to Senators Grassley, Feinstein and Durbin, and Representatives Goodlatte and Nadler (May 8, 2018).



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it has on hand to work on the risk assessment tool internally, in the absence of the committee.”<sup>3</sup> A “preliminary” summary of DOJ policies regarding the First Step Act, dated February 7, 2019, explained:

At the outset, the Attorney General is required to develop a “risk and needs assessment system” to evaluate the recidivism risk of each inmate, who will be classified as presenting a minimum, low, medium, or high risk of recidivism. *Alternatively*, the Attorney General may “use existing risk and needs assessment tools, as appropriate.” (*If the Attorney General develops a new system, he must do so within 210 days of enactment of the Act, but that deadline may be subject to delay due to the lapse in appropriations that began on December 21, 2018.*) (emphases added)

The official’s comment and the preliminary summary reflect a profound misreading of the law. The law provides no “alternative” that would permit the NIJ to fail to select the organization to appoint the Independent Review Committee, then DOJ claim compliance with the law and the July deadline by unilaterally using a “tool” of its choosing for some purpose of its choosing.

Section 3632 requires the Attorney General to develop—“in consultation with the Independent Review Committee”—a “system,” which “shall be used” to perform eight functions.<sup>4</sup> At the end of this list of multiple functions, Section 3632 states: “In carrying out this subsection, the Attorney General may use existing risk and needs assessment tools, as appropriate.” What this lone sentence means in context is that the Attorney General, “in consultation with the Independent Review Committee,” may use some feature of an existing tool *if* “appropriate” to accomplish any of the required functions. It does not provide an “alternative” escape hatch from the congressional mandate directing the Attorney General to develop new tools and programs in consultation with the IRC that will accomplish all of the functions listed in section 3632(a)(1)-(8).

Nor does it provide an alternative escape hatch through which DOJ can avoid—“in consultation with the Independent Review Committee”—(1) reviewing the effectiveness of

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<sup>3</sup> Ayesha Rascoe, *3 Months Into New Criminal Justice Law, Success for Some and Snafus for Others*, NPR (Apr. 1, 2019), <https://www.npr.org/2019/04/01/708326846/3-months-into-new-criminal-justice-law-success-for-some-and-snafus-for-others>.

<sup>4</sup> The “System . . . shall be used to” — (1) assess recidivism risk at intake, (2) assess the risk of violent or serious misconduct of each prisoner, (3) determine and assign appropriate programming for each prisoner based on his or her criminogenic needs, (4) reassess each prisoner periodically based on factors that are dynamic and that can reasonably be expected to change while in prison, (5) reassign each prisoner to appropriate evidence-based programming based on that revised determination to ensure that all prisoners at each risk level have a meaningful opportunity to reduce their classification, address their specific criminogenic needs, and are able to successfully participate in evidence-based programs, (6) determine when to provide incentives and rewards for successful participation, (7) determine when a prisoner is ready to transfer to prerelease custody or supervised release, and (8) determine the appropriate use of audio technology for course materials with an understanding of dyslexia. 18 U.S.C. § 3632(a), (b).

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evidence-based recidivism reduction programs that exist in BOP as of the date of enactment, (2) reviewing available information regarding the effectiveness of evidence-based recidivism reduction programs in State-operated prisons, (3) identifying the most effective evidence-based recidivism reduction programs, (4) reviewing the policies for entering into evidence-based recidivism reduction partnerships, or (5) directing BOP regarding evidence-based recidivism reduction programs and the addition of any new effective evidence-based recidivism reduction programs. 18 U.S.C. § 3633.

Nor does it provide an alternative escape hatch through which DOJ can circumvent the IRC's participation in (1) "conducting a review of the existing prisoner risk and needs assessment systems," (2) "developing recommendations regarding evidence-based recidivism reduction programs and productive activities," (3) "conducting research and data analysis on—(A) evidence-based recidivism reduction programs relating to the use of prisoner risk and needs assessment tools; (B) the most effective and efficient uses of such programs; and (C) which evidence-based recidivism reduction programs are the most effective at reducing recidivism, and the type, amount, and intensity of programming that most effectively reduces the risk of recidivism," or (4) "reviewing and validating the risk and needs assessment system." First Step Act, Sec. 107(a), (e).

Even *if* the law allowed the Attorney General to bypass the IRC, there is no existing tool that does what is required. For starters, the law defines "risk and needs assessment tool" to mean "an objective and statistically validated method through which information is collected and evaluated to determine—(A) as part of the intake process, the risk that a prisoner will recidivate upon release from prison; (B) the recidivism reduction programs that will best minimize the risk that the prisoner will recidivate upon release from prison; and (C) the periodic reassessment of risk that a prisoner will recidivate upon release from prison, based on factors including indicators of progress and of regression, that are dynamic and that can reasonably be expected to change while in prison." 18 U.S.C. § 3635(6). By this definition, the BOP's classification system is not a "risk and needs assessment tool" at all. Nor is the PCRA or any other tool that currently exists designed to do what the First Step Act requires.

In sum, the development and implementation of effective evidence-based programming, novel risk and needs assessment tools, and effective incentives and rewards requires the IRC's expert participation throughout. The deadline for establishment of the IRC passed over two months ago. The "system" is mandated to be "released" no later than July 19, 2019. But the system cannot, by law, be under development because the IRC has not yet been established. The NIJ must select the organization charged with appointing the IRC now.

Fourth, DOJ and BOP should begin *now* to eliminate long waitlists for sorely needed rehabilitative programs. There is no question that inmates who participate in BOP's educational, vocational, work, and substance abuse treatment programs are significantly less likely to recidivate than those who do not participate.<sup>5</sup> Yet 25,000 inmates are currently waiting to be placed in prison

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<sup>5</sup> See Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 4-5 (Aug. 1, 2012); FPI and Vocational Training Works: Post-Release Employment Project (PREP).



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work programs,<sup>6</sup> at least 15,000 are waiting for education and vocational training,<sup>7</sup> and at least 5,000 are awaiting drug abuse treatment.<sup>8</sup>

In January 2016, the Colson Task Force urgently called for immediate expansion of occupational training and educational programs, drug abuse treatment, and cognitive behavioral therapy and mental health treatment.<sup>9</sup> Instead, the current administration cut existing programming and halfway houses, refused to hire sufficient correctional staff, pressed teachers and clinicians into guard duty, sought budget cuts to reduce programs and staff even more, then complained that people who had been released after receiving no programming or even a transitional halfway house stay committed further crimes. As noted above, the administration's actions provoked widespread disapproval in Congress.

The First Step Act expressly encourages BOP to expand programming now, *see* 18 U.S.C. § 3621(h)(4), and it requires BOP to provide all prisoners the opportunity to actively participate in programming throughout their entire term of incarceration, *see* 18 U.S.C. § 3621(h)(6). Attorney General Barr has said that he is committed to implementing the law. Unfortunately, the cuts continue. DOJ has now requested a \$114.4 million cut in BOP's budget, elimination of 34 positions, and a \$71.5 million reduction in funding for current services.<sup>10</sup>

Again, neutral expert guidance is needed. The NIJ should therefore select the organization charged with appointing the Independent Review Committee without further delay.

We look forward to providing substantive comments regarding the development and implementation of a risk and needs assessment system as soon as the Independent Review Committee is established.

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<sup>6</sup> *See* Federal Bureau of Prisons, UNICOR, [https://www.bop.gov/inmates/custody\\_and\\_care/unicor\\_about.jsp](https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp).

<sup>7</sup> *See Oversight of the Federal Bureau of Prisons*, U.S. House of Representatives, Com. on the Judiciary, Subcom. On Crime, Terrorism, Homeland Security, and Investigations at 50 (Apr. 17, 2018) (BOP Director Inch).

<sup>8</sup> *See* Dep't of Justice, Bureau of Prisons, Drug Abuse Treatment Program, 81 Fed. Reg. 24484, 24488 (Apr. 16, 2016) ("over 5,000 inmates waiting to enter treatment"); Colson, *infra* note 8, at 36 ("at the end of FY 2014, more than 12,300 people systemwide were awaiting drug abuse treatment").

<sup>9</sup> *Transforming Prisons, Restoring Lives: Final Recommendations of the Colson Task Force on Federal Corrections* at 35-36 (Jan. 2016), <https://www.urban.org/sites/default/files/publication/77101/2000589-Transforming-Prisons-Restoring-Lives.pdf>.

<sup>10</sup> Dep't of Justice, Federal Prison System (BOP), FY 2020 Budget Request At A Glance, <https://www.justice.gov/jmd/page/file/1142606/download>.

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Thank you again for inviting our views.

Very truly yours,

/s

David Patton

Executive Director, Federal Defenders of New York  
Co-Chair, Federal Defender Legislative Committee

/s

Amy Baron-Evans

National Sentencing Resource Counsel  
Federal Public and Community Defenders

/s

Aamra Ahmad

Sentencing Resource Counsel Project  
Federal Public and Community Defenders

## **Risk and Need Assessment in the Bureau of Prison First Step Act**

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**University Professor**  
**George Mason University**  
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Thank you for the opportunity to comment on the First Step Act. I especially want to thank Dr. David Muhlhausen, Director of the National Institute of Justice, for encouraging this presentation.

I am a University Professor at George Mason University in Criminology, Law and Society, and run the Center for Advancing Correctional Excellence!. My work on risk and needs assessment goes back to the 1980's including developing and validating tools, defining subscales for dynamic needs, working on implementation issues in prisons, jails, and community correction agencies, and pretrial organizations, and developing methods to advance the use of risk-need tools in practice. I developed the RNR Simulation Tool ([www.gmuace.org/tools](http://www.gmuace.org/tools)) which is a decision-support tool to expand the use of risk and need assessment tools (RNA) information in front-line decisions.

My points today are going to be very succinct to guide BOP regarding the use of RNA. While I support the use of RNA in principle, there are considerable drawbacks to the current tools and these drawbacks are significant enough that BOP should not consider buying or using any off-the-shelf tools like LSIR, COMPAS, ORAS, SPIN, AO's PCRA, etc. or any other tool. These tools have not been adequately checked for systemic racial, ethnic, gender or other biases that might be inherent in the instruments, and they are inadequate for the myriad of populations that are managed by BOP.

Why not purchase the existing tools? These tools are inappropriate for the BOP goals, and are not well suited for helping to determine the services needs during the period of incarceration, during reentry, and during a period of stabilization. And, these tools use *antiquated* methods which are burdensome to staff, which often result in the results not being used in decisions about services and/or programs. The antiquated tool methods are based on paper and pencil methods instead of integrating machine learning, artificial intelligence, or prior experience. And, the likely implementation problems (given the uptake issues that other agencies have experienced) cannot be overstated. These tools are long (~45 minutes) and require staff to be involved, interpret the information (which is difficult), and unlikely to be synchronized to existing programs and services in the justice system. And, most importantly the tools do not integrate risk communication to help the individual learn about their behavior, become motivated to change behavior, and triage priority areas. The tools require staff skills that are not typically available in many correctional agencies.

Inappropriateness for BOP populations or systems. The current instruments are inappropriate to assess the dynamic needs of individuals incarcerated in BOP based on the existing criminogenic

subscales used in the existing instruments. The existing RNA instruments do not contain valid, psychometrically sound subscales to measure both the drivers of behavior that result in criminal justice involvement (i.e. antisocial peers, antisocial cognition, antisocial personality, substance abuse, education, employment, leisure) or the factors that affect stabilization in the community (i.e. motivation, mental health, identity, hope, etc.). The scales for substance dependence are not compatible with the DSM-V; the scales for antisocial personality or criminal personality are not compatible with DSM-V. There are no subscales for social supports which we know are important factors that affect adjustment in prison and reduces recidivism. And, the existing scales do not adequately measure antisocial values, antisocial peers, antisocial family or poor family supports—I could go on as to what the scales do not measure, or measure well. And, the scales tend to measure lifetime issues instead of problem behaviors.

Given that BOP individuals are incarcerated, it is important that the dynamic needs should be linked to services that can be offered in prison and in the community. More importantly, it is critical that the emphasis should be on assisting the individual in assume a citizenship identity—the existing tools tend to reinforce identities of an outsider, a criminal or someone that has limited hope or options in society. The RNA tool should lead to services that will contribute to helping the person to become a contributing member of society, not merely “doing services as part of doing time”. Right now, the needs that are identified are deficit-based, with little capacity to be geared to helping the individual grow and mature into a responsible citizen while they are incarcerated. This is an important part of implementation of the RNA, that the goal should be to measure needs of individuals that can be addressed during the period of incarceration and/or reentry to help the individual be a member of our community as a parent, employee, citizen, or other roles that recognized societal roles.

Finally, I want to address implementation of the tools. Just selecting a tool and putting one in place, does not guarantee that the information from the tool will be used to guide decisions or influence case plans. Collecting information about a person’s needs should mean that the BOP should address these needs—it would be remiss not to and it places the person at risk for being further negatively impacted by incarceration. Effective implementation requires a commitment by BOP and a change in policies and procedures that affects every single aspect of the organization. The goal of the RNA information should be clear—to build a person’s resiliency to be a contributing member of the community. But this must be integrated in BOP’s goals and mission, as well as operating procedures. Other operating tips to ensure that implementation proceeds well: 1) all staff should be trained in the concepts in the dynamic risk and need assessment tools which is focused on understanding the instruments; 2) all staff should be required to develop competency in the use of the information from the tool in key decisions such as case plans, service assignment, progress in treatment, and housing decisions (classification) before the tool is put in place; 3) staff and administrators at each prison should be required to modify their existing policies and procedures regarding how RNA information can be used before the RNA is in place which will send a clear message that the BOP is vested in using RNA to improve the time during incarceration; 4) RNA information and progress in programs should be provided to the Reentry Centers and/or Administrative Office of the Court (for supervision) to ensure that this information issued during reentry and supervision; and 5) BOP incarcerated individuals should be trained on the RNA instrument and how they should use the information to improve their incarceration time and to motivate the person to change; and 5) BOP should

collect performance measures for each of these indicators to assess how well each prison, reentry center, and staff are at accepting and using RNA information. Core implementation measures should be developed and used to achieve the goals of implementation. This is a multi-year process and should be piloted in one or more prisons. It will also require technical assistance to help the prisons adjust their workflow. And, it will require new programs and services to address the needs of each individual.

Thank you for your time today. I am available for questions at any time.

## **References**

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April 11, 2019

David B. Muhlhausen, Ph.D.  
Director  
National Institute of Justice  
Department of Justice  
950 Pennsylvania Ave NW  
Washington, DC 20530



**Re: Development of Risk and Needs Assessment under the FIRST STEP Act**

Dear Dr. Muhlhausen:

We, the undersigned organizations - all founded and/or led by directly impacted people - write to express our concerns about the implementation and use of a risk assessment instrument as authorized by the FIRST STEP Act. There are three key problems with the risk-assessment approach prescribed by this law. Given these problems, we urge you to employ a human-centered, human-driven, individualized needs assessment that is built with the input of directly impacted communities and other experts, and that is developed and overseen by community-based practitioners.

**Risk assessment instruments replicate or exacerbate human racial bias.** Research and our own lived experience have demonstrated, time and again, that risk assessment instruments (RAIs) replicate or exacerbate human racial bias. This happens because RAIs rely on data that is a product of decades of systemic racial discrimination and further entrench the disparities contained therein by utilizing that data to make determinations about people in the present day.<sup>1</sup>

By necessity, much of the data that RAIs must rely on is static data - data that cannot ever be altered regardless of what a person does after that data point is created. Examples of static data include *age at first arrest*, *underlying charge*, or *income at time of arrest*, just to name a few.<sup>2</sup> These static factors are disproportionately present among Black and brown people who live in neighborhoods that are under-resourced and over-policed, and in which the criminal legal system is dispatched as a primary response to the sociological and economic consequences of generational, community divestment.<sup>3</sup> RAIs are therefore objective only in the sense that they

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<sup>1</sup> Harcourt, B.E. (2010). *Risk Assessment as a Proxy for Race*. University of Chicago Public Law & Legal Theory Working Paper No. 323, 2010.; Hamilton, M. (2018). *The Biased Algorithm: Evidence of Disparate Impact on Hispanics*. 56 AM. CRIM L. REV. (forthcoming; presently available at SSRN: <https://ssrn.com/abstract=3251763>).

<sup>2</sup> Henry, M. (2019). *Risk Assessment: Explained*. Available at The Appeal: <https://theappeal.org/risk-assessment-explained/>.

<sup>3</sup> Zaw, K., Hamilton, D., Darity, W. (2016). *Race, Wealth and Incarceration: Results from the National Longitudinal Survey of Youth*. Race and Social Problems, vol. 8, issue 1.

consider the same inputs for every person that they score. However, those inputs are far from objective as they are built upon centuries of subjective policy decisions meant to discriminate against and harm Black, brown, and poor communities. The perceived objectivity of an RAI is, therefore, just that: perceived, but promised as a panacea for our concerns even when we know the truth.

**Determining preparedness for release by measuring risk of re-arrest reinforces the core structural problem in our criminal legal system.** As Sec. 3631(D)(102)(a)(h)(6) of the FIRST STEP Act states, “Priority for participation in recidivism reduction programs shall be given to medium-risk and high-risk [incarcerated people], with access to productive activities given to minimum-risk and low-risk [incarcerated people].” By allowing access to, or enabling obstruction of certain programs, and by determining release-readiness based on a person’s RAI score, this tool reinforces the ineffective construction of the criminal legal system.

The criminal legal system, by design, sees and responds only to a person’s worst moment or gravest mistake.<sup>4</sup> It fails to account for the failure of other societal systems to provide equitable opportunities to access housing, employment, healthcare, and other basic needs. And functioning in this vacuum of its own ignorance, the system is then used as a punitive, often harmful tool, theoretically intended to address criminal behavior while in practice punishing people for the myriad system failures that they are forced to confront. What is needed, instead, is a transformed approach in which all systems provide all people equal and equitable access to opportunities to lead fulfilling lives and also provide the services, supports, and safeguards to reach those opportunities successfully. All public systems should operate based on a belief in each person’s goodness, and not on the defined risk of “arrest” or “offense” - risk that is so often driven more by the actions of police, prosecutors, and systemic injustice than it is by individual actions, anyway.<sup>5</sup>

Instead of measuring that risk we must understand the needs a person has - needs that perhaps led to, and have been exacerbated by incarceration - and the programs and services that should be offered to address those needs. Far too often, “need” is defined as the support that is required to mitigate an evaluated risk.<sup>6</sup> But this linkage undermines our understanding of “need” by inextricably linking it to a separate measurement that is, as discussed above, racist. As this system sits today and as risk is defined by this tool, what people really “need” in order to avoid the “risk” of system interaction is the same opportunities and resources afforded white, well-resourced communities.<sup>7</sup> It is therefore incumbent upon you to define need separate and

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<sup>4</sup> Butts, J., Schiraldi, V. (2018). *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections*. Harvard Kennedy School Executive Session on Community Corrections.

<sup>5</sup> Multiple authors. (1993). *Performance Measures for the Criminal Justice System*. Bureau of Justice Statistics.

<sup>6</sup> Casey, P., Elek, J., Warren, R., et al. (2014). *Offender Risk & Needs Assessment Instruments: A Primer for Courts*. National Center for State Courts.

<sup>7</sup> Harriot, M. (2018). *Unprotected, Underserved: The (False) Criminalization of Black America*. The Root; Connolly, E., Lewis, R., Boisvert, D. (2017). *The Effect of Socioeconomic Status on Delinquency Across Urban and Rural Contexts: Using a Genetically Informed Design to Identify Environmental Risk*. Criminal Justice Review, 42(3), 237–253; Ehrenfreund, M. (2016). *Poor white kids are less likely to go to prison than rich black kids*. The Washington Post. (See also: NAACP. *Criminal Justice Fact Sheet*. Available at:

apart from risk, and beyond the narrow confines of this system. “Risk” and true human need are markedly different concepts, and they cannot be conflated into a single tool without reinforcing the generational, systemic mistreatment of Black and brown people.

**The Independent Review Committee tasked with overseeing the RAI does not include directly impacted people.** Our core belief, as people who have been impacted and harmed by mass criminalization and incarceration and who are now on the front lines of the fight to end those crises, is that *those closest to the problem are closest to the solution*. However, as discussed in Section 3631(D)(107)(d) of the FIRST STEP Act, the Independent Review Committee created in this law does not explicitly call for the inclusion of a directly impacted person. This is a significant misstep, but it is one that can and should be corrected as this law is implemented.

Directly impacted communities must always be involved - in the room, at the table, steering the conversations - in the development of any tool that will be used to judge us.

Even as we raise our concerns, we are aware that the Department of Justice will most likely proceed with the development and implementation of an RAI. If that is the case, then the RAI must comply with three basic conditions.

It must be accountable, with accountability derived from external validation, frequent public audits, and careful scrutinization for racial disparities, intended or otherwise. The tool must be transparent. Even - especially - when the algorithms are developed by private corporations, all inputs and outputs must be analyzed in full view of the public, including directly impacted communities. And the tool must not rely on static data, as that data is entirely tainted by racial bias, systemic discrimination across multiple systems, and societal neglect of whole communities.

Keep in mind that even if these three conditions are met, they will not remedy the myriad problems inherent in a risk assessment calculation. However, these three conditions are the bare minimum that you must account for to mitigate the impact that those problems will have.

Alternatively, you could choose to implement a human-centered, human-driven, individualized needs assessment that is built with the input of directly impacted communities and developed and overseen by community-based practitioners, and that actually seeks to understand the obligations this system has to address underlying harms it has exploited or created. That possibility is entirely within your reach, and we would welcome an opportunity to further discuss this matter with you and your staff.

Signed,



A New Way of Life  
All of Us or None - Southern California  
Civil Survival Project  
College and Community Fellowship  
EXPO (EX-incarcerated People Organizing)  
Families for Justice as Healing  
Florida Rights Restoration Coalition  
Forward Justice  
Healing Communities USA  
JustLeadershipUSA  
Legal Services for Prisoners with Children  
Mission: Launch  
Peace By Piece Inc.  
Peer Network Of New York  
R.I.H.D., INC  
Reentry Advocacy Project  
Reentry Campus Program  
The Center for Returning Citizens (TCRC Philly)  
The National Council For Incarcerated and Formerly Incarcerated Women and Girls (The Council)  
The Ordinary People Society  
Voice of the Experienced  
W. Haywood Burns Institute  
What's Next Washington  
Women's Community Justice Assn.  
WWNG,Inc.



## MAJOR CITIES CHIEFS ASSOCIATION

### Implementation of the First Step Act Comments and Recommendations April 12, 2019

Major Cities Chiefs offer these comments and recommendations for consideration by the National Institute of Justice and the Bureau of Prisons.

**(1) The BOP should use an individualized definition, rather than a categorical one, for “evidence-based recidivism reduction programs.”**

The First Step Act (FSA) requires that the risk and needs assessment system match inmates with “evidence-based recidivism reduction programs.” Successful participation in such programming allows inmates to earn incentives, including additional time credits that can be redeemed for earlier placement in prerelease custody. While the FSA includes a broad definition of “evidence-based recidivism reduction program” in its amended Sec. 3653(3) (on p.14 of the enrolled bill), BOP still must determine its application. The FSA defines “evidence-based recidivism reduction programs” to be programs that are either group or individual activities that:

- A) Have been shown by empirical evidence to reduce recidivism, or are based on research suggesting that they are likely to be shown to reduce recidivism;
- B) Are designed to help prisoners succeed in rejoining society after release; and
- C) May include one or more example types of programs (ethics classes, prison jobs, etc.) that are listed in the FSA.

The BOP will have to decide how to interpret the first part of that definition. What does it mean for a program to be “shown . . . to reduce recidivism”? One option is for the BOP to decide categorically whether a program reduces recidivism, adding each to a list of “approved” programs, participation in which would entitle an inmate to time credits. The other option is for the BOP to decide individually whether a program reduces recidivism based on the particular circumstances and situation of the inmate in question. In that scenario, a program would only be considered an “evidence-based recidivism reduction program” for an inmate if it has been shown to reduce recidivism for inmates with the specific characteristics of that inmate. The BOP should choose the individualized definition rather than the categorical one.

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## MAJOR CITIES CHIEFS ASSOCIATION

Releasing inmates earlier without reducing their risk of recidivism will only lead to an increase in the total number of crimes committed, and therefore it jeopardizes public safety to do so. The individualized definition is preferable because it makes it more likely that the inmate's early release under the time credit program will actually be accompanied by a lower risk of recidivism.

For example, there is evidence suggesting that drug treatment programs can reduce an inmate's risk of recidivism. However, it is common sense that drug treatment will not reduce the risk of recidivism for an inmate who does not have a substance abuse problem. Under a categorical definition, drug treatment would merely be on a list of "programs shown to reduce recidivism," and any inmate who participates would be eligible for earlier release through time credits. Under an individualized definition, drug treatment would only be considered a "program shown to reduce recidivism" if the inmate actually has a substance abuse problem, if that problem is related to the inmate's criminal activity, and other factors tied to the evidence showing treatment is likely to reduce the risk of recidivism for that inmate. As a separate matter, the BOP will also need to determine whether an inmate "successfully participates" in programming in the context of whether the inmate's participation has changed some dynamic factor associated with his risk of recidivism.

Just as programming should be tied to individual inmate situations, programs should not be so broadly defined as to lose their predictive effect on recidivism risk reduction. For example, there is some evidence suggesting that earning a GED is correlated with reduced recidivism. However, there is far more tenuous evidence suggesting that "academic classes" generally are correlated with reduced recidivism. So, just as an inmate who has already earned a GED equivalent should not earn time credits for time spent in GED classes, inmates should not earn time credits based on other specific programs unless they are shown to reduce recidivism risks for their specific type of inmate.

For example, a white collar criminal with advanced degrees should not receive time credits for participation in something like an art class (although that is still an "academic class") unless there is empirical evidence showing that art classes reduce recidivism for white collar inmates with advanced degrees. And, again, a half-completed class of any sort should not count for any credit (because there was no "successful participation") unless half-completed classes have been shown to reduce the risk of recidivism.

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## MAJOR CITIES CHIEFS ASSOCIATION

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Following an individualized definition, rather than a categorical one, will necessarily decrease the total universe of available programming that will allow an inmate to earn credits for earlier release. This may result in a practical “cap” on the amount of time a given inmate can earn in early release credits. This is a feature, not a bug. It means that time credits and other incentives will be directly tied to actual reductions in recidivism risk, which is the purpose of such incentives in the first place. A categorical approach would allow inmates to earn more time credits and be released earlier, but without reducing their recidivism risk, which endangers the public and will cause more crime. Further, the categorical approach is likely to lead to overbooked programming that limits access for inmates who actually need a particular program to reduce their recidivism risk.

**(2) The BOP should use an individualized definition, rather than a categorical one, for “productive activities.”**

For minimum and low risk inmates under the FSA, time credits may be earned by participation in “productive activities.” The FSA defines “productive activities” as group or individual activities that are “designed to allow prisoners . . . to remain productive and thereby maintain a minimum or low risk of recidivating, and may include the delivery of [evidence based recidivism reduction programs] to other prisoners.” As with evidence-based recidivism reduction programming, the BOP should interpret the definition of productive activities in an individualized way, rather than a categorical one. This will allow the BOP to account for the fact that “activity” is not necessarily productive. The mere fact that something is on an inmate's schedule need not necessarily qualify that activity as a productive one. The activity must actually produce something of value, and also must be connected to “maintain[ing] a minimum or low risk of recidivating.”

Therefore, for such activity to be eligible for earning time credits, it has to produce something of value in a way that is connected to the dynamic risk and needs assessment factors under the risk and needs assessment system. As with the evidence-based recidivism reduction programs, productive activities also must be related to the low or minimum risk maintenance of the individual prisoner to be time credit eligible.

To implement individualized definitions rather than categorical ones, BOP should consider designating certain activities as related to the maintenance of a low or minimum risk of recidivating, and then only programs that are so designated will earn time credits, and even then only when that programming is assigned to that particular inmate as part of the risk and needs assessment system.



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### **(3) The BOP should incorporate cooperation with prosecutors and law enforcement as an element of or even prerequisite for earning time credits.**

The FSA's requirements relating to a risk and needs assessment system, and the resulting incentives such as time credits that inmates can earn, are ostensibly designed to help reduce recidivism so that inmates reenter society successfully, leaving lives of crime behind them and embracing a fresh start as law-abiding members of society. However, it is clear that criminals who continue to withhold relevant information related to their offense after they are found guilty, including information that could assist the government in prosecuting co-conspirators, is continuing to work against the enforcement of our nation's laws and shielding criminal activity from justice.

In recognition of the fact that criminals cannot become truly law-abiding citizens until they stop shielding criminal activity from the law, the BOP should consider inmates' cooperation as part of their risk assessment, and as part of their recidivism-reduction efforts. It is not necessary that inmates provide "substantial assistance" in the prosecution of another offender to meet this requirement—indeed, many inmates may commit their crimes without any co-conspirators. However, inmates should nonetheless be required to truthfully provide to the government all information or evidence they have regarding their crimes.

Many inmates already complete this requirement before they are even incarcerated, often earning a "substantial assistance" downward departure from the applicable sentencing guideline range. The potential to earn early release time credits (or to earn a larger number of them) is likely to provide a stronger incentive for inmates to cooperate. Even when inmates do not have sufficient information to provide substantial assistance in another prosecution, they should still be incentivized to share all information and evidence they have regarding their own criminal activity.

It is not impossible, nor even particularly difficult, to make objective determinations of whether an inmate has fully cooperated. Indeed, this requirement is built into the "safety valve" in 18 U.S.C. § 3553(f)(5). The fact that the FSA expanded the applicability of the safety valve—which allows inmates to be sentenced below mandatory minimum sentences—only underscores that Congress in the FSA recommitted itself to the idea that cooperation by criminals is a relevant consideration when allowing them to earn lesser penalties for their crimes.



## MAJOR CITIES CHIEFS ASSOCIATION

In the context of the risk and needs assessment system, there should be no requirement that the inmate cooperate “not later than the time of the sentencing hearing,” as in the safety valve. Instead, inmates who chose not to take that important step as of their sentencing hearings (or who would be ineligible for the safety valve in any case) should have some remaining incentive to begin their transformation even if it occurs well into their prison term. Truthful disclosure of all information related to their crimes should be considered as part of the risk assessment and be eligible for time credits, then, while additional cooperation (such as informing on criminal activity within the prison system or showing willingness to testify against co-conspirators during their incarceration) should carry the potential of earning additional time credits and other incentives.

### **(4) The BOP should measure participation time appropriately through a workday model.**

The FSA is clear that prisoners earn 10 days of time credits “for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.” However, the FSA does not define what is meant by a “day of successful participation.” BOP should not award an entire “day” of such participation based only on a minimal amount of participation in a program on any given day in prison. Instead, the BOP should adopt an hourly approach that mirrors the workday model used by the law-abiding public: 8 hours of work is considered a “day.” This means an inmate would earn 10 days (or 15, depending on their risk level) of time credit for every 240 hours of programming they complete, not for every calendar month where the inmate had minimal participation each day.

This approach is preferable to a minimal participation model. First, it incentivizes sustained participation in multiple types of programming. If an inmate earns a full “day” of participation by merely attending a 30-minute therapy session on a Tuesday, then the inmate has no incentive to participate in any other programming on that day—he has already earned his “day” of participation. By using an hourly approach, inmates are incentivized to voluntarily go beyond the minimum. For example, an inmate could attend the minimum number of GED classes, but an inmate who is incentivized to participate will spend more time studying in-between classes and will become a better student as he spends additional time improving his chances of successful reentry.

Second, this approach is fairer to inmates by rewarding those who apply themselves to their programming. If Inmate A spends 4 hours per day attending a GED class, learning a trade as part of Federal Prison Industries, and attending an ethics class, while Inmate B spends only 1 hour per day attending a GED class, then Inmate A should earn time credit four times faster than Inmate B.

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## MAJOR CITIES CHIEFS ASSOCIATION

The workday approach allows the system to recognize those variances. It avoids unfairness to an inmate who, through no fault of their own, has most of their programming concentrated on a few days per week (and with no programming on one or two days per week), compared with an inmate whose programming happens to be spread more evenly across the week. Scheduling luck should play as minimal a role as possible in earning time credits, or else inmates face unfair differences in their true sentence lengths.

Other models the BOP could consider could involve shorter or longer numbers of hours for each “day” of participation. For example, the BOP could use a “school day” model so that approximately six-and-one-half hours of programming is a “day.” The BOP could also utilize a “workweek” model where 40 hours of participation counts as seven “days” of participation—working out to a little less than 6 hours of participation per calendar day. Either of these models could work, because like the workday model they appropriately recognize variances between inmate participation levels and reward greater participation.

We hope that these suggestions will be helpful and look forward to ongoing participation in this process. Please know that we are grateful for this opportunity to provide input on behalf of the communities we are sworn to protect across the Nation.

Sincerely,

Art Acevedo  
Chief, Houston Police Department  
President, Major Cities Chiefs Association

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# NATIONAL SHERIFFS' ASSOCIATION

## Comments to the U.S. Department of Justice on the First Step Act Implementation

Good afternoon, I am Jonathan Thompson, the Executive Director and CEO of the National Sheriffs' Association. Today I am presenting our recommendations and comments about the Department of Justice's efforts to implement the FIRST STEP Act (FSA) approved by the Congress, and signed by the President. We will provide a summary of our comments, and a formal written submission for the staff and Department to consider.

In our country's current state of the raging opioid epidemic, increasingly volatile border crisis, and continuing threat of gun violence-- it is imperative that the Administration makes it their mission to work in collaboration with law enforcement to keep this country safe. It is critical that both community safety and victim support are at the forefront of this implementation plan. While the First Step Act seeks to reduce the number of inmates in our current prison population, we need to ensure that this is done in a manner that safely and efficiently provides law enforcement with the resources required to effectively serve their communities.

When looking at the importance of properly conducting risk-assessments on each individual, it is paramount that officials share this information not only among their local jurisdictions, but on a county-to-county level. This information sharing and risk assessment notification will allow law enforcement access to the tools they need to both oversee the released individual accordingly, while simultaneously considering the needs of the victim's and the community at-large.

### **Juvenile Justice Mandate**

One of our largest concerns remains the prospect of FSA's unfunded mandate on local jails in reference to juvenile justice and the solitary confinement.

Therefore, we ask that federal rules be written to recognize that not all jails, nor inmates, are equal. Any rules must state and acknowledge that every county or jurisdiction faces different economic stressors. As a result those in local custody may not have access to equal resources, and the Department must acknowledge that when an inmate demonstrates dangerous (health or injurious) behavior or conditions, rules or guidelines must respect local capabilities and conditions of individual and the facility. The need for flexibility to use local oversight to achieve adherence to the intentions of the First Step Act is paramount. This must not be a proscriptive "one-size fits-all" approach.

### **Re-entry Programming, Substance Abuse, and Good Time Credits**

*We applaud the stated goal of the legislation to improve re-entry programs to reduce recidivism.* The bill calls for a variety of rehabilitative and re-entry programs within our federal prisons. We are concerned that currently successful programs may be cannibalized in an effort to create something new that is untested or without sound research supporting its modality. Without new appropriations the Bureau of Prisons remains challenged to select new "evidence-based" programming. While we applaud the initiative, new unproven re-entry programming must be instituted with caution, and with documented research that



demonstrates replicable success. While some programming is likely to improve re-entry into our communities, we must remain diligent to identify programming that may, or may not, work in state or local facilities. Programming must be measurable against the unique needs and environments inside the federal prison system.

*Additionally the bill failed to provide substance abuse treatment, individual and family counseling services needed throughout the process, to a successful re-entry to society.*

We know that those coming into federal custody with an addiction or substance abuse history require continued support after incarceration. Therefore, we urge the Department to provide funding and programming guidance to federal and local facilities to support any legacy addiction conditions of an inmate.

Unfortunately, under the good time credit portion of the law, inmates can earn time in prerelease custody through participation in "evidence-based recidivism reduction programs" ("EBP"). The definition of these evidence-based recidivism programs is limited and vague. For example, the definition includes group or individual activities that are (a) shown by empirical evidence to reduce recidivism or are based on research suggesting it likely will do so; (b) are designed to help prisoners succeed after release; and (c) could include things on a list provided in the law (prison jobs, classes on ethics, etc.).

DOJ should interpret this definition to be individual rather than categorical. In other words, for something to count as an "evidence-based recidivism reduction program," it must be one that has been proven to reduce recidivism (or research proves it will be) for an offender in that particular inmate's situation. For example, there is evidence suggesting that drug treatment programs help reduce recidivism. However, it's common sense that drug treatment programs won't help an inmate who doesn't have a drug problem. Therefore, participation in drug treatment should not cause time credits to be awarded to inmates who don't have documented drug problems.

Therefore, the Bureau should interpret and define "productive activities." BOP should interpret this definition narrowly--activity is not the same as productivity. The mere fact that something is on the inmate's schedule need not necessarily qualify that activity as "productive." The activity must actually produce something of value, and according to the First Step Act also must be connected to "maintain[ing] a minimum or low risk of recidivating."

The FSA's provisions for time credits make it clear that prisoners earn 10 days of time credits "for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities." However, the FSA does not define what is meant by a "day of successful participation." We question awarding an entire "day" of such participation based only on a minimal amount of participation in a program on a given day in prison. The BOP should adopt an hourly approach that mirrors state, local and government sector workday models: 8 hours of work is considered a "day."

## **State Programs**

The legislation is based upon state prison programs. However, these state track records appear less successful than current federal recidivism programs, as federal prisons measure recidivism based upon non-identical charge/conviction of crimes. It remains unclear whether state programs have reduced recidivism more than current federal prison programs, which have achieved a recidivism rate of 38%, based upon the rate of re-arrest within five years of release.

Therefore, when measuring any recidivist or repeat offender after his/her release, reports should include any/all crimes which the inmate was subsequently charged.

## **Information Sharing Prior To Release**

From the beginning, NSA stressed the need for a law enforcement notification system. It is only sensible to assume that when any federal inmate is released early either into half-way house, home confinement or probation, that the respective local law enforcement office will receive details of their original charge sheet, as well as their risk report, conducted while in jail. For example, inmates that are convicted for drug charges and released, should have any post-release criminal charges/convictions included in the recidivism risk assessment. Including a proper risk assessment in collaboration with the notification of release is paramount to the integrity of the goal of community safety.

Local law enforcement must have transparency into the re-entry process. The Department must establish, and measure, a notification system that would provide local law enforcement 60 days prior notice for the release of the individual, and a 30 day verification notice, into any community. This notice should be provided to the Chief Law Enforcement Officer of the legal jurisdiction of an inmate's release location, and include a copy of the inmates:

- i. Original charge sheet or equivalent;
- ii. A certified copy of the risk assessment used to measure the risk to the community, victims of any crime committed by the inmate, family members of the victim or the inmate; and,
- iii. A certified copy of the victim's notification or any entity or individual affected by the inmate's crimes of which they were convicted.

Further, if any change of the inmate's release status occurs, the BOP should notify the local law enforcement agency within 7 days of that change. This should include a change in their parole, probation, or placement or if applicable any charges initiated against the inmate. All notifications should be traceable and directed to the known, and verified, officer or deputy managing any local offender programs

## **Metrics**

Lastly, and perhaps most importantly, the Department must begin by acknowledging that whatever programs or initiatives are developed for re-entry are measurable. Without comparable measurements of success, programs cannot be effectively replicated or modified.

We ask the Department to share its draft of the First Step Act Implementation Plan, and we stand ready to support the Department as it seeks to implement the First Step Act. Thank you.

## Statement on Title 1 of the First Step Act, on the Federal Bureau of Prisons' Risk and Needs Assessment System

John S. Hollywood, Ph.D., Senior Operations Researcher, RAND Corporation

We have identified findings from RAND's research on predictive analytics in criminal justice and homeland security that may help with the development and implementation of the Bureau of Prison's risk and needs assessment system. These include results from general assessments of predictive policing, designing and testing prediction systems, and evaluating them, such as the Crime and Violence Risk Model (CVRM, formerly SSL) in Chicago.

- First, robustness and tolerance for uncertainty need to be built into the system and its uses. These tools are far from crystal balls and that has to be understood and anticipated by users. They typically provide incremental improvement over traditional instruments. In predictive policing, a "high risk finding" from a tool like Chicago's might be that someone has a 25% chance of becoming a shooting victim some time over the next two years. That leaves plenty of uncertainty.
- Second, the input data needs to be as relevant to the prescriptions at hand, as possible, and as complete and correct as possible. Data sourcing, integration, cleaning and checking typically require substantial efforts, so it's important to start planning for these efforts upfront.
- Third, simply estimating "recidivism risk" is not enough. There is a substantial difference between high risk of re-offending on a serious crime and high-risk of re-offending on a technical violation, and the system should separately assess "risk" and "threat".
- Fourth, it is likely that multiple diagnostic tools and algorithms will be needed, not a mega-algorithm that will somehow estimate all the Title 1 assessments at once. The system will need a combination of data collection tools and algorithms, integrated in a well-thought out systems architecture and set of business processes.
- Fifth, the system should be dynamic, able to update recommendations quickly as major new pieces of information come in. Title 1 does specify "periodic updates" but this should not mean "every few years." What we call "circuit breakers" are key. If you learn something clearly indicating that someone has just become high-risk, you need to address that quickly, regardless of past assessments. For example, we have seen commanders directing efforts to people who had just been shot and their associates, regardless of their prior risk scores.
- Sixth, concerns about race and class bias have been persistent throughout the history of predictive analytics in criminal justice. Developers and testers should perform bias or disparate impact tests and validations on both the input data and algorithms, then keep tracking for potential problems as the system enters service.
- More broadly, the time to design in cyber security, privacy, and civil rights protections to the system is from the beginning, not as a late add-on. This is consistent with recent recommendations, such as Global Advisory Council proceedings and our own PCJNI panels.
- Finally, design and testing should be transparent throughout, with sponsors regularly asking for feedback. The algorithms, instruments, and other processes used should be transparent. Otherwise, will be hard to rigorously assess the system for potential major flaws and validate its operations before it goes into effect.

If BOP seeks to adopt a commercial tool to use as its risk and needs assessment system, we have identified some contractual provisions that are typically useful to include, based on our research on law enforcement information technology systems, such as records management systems and computer assisted dispatch systems.

- The input data being used, the algorithm being used, results used to make assessments, and training and testing data should all be transparent to the BOP. We understand that there are some details of the inner workings of the algorithms that can be proprietary (e.g., computational speedups), but these should be the only exceptions.
- The tool should support further testing and validation. This will permit testing and validation to check for problems such as racial and class biases.
- The users must be able to import and export data out of the tool in reasonably-translatable and understandable formats such as .CSV, .XLSX, JSON, and so on. Common data fields such as names, addresses, date and time stamps, geospatial coordinates, and text descriptions should be in common data formats (such as the National Information Exchange Model, NIEM).
- BOP should retain ownership of its own data it inputs and stores in the tool.
- The tool needs to comply with reasonable cybersecurity protections. A primary example would be compliance with relevant provisions of the FBI Criminal Justice Information Systems policy.



RESEARCH AND ADVOCACY FOR REFORM

# **Testimony of Marc Mauer**

**Executive Director**

**The Sentencing Project**

**“First Step Act Listening Sessions”  
on Risk and Needs Assessments**

**Before the National Institute of  
Justice**

**April 11, 2019**

Thank you for the opportunity to share my perspective on the development of a risk and needs assessment tool, as required by the First Step Act legislation adopted by Congress in 2018. I am the Executive Director of The Sentencing Project, and I have been engaged in research and advocacy on criminal justice reform for four decades. The Sentencing Project works to promote a broad approach to public safety that is less reliant on incarceration and more so on expanding opportunity and fairness.

While risk assessment instruments have been in use by criminal justice practitioners for several decades, their structure and implementation have been controversial. Therefore, it is critical for NIJ to think through a process by which these tools can support the constructive goals of the First Step Act without exacerbating the negative consequences of some existing instruments. Following are recommendations for consideration in this process.

## **RISK AND NEEDS ASSESSMENTS SHOULD BE VIEWED AS A TOOL TO AID CORRECTIONS DECISIONMAKERS**

These instruments should be viewed as a guide, and not the final determination, of a process to aid in the rehabilitation and community reentry of individuals in prison. The instruments should not take the place of practitioners' insights and experience, but rather provide information and analysis that can improve the decision-making process overall.

## **TRANSPARENCY IS KEY TO THE DEVELOPMENT AND IMPLEMENTATION OF THIS PROCESS**

Most commercially available risk assessment instruments are proprietary in nature and therefore not subject to review by corrections officials, attorneys, or prisoners. Not only does such a process raise the potential for erroneous predictions, but it can lead to implementation challenges if there is not sufficient "buy-in" from staff who will be overseeing the process. Initiatives such as the "listening sessions" are a good first step in gaining constructive feedback from researchers, practitioners, and affected communities.

## **RECOGNIZE AND RESPOND TO THE LIMITATIONS OF RISK AND NEEDS ASSESSMENT INSTRUMENTS**

Existing risk instruments have achieved a high degree to accuracy in low-risk predictions, so that few individuals identified as "low risk" go on to become high-rate offenders. But at the other end of the process, even the most effective instruments have a false positive rate of about 30 percent in identifying individuals as "high risk." This raises troubling concerns about erecting barriers to personal transformation for individuals who would otherwise be successful in their rehabilitation efforts. Measures that can be incorporated into the risk assessment process to address this problem could include:

- Establishing a mechanism whereby corrections officials can override a "high risk" designation based on their judgment, evidence presented by the prisoner, or a history of successful program completion.

- Ensuring that the process incorporates a mechanism and communications process for informing individuals of how they can reduce their risk from a high-risk category to low or medium status.
- Unfortunately, the First Step Act inappropriately rewards low-risk individuals more than high-risk people, a structure which runs counter to research evidence which demonstrates greater impact on high-risk individuals. NIJ should consider adopting additional incentives that can more directly be targeted to people in the higher risk categories.

## **AVOID EXACERBATING RACIAL DISPARITIES IN CORRECTIONS THROUGH THE RISK INSTRUMENT**

Intentionally or not, risk assessment instruments can extend the racial disparities already present in the justice system. There are two main mechanisms by which this can develop. The first is through excessive reliance on static risk factors based on criminal justice histories. A wealth of evidence documents that heavily-policed low-income communities of color produce higher rates of arrest and conviction for young blacks and Latinos that are at least in part based on a greater law enforcement presence rather than higher rates of involvement in crime.

Another mechanism relates to non-criminal justice data that may be correlated with race. As one example, a risk instrument used in Multnomah County (Portland), Oregon, to guide decision-making on juvenile detention asked whether a young person had a “good family structure.” When local officials revised that item to ask whether there was a “responsible adult” who could oversee the teenager’s behavior in the community, the rate of African American juvenile detention dropped sharply with no adverse effects on public safety. Means of avoiding the extension of racial disparities include:

- To the extent that the instrument incorporates measures of criminal justice histories, rely on past convictions and not arrests.
- Explore the recency of felony convictions since there are likely to be substantial differences in risk assessments between someone with a burglary conviction six months ago and another with a conviction 20 years ago.
- To the extent that an individual’s criminal history involves convictions for a drug offense, consider downplaying or eliminating that as a measure given the racially skewed nature of drug law enforcement.
- Once a draft instrument is prepared isolate the factors that are highly correlated with race and then assess the degree to which they affect predictive accuracy. For example, a pretrial risk instrument used in Hennepin County (Minneapolis), Minnesota that relied on nine factors was found to have three factors that were highly correlated with race but yielded no improvements in predicting failure to appear rates.

## **THE IMPLEMENTATION PROCESS IS AS CRITICAL AS THE DEVELOPMENT PROCESS.**

Placing a new tool into everyday practice in corrections requires substantial training, oversight, and evaluation for all staff. If staff are not motivated to view the risk assessment process as beneficial to their work this will show up in poor decision-making and programming.

I hope that these comments are useful in the development of the federal risk and needs assessment instrument, and I would be pleased to provide further information as helpful.





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**Project Tikvah for Youth at Risk**

April 12, 2019

## STATEMENT BY RABBI Y. WEISS OF THE ALEPH INSTITUTE

**TO: NATIONAL INSITTUTE OF JUSTICE (NIJ)**

**RE: TITLE 1 OF THE FIRST STEP ACT (FSA)**

I write with utmost respect and gratitude for the tremendous work NIJ has already done and continues to do for our nation in implementing this important justice reform legislation, the First Step Act (FSA).

I am a Senior Advocate for the Aleph Institute, a nationally recognized NPO founded in 1981 and dedicated to providing advocacy and rehabilitation for prisoners and their families. Thank you for this opportunity to share our recommendations as Title 1 of the FSA is created in policy. We ask that you please take into consideration the following:

### Risk Assessment System

In developing the risk assessment system, dividing the categories into High, Medium, Low and Minimum – we believe it would make the most practical sense to establish that any BOP inmate designated to a Minimum security institution, also known as Federal Prison Camp (FPC) or Satellite Prison Camps (SCPs), should automatically be categorized as Low or Minimum Risk. Indeed, the BOP already has in place criminogenic factors to determine if an offender is suitable for Camp status, the lowest possible security in BOP. Inmates at a Camp are without secure perimeters and they can literally walk out the door to the parking lot without any issue. As in its name, the security is truly at a minimum. BOP will, of course be able to provide more details as to the factors that determine the eligibility for Camp placement, but to my understanding these include the nature of the offense, time left to one's sentence, citizenship, flight risk, program participation, outside support and behavior while incarcerated. Inmates with history of violence or sex offenders are automatically disqualified for Camp status. Furthermore, inmates with an "out" or a "community" custody level (currently used by BOP) should be automatically determined to be a Low or Minimum Risk to recidivate.



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### **Religious Needs Should Remain in Placement Consideration**

With regards to § 3632(c) “Housing and Assignment Decisions” it is imperative that the religious needs of offenders be taken into account. For example, there are certain facilities that are more suitable for the religious accommodation needs of Jewish inmates versus other facilities. It goes without saying, that a facility with a small Jewish population, or no Jewish inmates, is going to be less suitable than a facility with a larger Jewish population. Facilities with larger Jewish populations have more prayer services, holiday programs, rabbinic visits and study sessions compared to a facility with few or no Jewish inmates. Furthermore, we have found that institutions with larger Jewish populations tend to have less anti-Semitic incidents than other institutions that don’t have a significant Jewish population. Therefore, respecting Jewish inmates’ desire to be placed in facilities with larger Jewish populations also improves overall safety. Religious observance has also proven to reduce recidivism. BOP takes religious factors into consideration when considering placement, as it should. We ask that this not change with the First Step Act.

### **Phone Privileges**

FSA gives 510 minutes as an incentive for successful participation in the recidivism reduction programs. Inmates currently receive a limit of 300 minutes per month of phone time. We believe that the “510 minutes per month” reward should be *in addition* to the regular 300 minutes inmates already receive. Inmates who successfully participate in the program should thus receive up to 810 minutes a month of phone time.

### **Time Credits**

The FSA states:

“(i) A prisoner shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

“(ii) A prisoner determined by the Bureau of Prisons to be at a minimum or low risk for recidivating, who, over 2 consecutive assessments, has not increased their risk of recidivism, shall earn an additional 5 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.”



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We believe it would be more practical to interpret the aforementioned “30 days” as one month, not actual 30 days of participation.

### **Relation to Other Incentive Programs - to Include Maximum Home-Confinement**

The FSA states under “(6) RELATION TO OTHER INCENTIVE PROGRAMS”:

“The incentives described in this subsection shall be in addition to any other rewards or incentives for which a prisoner may be eligible.”

Additionally, in Section 602 of the FSA it states:

“The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph.”

With Section 602, a “shall rule”, the intent of Congress is clear: to mandate BOP to give the full amount of home confinement accessible to an inmate for which they qualify, i.e. 6 months or 10% of their sentence. Prior to the FSA, BOP would periodically give inmates *less than* the maximum home confinement for which they qualified for by law (less than 6 months or less than 10%). With Section 602, Congress is attempting to preclude this from happening. Accordingly, 6 months or 10% of the sentence of home confinement – which inmates only qualify for if they conduct themselves to be “lower risk” -- is now a mandated reward and incentive for which prisoners are eligible. Therefore, based on the above-mentioned provision subtitled “(6) Relation to Other Incentive Programs”, the earned credits an inmate earns through participation in recidivism reduction programs and productive activity should be *in addition to* the home confinement that they earn in accordance with Section 602 of the FSA. Indeed, this would align with the spirit of the FSA, which is to maximize as much as possible the reentry prospects of federal prisoners, as this would further incentivize participation in the recidivism reduction programs.

### **Faith Based Programs**

FSA requires the Independent Review Committee to “direct the Bureau of Prisons regarding...the ability for faith-based organizations to function as a provider of educational evidence-based programs outside of the religious classes and services provided through the



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Chaplaincy.” FSA further requires the Attorney General to “develop policies for the warden of each prison of the Bureau of Prisons to enter into partnerships” with “Nonprofit and other private organizations, including faith-based, art, and community-based organizations that will deliver recidivism reduction programming on a paid or volunteer basis.”

To ensure integrity, we recommend that an accepted faith-based organization should be a 501c3 religious organization for a religion recognized by the BOP.

In creating the guidance for such faith-based programs, we believe it is imperative that such guidance allow faith-based organizations the maximum possible latitude in carrying out such programs. Therefore, the guidance should provide the least restrictive means possible.

We recommend that faith-based organizations be allowed to send mail-in study courses as part of these faith-based recidivism reduction programs.

Faith-based programs should include, but not limited to:

- Programs that teach moral reasoning, with a focus on human self-worth, the value of human life and well-being, and values/virtues that support society such as giving and respect for the law.
- Programs that promote and/or improve interpersonal relationships including conflict-resolution, identifying functional vs. dysfunctional behaviors and relationships, and tools for recruiting family and peer support.
- Programs that encourage spiritual development as a means of stress-management, finding personal meaning and dealing with the ups-and-downs of life.
- Programs based on Cognitive-Behavior Therapy (CBT) or its methodology.
- Programs that address low self-esteem, self-control, antisocial ways of thinking or behaving, substance-abuse, family relationships and social relations.
- Programs concerning answering to a Higher Authority.
- Programs concerning one’s inner soul and higher purpose of life.
- Programs that teach education and pride in one’s religious heritage.
- Participation in clergy visitation, services and study groups.



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- Self-study (with short writing-based assessment necessary for credit).

We ask for consideration that being less restrictive and allowing more programs to participate will mean broader, richer and more varied data for researchers to consider when studying factors that reduce recidivism. Therefore, the primary criteria should be any:

- programs that track results, keep statistics and provide relevant data for the use of the BOP and/or researchers;
- that promote critical thinking about morals and ethics;
- that teach concepts of meaning, Higher-Authority and/or spirituality;
- that foster positive inter-personal relations, help inmates to develop a peer-group and offer strategies/tools to develop a support network once released.

Criteria should not pertain to educational background of staff (since many clergy have non-standard educational background and experience), nor to whether a psychologist etc. is involved, nor to how long a program has been around (i.e., developing *new* programs should be encouraged).

### **Preliminary Expansion of Evidence-Based Recidivism Reduction Programs**

We ask that the following provision be enforced; it currently is not being enforced:

“(4) PRELIMINARY EXPANSION OF EVIDENCE-BASED RECIDIVISM REDUCTION PROGRAMS AND AUTHORITY TO USE INCENTIVES.—Beginning on the date of enactment of this subsection, the Bureau of Prisons may begin to expand any evidence-based recidivism reduction programs and productive activities that exist at a prison as of such date, and may offer to prisoners who successfully participate in such programs and activities the incentives and rewards described in subchapter D.”

By putting this provision in the FSA, we believe Congress thus clearly wants BOP to immediately start giving credit and awards to the inmates *before* the risk assessment is created within 210 days so that we can start seeing reentry benefits immediately. BOP should indeed do this and start to give inmates credits right away for programs that they are currently participating in. This can be done even though the risk assessment system, and other elements of Title 1, have not yet been created because BOP can simply *store the data*



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*Advocacy Department*

of the days which inmates participate in existing recidivism reduction programs or “productive activities” starting from December 21, 2018. When the risk assessment system etc. is subsequently created, those credits for that past participation will kick in retroactively from the date the bill was signed into law.

### **Conclusion**

It is our hope and prayer that the intent and spirit behind the NIJ in implementing the FSA be that of a strong desire to maximize its potential as Congress intended. The goal of the FSA is to profoundly reduce recidivism and alleviate overcrowded prisons, thereby making a safer society and saving millions in taxpayer dollars. The FSA literally has the capability to literally change lives for the better and dramatically improve our justice system, but only if fully and properly implemented. Hence, the bolder it is, with the maximum number of inmates participating, the greater the results. With G-d's help, we will all indeed see the fruits of our labor with reduced recidivism, reduced crime, safer and more humane prisons, inmates utilizing their time more productively, safer communities and a better world for it.

Thank you for taking the time to read this statement and for considering its content. May the Almighty bless you with tremendous success in this noble endeavor.

Respectfully,

A handwritten signature in black ink, appearing to be "Y. Weiss", written in a cursive style.

Rabbi Y. Weiss  
The Aleph Institute

**Public Comment of Andrea James,  
Executive Director  
The National Council for Incarcerated and  
Formerly Incarcerated Women and Girls  
to  
The Department of Justice  
*First Step Act Listening Session*  
April 12, 2019**

The National Council for Incarcerated & Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. Organizing began in a federal prison yard with a group of women who were tired of policy makers instituting criminal justice reform without consulting any formerly incarcerated people – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person’s humanity.

While still incarcerated, these women founded “Families for Justice as Healing,” which is now doing profound criminal justice reform work in the Boston area. In 2015, Andrea James received a Soros Justice Fellowship and used her 18 months of support to launch the National Council – a platform of connectivity, networking, and support of advocacy organizations led by incarcerated and formerly incarcerated women and girls across the country. In its short history, the National Council has already had a significant impact, including acting as the voice of the incarcerated women who helped draft the Dignity Act, which mandated that women in federal prison receive adequate feminine hygiene supplies and have appropriate and adequate visitation and communication with their children.<sup>1</sup>

The National Council is committed to abolishing incarceration for women and girls. As formerly incarcerated women, we believe a prison will never be the place to appropriately address the economic and psychological reasons women end up in prison. Prison most often causes further social and economic harm and does not effectively result in an increase in public safety. The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although our long-term goal is to end the incarceration of women and girls, we are also working to address conditions of confinement for those still living inside prisons. Through our “Reimagining Communities” project,<sup>2</sup> a national infrastructure for supporting community-based initiatives led by incarcerated, formerly incarcerated, and directly affected women and girls, we support prison reform programs that are designed with the input of incarcerated women and work to keep people out of the legal system.

The National Council opposed the First Step Act because we felt that it did not sufficiently reduce the number of people in federal prisons who need to come home. According to NPR, as of April 1, 500 people have been released under the First Step Act, mainly due to the

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<sup>1</sup> <https://justiceroundtable.org/dignity-act-for-incarcerated-women/>

<sup>2</sup> <https://www.nationalcouncil.us/reimagining-communities/>



retroactive sentencing for crack cocaine and compassionate release for the terminally ill. That amounts to .02% of the federal prison population<sup>3</sup> and 18% of those eligible for release under the FSA according to the U.S. Sentencing Commission.<sup>4</sup> A Justice Department press release issued on April 8 states that the retroactive application of the Fair Sentencing Act of 2010 “has resulted in 826 sentence reductions and 643 early releases.”<sup>5</sup> We are pleased that the numbers of those being released are increasing and are committed to supporting implementation of the Act so that those who are eligible may reap all the benefits available.

The greatest impact of the FSA will be in providing earned time credits for participating in programming – which is supposed to benefit some 150,000 incarcerated people.<sup>6</sup> The Department’s first public act in implementing that program – naming the Hudson Institute as the “host” for the development of the “recidivism risk assessment tool” – further reinforces our impression that the First Step Act is neither groundbreaking nor bipartisan. We urge the Department to reconsider this decision and create a community oversight board that truly represents the political spectrum and makes a place for formerly incarcerated people to join the conversation.

The National Council also objects to determining appropriate programming for incarcerated people in terms of failure – namely recidivism. The premise of this exercise should not be that people will commit crimes once they are able to return home, i.e. recidivate. Instead, we should attempt to measure how well prepared each incarcerated person is for successful reentry into society.

The FSA requires the development of a “recidivism risk assessment” tool to determine every incarcerated person’s risk of recidivism at the beginning of their sentence and periodically thereafter. The person’s rating (minimum, low, medium, high) will determine what programming they are eligible for and whether they ultimately may be released early. The National Council is skeptical that this system can be implemented in a way that fully respects the individual circumstances and background of each incarcerated person.

At the very least, this risk assessment tool must be developed based on the principles listed below. This list is adapted from principles put together by the Leadership Conference for pre-trial risk assessments and to which 130 non-profit organizations, including the National Council, subscribed.<sup>7</sup>

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<sup>3</sup> Federal Bureau of Prisons, Statistics (Mar. 28, 2019), [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp)

<sup>4</sup> Mathew Charles, *I Was Released Under the First Step Act*, Washington Post (Feb. 1, 2019), [https://www.washingtonpost.com/opinions/i-was-released-under-the-first-step-act-heres-what-congress-should-do-next/2019/02/01/1871f1f0-24bb-11e9-ad53-824486280311\\_story.html?noredirect=on&utm\\_term=.d696f1cb54df](https://www.washingtonpost.com/opinions/i-was-released-under-the-first-step-act-heres-what-congress-should-do-next/2019/02/01/1871f1f0-24bb-11e9-ad53-824486280311_story.html?noredirect=on&utm_term=.d696f1cb54df)

<sup>5</sup> Press Release, Dep’t of Justice, *Department of Justice Announces First Step Act Implementation Progress* (Apr. 8, 2019), <https://www.justice.gov/opa/pr/departments-justice-announces-first-step-act-implementation-progress>

<sup>6</sup> *Id.*

<sup>7</sup> Leadership Council, *The Use of Pre-trial “Risk Assessments”: A Shared Statement of Civil Rights Concerns*, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>

The criminal justice reform community, especially incarcerated and formerly incarcerated people, must have significant input in designing the recidivism assessment instrument. The tool must then be “trained” and revalidated by independent data scientists who will work under meaningful community oversight. Specifically, the instrument should not be considered valid if it has any indication of racial bias.

The National Council therefore expresses concern that two of the three the social scientists in charge of developing this tool have professional backgrounds in the criminal justice system. This group has two men and one woman, none of whom are people of color or appear to have any connection to communities who are impacted by the criminal justice system. In order for their work to be legitimate, this group must be expanded to include social scientists from a wider demographic and political spectrum.

Recidivism instruments must presume that incarcerated people will successfully return to their communities at the end of their sentences and be designed to presume eligibility, i.e. a minimum or low rating, for early release. Under the FSA, incarcerated people who engage in programming are automatically eligible for early release to a halfway house or home incarceration unless they maintain a medium or high recidivism rating. In that case, their release is left up to the discretion of the Warden. In accordance with basic concepts of fairness and due process, a person’s release should not depend on a computer formula and the whim of a single person. Instead, anyone denied the benefits of the FSA should be entitled to a hearing and legal representation.

April 12, 2019

U.S. Department of Justice  
Office of Justice Programs  
National Institute of Justice  
Washington, D.C. 20531

To: David Muhlhausen, Director

Subject: WSIPP statement on Bureau of Prison's risk and needs assessment system

With the passage of the First Step Act of 2018 (P.L. 115-391),<sup>1</sup> the United States Congress took major steps towards reforming federal sentencing and corrections policies. Included in this Act is a mandate to the Department of Justice (DOJ) to develop and implement a risk and needs assessment (RNA) system to be used by the Federal Bureau of Prisons (BOP). Specifically, the RNA system should classify incarcerated individuals as minimum, low, medium, or high risk of recidivism, should identify the risk of violent or serious prison misconduct, should be used to assign incarcerated individuals to evidence-based recidivism reduction programs associated with appropriate criminogenic needs, and should be used to award earned time credits for successful completion of evidence-based programming.<sup>2</sup>

The use of actuarial risk and needs assessments in criminal justice has grown substantially over the last 30 years.<sup>3</sup> Many states, including Washington, have already implemented evidence-based RNA systems to more effectively allocate rehabilitative resources and to reduce recidivism.<sup>4</sup> Similar RNA systems have also been used to cost-effectively reduce recidivism for moderate- and high-risk individuals supervised in the community.<sup>5</sup> When developing an RNA system, we recommend the DOJ consider the prior research on RNA systems as well as the inherent policy decisions related to the development and implementation of an effective RNA system. In this memo, we suggest three areas for consideration: 1) the development and validation of the RNA instrument, 2) the implementation and use of the RNA system, and 3) the continued review and revalidation of the RNA system.

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<sup>1</sup> Hereafter, "the Act."

<sup>2</sup> James, N. (2019). *The First Step Act of 2018: An overview* (CRS Report No. R45558). Retrieved from Congressional Research Service website: <https://fas.org/sgp/crs/misc/R45558.pdf>

<sup>3</sup> Andrews, D. A., & Bonta, J. (2010). Rehabilitating criminal justice policy and practice. *Psychology, Public Policy, and Law*, 16(1), 39.

<sup>4</sup> Bonta, J. (2002). Offender risk assessment: Guidelines for selection and use. *Criminal Justice and Behavior*, 29(4), 355-379; Hamilton, Z., Mei, X., & Routh, D. (2018). The Static Risk Offender Needs Guide-Revised (STRONG-R) In Singh, J.P., Kroner, D. G., Hamilton, Z., Desmarais, S. L., & Wormith, S. (Eds), *Handbook of Recidivism Risk/Needs Assessment Tools*. New Jersey: Wiley.

<sup>5</sup> Wanner, P. (2018). Inventory of evidence-based, research-based, and promising programs for adult corrections (Document Number 18-02-1901). Olympia: Washington State Institute for Public Policy

The recommendations we set out in this letter reflect WSIPP's understanding of the current research literature concerning the development, implementation, and revalidation of RNA systems.

### Development and Validation of an RNA Instrument

The Act authorizes the DOJ to use existing RNA instruments or to develop and use a new instrument. Supporting the latter approach, previous research suggests that RNA instruments perform better when they are developed independently and tailored to the population for which they will be used.<sup>6</sup> Consistent with other research, an evaluation of different RNA instruments for incarcerated individuals in Washington State found that an instrument developed for populations under supervision by the Washington State Department of Corrections (WADOC) (the Static Risk and Offender Needs Guide-Revised, or the STRONG-R) demonstrated higher predictive accuracy for predicting recidivism among WADOC populations than two other instruments developed outside of Washington State (Level of Service Inventory-R and the Ohio Risk Assessment System).<sup>7</sup> However, if the DOJ does choose to use an existing instrument, research suggests the instrument should first be evaluated and normed on datasets comprising populations from the BOP facilities.<sup>8</sup>

The development of a new instrument or evaluation of an existing instrument should be transparent, should consider characteristics about the data used in the evaluations, and should include a comprehensive review of disparate impacts by population subgroups. Importantly, the development of RNA instruments requires active collaboration between researchers and policy makers. The development of RNA instruments includes consideration of policy decisions such as which outcomes should be considered, how thresholds for classifications should be established, and how the instrument's recommendations should be integrated into the larger correctional system.<sup>9</sup> Transparency in the research and decision-making processes is necessary to establish perceptions of legitimacy by practitioners in criminal justice institutions, incarcerated individuals, and members of the public.<sup>10</sup>

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<sup>6</sup> Wright, K. N., Clear, T. R., & Dickson, P. (1984). Universal Applicability of Probation Risk-Assessment Instruments: A Critique. *Criminology*, 22(1), 113-134; Duwe, G. (2014). The development, validity, and reliability of the Minnesota screening tool assessing recidivism risk (MnSTARR). *Criminal Justice Policy Review*, 25(5), 579-613; Desmarais, S. L., Johnson, K. L., & Singh, J. P. (2016). Performance of recidivism risk assessment instruments in US correctional settings. *Psychological Services*, 13(3), 206; Lovins, B. K., Latessa, E. J., May, T., & Lux, J. (2018). Validating the Ohio Risk Assessment System community supervision tool with a diverse sample from Texas. *Corrections*, 3(3), 186-202.

<sup>7</sup> Drake, E. (2014). *Predicting criminal recidivism: A systematic review of offender risk assessments in Washington State* (Doc. No. 14-02-1901). Olympia: Washington State Institute for Public Policy

<sup>8</sup> Lovins et al., (2018).

<sup>9</sup> Makarios, M., & Latessa, E. J. (2013). Developing a risk and needs assessment instrument for prison inmates: The issue of outcome. *Criminal Justice and Behavior*, 40(12), 1449-1471; Eckhouse, L., Lum, K., Conti-Cook, C., & Ciccolini, J. (2019). Layers of bias: A unified approach for understanding problems with risk assessment. *Criminal Justice and Behavior*, 46(2), 185-209.

<sup>10</sup> Eckhouse et al., (2019).

Recent scholarship has raised concerns over the quality and characteristics of the data used to develop RNA instruments. Of particular concern is the use of “zombie predictions,” or the use of old data that are no longer representative of current institutional practices or populations.<sup>11</sup> As populations and policies change over time, so too do the risks and needs of individuals assessed using RNA instruments. The development of RNA instruments on outdated samples of justice-involved persons may lead to the overestimation of risk in current populations.<sup>12</sup>

Many experts have also raised concerns about the possibility of racial, gendered, or socioeconomic disparity in the classification and use of RNA instruments.<sup>13</sup> Because the RNA system mandated under the Act is directly tied to some individuals’ length of stay in incarceration, the DOJ should carefully consider the differential impact of RNA instruments on population subgroups.<sup>14</sup>

The methods used to evaluate fairness and bias have grown substantially in the last few years. Simple evaluations of overall predictive accuracy (e.g., a comparison of the Area Under the Curve, or AUC) are no longer sufficient for evaluating the possibility of disparate outcomes.<sup>15</sup> The research should include a comprehensive impact analysis that presents information on the impacts of different RNA options consistent with the current recommendations in the literature. However, the decisions regarding acceptable levels of accuracy and fairness are ultimately policy decisions, not research decisions.<sup>16</sup>

### Implementation and Use of RNA Instruments

Research on RNA systems emphasizes the need to consider how the RNA instrument is presented to practitioners and how resource constraints within an institution influence the effectiveness of RNA systems. Even the best RNA instruments can fail to achieve the desired

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<sup>11</sup> Koepke, J. L., & Robinson, D. G. (2018). Danger ahead: Risk assessment and the future of bail reform. *Washington Law Review*, 93, 1725.

<sup>12</sup> Ibid.

<sup>13</sup> Harcourt, B. E. (2014). Risk as a proxy for race: The dangers of risk assessment. *Federal Sentencing Reporter*, 27, 237; Starr, S. B. (2014). Evidence-based sentencing and the scientific rationalization of discrimination. *Stanford Law Review*, 66, 803. Eckhouse, et al., (2019).

<sup>14</sup> Correctional risk assessments have generally been excluded from discussions disparate impacts because they are traditionally used for prison administration purposes and not for determining length of stay. See Hamilton, M. (2015). Risk-needs assessment: Constitutional and ethical challenges. *Am. Crim. L. Rev.*, 52, 231.

<sup>15</sup> Berk, R., Heidari, H., Jabbari, S., Kearns, M., & Roth, A. (2018). Fairness in criminal justice risk assessments: The state of the art. *Sociological Methods & Research*, 1-42; Chouldechova, A. (2017). Fair prediction with disparate impact: A study of bias in recidivism prediction instruments. *Big data*, 5(2), 153-163; Skeem, J. L., & Lowenkamp, C. T. (2016). Risk, race, and recidivism: Predictive bias and disparate impact. *Criminology*, 54(4), 680-712; Singh, J. P. (2013). Predictive validity performance indicators in violence risk assessment: A methodological primer. *Behavioral Sciences & the Law*, 31(1), 8-22.

<sup>16</sup> Berk, R. (2019). Accuracy and fairness for juvenile justice risk assessments. *Journal of Empirical Legal Studies*, 16(1), 175-194. (“Finally, there are complicated tradeoffs between different kinds of fairness and between different kinds of accuracy. You can’t have it all. Computer scientists and statisticians will over time provide far greater clarity about these tradeoffs, but they cannot be (and should not be) asked to actually make those tradeoffs. The tradeoffs must be made by stakeholders through legal and political processes.” Id p. 191:192). See also Eckhouse et al., (2019). (“These questions cannot be answered by statisticians. . . Policymakers should debate the value of different criteria for fairness as they choose which models to adopt.” Id p. 11).

outcomes if the practitioners using the instruments do not fully understand the RNA classifications or if institutions lack the resources needed for effective correctional programming.

Recent studies have evaluated different methods of communicating risk and needs information to practitioners who use risk assessments.<sup>17</sup> While traditional methods use a nominal classification system (i.e., high, moderate, or low risk), more specific information such as the likelihood of recidivism in each classification group may be more meaningful. The DOJ should consider how the presentation of RNA classifications may affect practitioners' decision-making processes.

Presentation considerations are particularly important when the outcome of interest is relatively rare (e.g., violence).<sup>18</sup> In an RNA instrument predicting general recidivism, the likelihood that individuals in the high-risk group recidivate may be large (i.e., 60-70%). However, in an RNA instrument predicting only violent offenses, the likelihood that individuals in the high-risk group recidivate will likely be smaller (i.e., 10-20%) due to the relative rarity of specific outcomes. Consequently, what it means to be "high-risk" is not consistent across different instruments.

Correctional RNA systems should also consider the availability of resources for evidence-based programs in the institutions. The benefits of RNA instruments compared to static risk assessment instruments are derived from the ability to observe changes in dynamic risk characteristics over time.<sup>19</sup> Highly predictive RNA instruments may have limited impacts on future recidivism if appropriate resources are not available to effectively implement the RNA recommendations.<sup>20</sup>

Further, the DOJ should consider differences in responsivity to treatment and ensure that there are equal opportunities for individuals to access treatment programs administered in ways that accounts for individual learning styles and cognitive or social abilities.<sup>21</sup> Concerns over equal access are particularly important because the Act conditions offender rewards on changes on RNA classifications. Differential likelihood of selection into appropriate programming due to resource constraints may directly impact individuals' abilities to reduce risk and to subsequently be eligible for the Act's rewards.

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<sup>17</sup> Varela, J. G., Boccaccini, M. T., Cuervo, V. A., Murrie, D. C., & Clark, J. W. (2014). Same score, different message: Perceptions of offender risk depend on Static-99R risk communication format. *Law and Human Behavior*, 38(5), 418; Hilton, N. Z., Scurich, N., & Helmus, L. M. (2015). Communicating the risk of violent and offending behavior: Review and introduction to this special issue. *Behavioral sciences & the law*, 33(1), 1-18; Ruback, R. B., Kempinen, C. A., Tinik, L. A., & Knoth, L. K. (2016). Communicating Risk Information at Criminal Sentencing in Pennsylvania: An Experimental Analysis. *Fed. Probation*, 80, 47.

<sup>18</sup> Garrett, B. L., & Monahan, J. (2018). *Judging Risk*.

<sup>19</sup> Makarios & Latessa, (2013).

<sup>20</sup> Ibid. Bonta, (2002).

<sup>21</sup> Some authors even suggest that demographic characteristics, such as gender, ethnicity, and race, should be considered when evaluating responsivity. See Bonta, (2002).

## Continued Review and Revalidation

Similar to the aforementioned concerns over “zombie predictions,” the accuracy of an RNA instrument may change as the populations being assessed change over time. Once an RNA instrument is developed and implemented, the DOJ should continuously monitor the accuracy of the RNA classifications. Conducting occasional comprehensive revalidations may reveal important changes in the risks and needs of correctional populations and can allow for the opportunity to recalibrate the instrument to maximize accuracy.<sup>22</sup>

Future reviews will also allow for the evaluation of differences in the way the RNA system operates in different locations.<sup>23</sup> In the same way that independently developed instruments can be more predictive than off-the-shelf instruments, assessments used by the BOP may benefit from the consideration of the unique populations in different correctional institutions. Further, continuing reviews provide the opportunity to assess practitioner fidelity to the model and can evaluate whether the RNA instruments are being used consistently in different institutions.

## Conclusion

The First Step Act represents a major step towards reforms in the federal corrections system that align with the current research on risk and needs assessments and the use of evidence-based programs. The development and implementation of an RNA system for the BOP has the potential to reduce recidivism by effectively allocating resources to target criminogenic needs. State and local reforms preceding this Act have established a robust literature base to assist the DOJ in its efforts to establish an effective RNA system in the BOP. This memo summarizes only a small portion of the research analyzing the development and validation of RNA instruments, the implementation and use of RNA instruments, and the use of continuing reviews and revalidations of RNA instruments. We look forward to following the progression of the DOJ’s work to develop and implement a new risk and needs assessment system in the federal corrections system.

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<sup>22</sup> Garrett & Monahan, (2018).

<sup>23</sup> Andrews & Bonta, (2010).

## **Session 3 Written Statements Submitted to NIJ**

1. Anne Seymour
2. Maricopa County – Shawn Cox
3. Network of Victim Recovery of DC – Bridgette Stumpf
4. The Catholic University of America – Mary Graw Leary



Most victim/survivor advocates and likely ALL crime survivors have no (or very limited) knowledge about how inmates are assessed for risk and needs. Therefore, basic information about the risk assessment and needs assessment processes and protocols would be helpful to crime survivors, and those who assist them. This can be provided online by the BOP and other Federal agencies that assist crime victims/survivors (OVC, OVW, etc.) and through state VOCA/victim assistance and crime victim compensation programs. Some “training points” could also be developed for these entities.

In addition, in accordance with the passage of the First Step Act, the BOP’s Federal Victim Notification System (VNS) will likely need modifications to how it provides survivors of Federal crimes with notification and information.... Including information about the inmate risk/needs assessment processes.

That’s all I have for now. Thanks for the opportunity to provide my (somewhat) limited input!

Anne Seymour



# Maricopa County Attorney

BILL MONTGOMERY

Rhea Walker, Special Assistant  
National Institute of Justice  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street N.W., Rm. 6217  
Washington, D.C. 20531

Dear Ms. Walker:

I appreciate the invitation to submit a statement on behalf of the Maricopa County Attorney, William Montgomery regarding the development of a risk and needs assessment system. Any risk and needs assessment system that has been developed to allow an early release of inmates from the Bureau of Prisons must take into account the nature of the current offense, input from the victim, and the statutory obligations under the Crime Victims' Rights Act. The tool should also account for the likelihood of incarceration upon reoffending.

A risk assessment system should be thoroughly researched, peer reviewed and validated for a high level of reliability. Research should also be conducted in border states for greater accuracy in the validation of this tool.

Sincerely,

Shawn Cox  
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May 10, 2019

First Step Act, Independent Review Committee  
National Institute of Justice  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street N.W., Rm. 6217  
Washington, D.C. 20531

Ms. Walker and other Committee members:

I represent the Network for Victim Recovery of DC (NVRDC), a DC-based non-profit organization. Since its inception in 2012, NVRDC has served over 3,500 victims of crime by providing holistic services, including free legal representation, advocacy, and case management in the District of Columbia. NVRDC strongly supports Congress' efforts to reform the criminal justice system and to redefine justice within the framework of a progressive and holistic lens. While NVRDC is supportive of criminal justice reform, and the implementation of the reform efforts through this Committee; NVRDC requests that the Committee carefully consider the unintended prejudicial effects on crime victims.

Under the Crime Victims' Rights Act (CVRA, 18 U.S.C. § 3771), and many state-level crime victims' rights laws (e.g. DC Crime Victims' Bill of Rights, D.C. Code § 23-1901), crime victims are afforded various protections intended to preserve their voices within the criminal justice system. Some of these rights are listed below:

- (1) The right to be reasonably protected from the accused.
- (2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.
- (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.<sup>1</sup>

The reason these rights are so critical is because despite being the individual harmed during the commission of a crime, our system often forgets to include them in its pursuit of justice. The CVRA, and local legislation, seek to remind the criminal justice system that the privacy, safety, and dignity of victims should not be ignored. It is in that spirit that NVRDC requests that this Committee consider how the First Step Act can be implemented to create the time and space for consideration of the crime victims whose lives were affected by the prisoners' actions. We are *not* requesting that crime victims' are given the deciding vote in a prisoner's future, but that they are afforded, at the very minimum, notice and an opportunity to be heard.

The First Step Act affords many prisoners the chance to participate in rewards and incentive programs that could result in their early release, or modification to their incarceration conditions. To a victim without notice, the modification of a prisoner's sentence that results in early release could be seen as a potential threat to their safety and could re-traumatize them. A simple notification provides the victim with the basic information they need to make decisions for safety-planning, if they feel it is necessary.

In addition to notifying crime victims about prisoners' eligibility under the First Step Act, we feel it is equally important to allow for a victim to be heard on the prisoner's eligibility for such a program. Many of the variables outlined in the First Step Act seek to analyze a particular prisoner's chances for recidivism, such as the risk of violent or serious misconduct or the prisoner's specific criminogenic needs.<sup>2</sup> One of the most helpful tools in making these assessments, is the crime victim. While case files, transcripts, and pre-sentencing reports are helpful components in guiding sentencing decisions, they alone cannot capture the entirety of the crime, the criminal, and its effects. This is especially critical when the nature of the offense is obscured by the downgrading of the charge during the plea bargaining process. A crime victim should be given an opportunity to support or oppose a prisoner's eligibility. They deserve to have their experiences considered as a variable in the determination of the prisoner's future.

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<sup>1</sup> 18 U.S.C. § 3771(a)(1)-(4).

<sup>2</sup> §3632(a)(2)-(3).

For the aforementioned reasons, we make the following suggestions for ways to be more inclusive to crime victims:

- 1) Consulting crime victims, or considering crime victims' impact statements, when analyzing the recidivism risk of each prisoner. This could be especially helpful when calculating the "risk of violent or serious misconduct" under §3632(a)(2).
- 2) Providing crime victims the option of timely notification is a prisoner becomes eligible for any incentives or rewards that may result in their early release, or otherwise pose a threat to a crime victims' safety. For example, if a prisoner were afforded time credits under §3632(d)(4).

NVRDC applauds Congress' and this Committee's efforts at criminal justice reform. We believe that "justice" does not always mean "incarceration." We support evaluating prisoners' backgrounds and propensities for violence to identify suitable candidates for rehabilitative and restorative justice programs. However, we believe any conversation about the nature and impact of a crime cannot sincerely occur without the voice of the person most affected by it, the victim. And for this crucial reason, we ask that this Committee help integrate the voices of crime victims into the implementation of the First Step Act. We thank you for your time and consideration of our concerns. We are available for any questions you may have.

Sincerely,



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**CUA**



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**Department of Justice**

**Office of Justice Programs**

**National Institute of Justice**

**Listening Session on the Risk and Needs Assessment of the First Step Act**

***Statement of Mary Graw Leary***

***Professor of Law***

***The Catholic University of America, Columbus School of Law.***

***May 2, 2019***

Thank you to the Department of Justice, Office of Justice Program, National Institute of Justice, and Bureau of Prisons for this invitation to participate in the listening session regarding the development and implementation of a risk and needs assessment system for the Federal Bureau of Prisons consistent with Title I of the First Step Act.<sup>1</sup>

My name is Mary Graw Leary and I am the Chair of the Crime Victim Advisory Group (“V.A.G.”) for the United States Sentencing Commission (“Commission”).<sup>2</sup> The V.A.G. is a

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<sup>1</sup> First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

<sup>2</sup> Due to short notice of this session, the V.A.G. was unable to convene in preparation for this listening session. Therefore, the views expressed by Professor Leary are informed by the V.A.G., but are her own. These are informed by her work with the V.A.G. but also her work at as the Co-Chair of the Crime Victims Subcommittee of

standing advisory group to the Commission whose purpose is, among other duties, to assist the Commission by providing the views of the crime victim community on sentencing priorities and policies. We are a diverse group of professionals from across the country comprised of crime victim organizations, criminal justice professionals, victim advocates, attorneys, and academics. We thank you for the opportunity to address you as you develop this assessment.

Under federal law, specifically the Crime Victims' Rights Act,<sup>3</sup> crime victims - who include those **directly** affected and those **proximately affected** by the commission of federal crimes - have several enumerated rights. I mention that broad definition of the crime victim to underscore the point that many crimes are mislabeled "victimless crimes" but they in fact do proximately affect many people. These can include crimes such as narcotics offenses that can destroy communities, crimes of violence to which children are exposed thus becoming victims themselves, or financial crimes that negatively affect consumers, etc. All such people - those directly and indirectly affected by crime - have such rights and many of these rights are implicated by the First Step Act. These include, but are not limited to:

- a. Most fundamentally, the right to be treated with **fairness** and **with respect for the victim's dignity**;<sup>4</sup>
- b. the right to be **reasonably protected** from offenders;<sup>5</sup>

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the Criminal Justice Section of the American Bar Association, as the former Director of the National Center for the Prosecution of Child Abuse, as a former advisor and attorney with the National Center for Missing and Exploited Children, as a former prosecutor on the state and federal levels, and as a legal scholar examining the effect of the criminal law on victims of crime.

<sup>3</sup> 18 U.S.C. 3771

<sup>4</sup> 18 U.S.C. 3771 (a)(8).

<sup>5</sup> 18 U.S.C. 3771(a)(1).

- c. the right to **reasonable, accurate, and timely notice** of any proceeding involving the crime or of any **release** of the offender.<sup>6</sup>

A theme woven throughout all the rights of this Act includes the requirement to inform victims of their rights and the developments that occur throughout the investigation, prosecution, and sentence of their offenders; adequate notice of events; and opportunities to participate in the processing of the case at all stages. These rights, as well as the basic tenets of a holistic criminal justice system, are implicated by the development of the assessment tool and the evidence based recidivism program as well as the execution of this program.

Due to the narrow topic at hand and the time limitation, I would like to focus my comments on three areas: the assessment tool itself; the evidence based recidivism program itself, and the execution of this new system.

### **Assessment Tool**

Regarding the Assessment Tool, we note that while the risk and needs assessment serves an important purpose to prison populations, they have what has been described as a “moderate level of accuracy” in predicting who is at risk for recidivism and that some evidence exists that “there is a natural limit to the predictive utility of [these] instruments.”<sup>7</sup>

I underscore this point because, from a crime victim perspective, that limited accuracy represents more than just a number, but it is in actuality additional people victimized again by an offender. In a federal prison system of where almost half of federal offenders studied were rearrested and almost one third reconvicted,<sup>8</sup> this represents thousands of crime victims whose

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<sup>6</sup> 18 U.S.C. 3771(a) (2).

<sup>7</sup> Nathan James, Risk and Needs Assessment in the Federal Prison System, CRS R44087, at 4 (July 2018).

<sup>8</sup> Kim Steven Hunt, Recidivism Among Federal Offenders: A Comprehensive Overview, USSC, at 4, 15 (March 2016).



offender repeated his criminal activity after the victim went through the rigors of the system, and thousands more victims harmed by these an offenders' released into the community.

Therefore, we urge you to include as part of your assessment the obtaining of as full an understanding of the offender as possible. This information cannot only come from the offender but must also come from the crime victim. Consistent with the research, this includes understanding of whether the offender has a history of antisocial behavior, antisocial personality disorder, antisocial cognition, antisocial associates, as well as an understanding of his family circumstances, school performance, substance abuse, etc.<sup>9</sup> This information comes from understanding both the criminal event and the offender's history.

Regarding the criminal event, not only can the victim describe the criminal event and the offender's behavior during it, but this description will no doubt differ from the offender. This information will provide the evaluators with a more complete picture of the offender and his crime, which will inform their assessment of the above factors.

Similarly, the victim can often provide valuable information regarding the offender more generally. With a majority of criminal victimization being committed by offenders who know their victims,<sup>10</sup> victims and their families are often uniquely situated to offer information about offenders and their risk of recidivism. Such information is invaluable to ascertaining an accurate assessment of risk.

While this information may sometimes come to the Bureau of Prisons through a Pre-Sentence Report, in a federal system in which 97% of the cases resolve in guilty pleas,<sup>11</sup> and

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<sup>9</sup> James, *supra* note 7 at 4.

<sup>10</sup> Bureau of Justice Statistics, Number of Violent Victimizations by Victim-Offender Relationship, 2013-2017, (generated using the NCVS Victimization Analysis Tool at [www.bjs.gov](http://www.bjs.gov). 10-May-19).

<sup>11</sup> Overview of Federal Criminal Cases Fiscal Year 2017, U.S.S.C., at 4 (June 2018).

those guilty pleas often are to lesser charges (such as narcotics possession when the facts support a charge of possession with intent to distribute, or an assault when the facts support an aggravated assault), the actual details of the crime, the offender, or the community are not included. Moreover, because the statute excludes crimes based on the offense of conviction and not the facts of the case, many offenders will be eligible for the benefits of the First Step Act even though the actual crime committed falls within the list of criminals for whom this Act was not intended.<sup>12</sup> As such, this assessment should include information from the victims – and by definition that includes those proximately affected by the criminal activity.

### **The Evidence Based Recidivism Program Itself**

The V.A.G. notes the language of the First Step Act requiring an “evidence based program that has been shown to reduce recidivism” seems in tension with the high recidivism rates of federal prisoners as well as the moderate level of the effectiveness of such programs. This concern is compounded by the broad list of programs that may meet this criteria which is very vague and “may include [among other activities] classes on morals and ethics, faith based services, prison job, or academic classes.”<sup>13</sup> Victims would be concerned that mere participation in such an activity – such as mere attendance at one presentation or merely working minimally in a required prison chore would not sufficiently meaningfully affect recidivism. Therefore, we request NIJ to ensure two realities. First, these programs that can earn credits must be robust and meaningful. Second, completion of an activity cannot be enough to earn the credits, but an assessment must be done at the close of the program to determine if the offender has meaningfully immersed himself in the program and been evaluated on whether it has indeed

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<sup>12</sup> 18 U.S.C. 3632(d)(4)(D).

<sup>13</sup> 18 U.S.C. 3635(3)(c).

impacted him in a manner that more likely will reduce recidivism. That is to say that attendance at such activities cannot simply “check the box” which allows an offender to automatically earned credit.

More specifically, the Act also includes “civic engagement and re-integrative community services” as well as a “victim impact” programs.<sup>14</sup> Such programs, if robust and of high quality may be helpful. However, the most successful of such programs incorporate the voice of victims in their development and execution. The victim community urges this body to have victims and survivors develop these programs and participate in them fully to maximize their impact.

### **Execution of this System**

There are many stages in the risk and needs assessment and recidivism program process where victims’ rights are implicated. In accordance with Crime Victims’ Rights Act, victims should not only have the opportunity to participate in the assessments but receive critical notifications. These include first being notified **at sentencing** that the sentence handed down by the court can be reduced by up to 10 days for every 30 days of meaningful completion of a program. While the Act simply says “30 days of program participation” victims ask that it be meaningful completion and evaluated as such. Second, **during the offenders’ incarceration** victims should have the opportunity to be notified of the offender’s initial assessment risk level and programs to which he is assigned; any reassigned levels; any determination he is ready to transfer to prerelease custody or supervised release; any move in prison closer to release residence; as well as any change in release date. Victims should not only be notified of such, but have an opportunity to be heard at relevant stages.

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<sup>14</sup> Id.

**The Act also calls for training for Bureau of Prison employees** on how to administer the program. Crime victims should be a part of this training to underscore to the staff the importance of the victim experience and how decisions made by these staff members regarding offenders (approximately half of whom will be re-arrested) will directly affect the communities to which these offenders are entering.

## **Conclusion**

As a country we are hopeful that the First Step Act will achieve its claims of reducing recidivism. Crime victims share that hope, as a victim of crime often participates in the criminal justice system for the purpose of ensuring no future person is victimized in the same way she experienced. Moreover, when these measures fail, new groups of crime victims are created needlessly and we should do all we can to eliminate that possibility. Thank you for the opportunity to present these views to you today.