National Institute of Justice

Stakeholder Statements Submitted to NIJ's September Listening Sessions: Comments on the Department of Justice's Report, *The First Step Act of 2018: Risk and Needs Assessment System*

September 2019

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STRENGTHEN SCIENCE. ADVANCE JUSTICE.

Session September 10, 2019
Day 1

1. The Sentencing Project – Kara Gotsch

2. The Catholic University of America – Mary Graw Leary

3. National Association of Criminal Defense Lawyers – Nina J. Ginsberg

Statement of Kara Gotsch, Director of Strategic Initiatives, The Sentencing Project

First Step Act Listening Session on the Prisoner Assessment Tool Targeting Estimated

Risk and Needs (PATTERN)

U.S. Department of Justice

September 10, 2019

Good afternoon, my name is Kara Gotsch and I am the Director of Strategic Initiatives at The Sentencing Project, a national criminal justice research and advocacy organization. On behalf of The Sentencing Project I would like to thank the Department of Justice for this opportunity to share our feedback on implementation of the First Step Act of 2018 and the newly developed risk assessment system for the Federal Bureau of Prisons commonly known as PATTERN, the Prisoner Assessment Tool Targeting Estimated Risk and Needs.

After reviewing the Department's July report describing PATTERN, it is my understanding that this tool is a work in progress. Indeed, a critical component of PATTERN and the last word in the system's name, "Needs," has yet to be shared publicly as part of the tool. The advocacy community is eager to review the developing needs assessment as well as subsequent iterations of PATTERN as the tool is modified in response to feedback and new information gathered by the Department. The Sentencing Project looks forward to this continued collaboration.

The heart of the prison reform provisions of the First Step Act is the investment in prison programming and the establishment of an earned time credit system to incentive participation among incarcerated people and to hasten their earlier transition from prisons to communities. In a press release issued by Representative Doug Collins, the Act's lead sponsor in the House of Representatives, this is how he described the pending legislation last year:

The legislation would…offer individualized, evidence-based recidivism reduction plans to all inmates, without exception. Programs could include vocational training, educational support,

substance abuse treatment, mental health care, anger-management courses, faith-based initiatives or other resources proven to lower the chance that men and women reoffend. The First Step Act would also prepare citizens by allowing them to serve the final days of their sentences in halfway houses or home confinement, which equips them with support structures as they transition out of custody.

The risk and needs assessment tool which is the focus of today's listening session is mandated under the law to facilitate this process. Unfortunately, I am concerned that PATTERN, as currently described in the Department's July report will undermine the rehabilitative objectives of the First Step Act for several reasons: (1) Static factors compromise the bulk of an individual's risk score and dynamic factors based on prison programming are underweighted; (2) The likelihood of high and medium risk individuals to reduce their risk levels and thereby transition earlier to community corrections appears limited; and (3) The tool's weight for prior criminal history scores inherently produces a racially disparate effect, which is difficult to overcome within the overall structure.

(1) The First Step Act requires the incorporation of dynamic factors in its risk and needs assessment tool in order to encourage productive behaviors in prison and to expand opportunities for earned time credit accrual and early transition to community corrections. Unfortunately, PATTERN disproportionately emphasizes age and criminal history in determining risk levels and thus over half the population qualifies as medium or high risk. Scores for program participation are only likely to significantly reduce an individual's score if they participate in 10 or more programs, an unlikely scenario.

(2) Page 47 of the Department's report provides useful data on the backgrounds of nearly 223,000 people released from BOP custody in recent years and a vital insight into the opportunities for rehabilitation and therefore risk reduction. The sample studied for testing PATTERN indicated that 49% completed no programming while in custody, 57% of people in need of drug treatment received none and 60% had no drug education while incarcerated. These statistics are shocking and quite frankly an embarrassment to the Department of Justice, but they also exemplify the challenges faced by anyone in federal prison in need of programming. Risk will not be reduced without robust programming available to all in need, particularly those assessed as medium and high risk. Indeed, if these opportunities are not made available with a

substantial investment from Congress, and prioritization by the Department that exceeds the $75 million authorized in the law, First Step will not achieve its mission.

(3) According to the report, African American men are significantly more likely to be scored as high risk (53% compared to 29% for white men and 33% for Hispanic men). This higher rate is likely due to their elevated interactions with the criminal justice system which research partially associates with structural racism, policing practices in communities of color and socio-economic status. The report states that dynamic factors are included in the risk scoring to address this bias within criminal history but as stated above, the inclusion of dynamic factors in PATTERN is undervalued and opportunities for people in federal prison to adjust their risk score with dynamic factors are extremely limited. The Department must ensure more efforts are undertaken to address this racial disparity.

The Sentencing Project concurs with the assessments of many of its colleagues, including the Leadership Conference for Civil and Human Rights, the ACLU and Brennan Center for Justice, regarding PATTERN's potential negative outcomes for people assessed as high risk because of the tool's overreliance on criminal history, the associated racial disparity, limited dynamic factors influencing risk scores, and the challenges people will face in reducing their risk levels. At the same time, PATTERN is a work in progress and I am encouraged by your proactive approach to secure expert assistance, outreach to jurisdictions that can provide relevant insights, share information with the public on PATTERN's development and receive feedback from formerly incarcerated people and other stakeholders. I look forward to reviewing the Department's next step in this process.

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Office of Justice Programs

National Institute of Justice

Listening Session on PATTERN

Statement of Mary Graw Leary

Professor of Law

The Catholic University of America, Columbus School of Law

Chair

Victims Advisory Group, United States Sentencing Commission

September 10, 2019

Introduction

Thank you, Director Muhlhausen, Associate Attorney General Bacon, and Director Sawyer for this invitation to participate in the listening session regarding the recently released Prisoner Assessment Tool Targeting Estimated Risk and Needs System, PATTERN.[1] 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").[2] The V.A.G. is a standing advisory group to the Commission whose duties include 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. In preparation for today's session, the V.A.G. convened a meeting of our members and discussed the First Step Act Risk and Needs Assessment Report and our concerns as representatives of victim groups throughout the country. We thank you for the opportunity to share with you our comments on the Report.

As a threshold matter, the V.A.G. appreciates the significant amount of work the staff of the Department of Justice and other stakeholders have put into the development of this assessment tool in the short timeline provided by Congress to do so. Such a task is immense and the V.A.G. commends the individuals who toiled to develop this tool. Furthermore, the V.A.G. wishes to underscore that it shares the goal of First Step Act to reduce recidivism through thoughtful evidence based determinations as an essential component of any risk assessment. While some may perceive crime victim perspectives in tension with programs designed to decrease

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[1] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; The First Step Act of 2018: Risk and Needs Assessment System, *available at* https://nij.ojp.gov/sites/g/files/xyckuh171/files/media/document/the-first-step-act-of-2018-risk-and-needs-assessment-system_1.pdf ("The Report").

[2] Prior to this Listening Session the VAG was able to convene a meeting to discuss the upcoming session. The views expressed at the Session were products of that discussion

recidivism, nothing could be further from the truth. For crime victims, recidivism failures are not merely numbers. Each recidivist event represents another innocent person whose life is permanently changed – never for the better – because the system failed and an offender has victimized again. A recent study of approximately 25,000 prisoners found that 49% were rearrested and 32% convicted. These statistics reflect a possible 6,300 – 12,500 new crime victims.[3] If we were to extrapolate that out to include the approximately 177,000 federal inmates[4] and assume that half will be released at some point, the number of potential new crime victims created is staggering. Assuming half (88,000) will be released, those offenders who become recidivists could victimize 29,000 – 44,000 people. These numbers could increase with increased releases, and it is against that sobering backdrop that the V.A.G. examines the issue of recidivism and its very real human toll.

Victim Input Must Be Heard and Implemented

That being said, the V.A.G. was disappointed with the lack of regard for victims and a failure to utilize the input previously provided by victim groups who addressed this body in May.[5] At that meeting and later in writing, the victim organizations who addressed you made several overlapping points centralizing on the following themes:

1. Victims are an essential source of information regarding offenders and facts about the offense – both of which are highly relevant to risk assessment.[6] As such, the assessment

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[3] Kim Steven Hunt and Robert Dumville, Recidivism Among Federal Offenders: A Comprehensive Overview, United States Sentencing Commission, 5 (2016).
[4] https://www.bop.gov/mobile/about/population_statistics.jsp
[5] These include but are not limited to the statements of Susan Howley, Center for Victim Research, Justice Research and Statistics Association; Lindsay Silverberg, The Network for Victim Recovery of DC; Mary Graw Leary, The Victims Advisory Group for the U.S.S.C., and Bridget Stumpf, The Network for Victim Recovery of DC.
[6] Nathan James, Risk and Needs Assessment in the Federal Prison System, CRS R44087, at 4 (July 2018).

tool should consult victims in order to obtain the most accurate of information necessary to assess risk.

2. Since the First Step Act is offense based, circumstances will arise in which violent offenders will become eligible for its benefits. While this is not the intent of the Act, situations will occur where the plea and/or crime of conviction will be qualifying although the specific facts of a case would have precluded the offender from enjoying this benefit. As such, obtaining information from victims regarding the offense is essential.

3. The need to consult with victims in not a whim or a vague request. To the contrary, these demands are grounded in legal rights under the Crime Victim's Rights Act.[7] Of most relevance here are:

   i. The right to be protected from the accused;[8]
   ii. The right to restitution;[9]
   iii. The right to notice of any court or parole proceeding involving the release of an accused;[10]
   iv. The right to be reasonably heard;[11] and
   v. The right the right to be treated with fairness and with respect for the victim's dignity.[12]

.Yet, notwithstanding the existence of these rights, the comments from these victim organizations are not reflected in any meaningful way in the Report. Indeed, in the 93 page report, the word "victim" is only used only 10 times. However, 6 of those merely reference that "victim organizations" gave statements or list the titles of the people who delivered those

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[7] 18 U.S.C. 3771.
[8] 18 U.S.C. 3771(a)(1).
[9] 18 U.S.C. 3771(a)(6).
[10] 18 U.S.C. 3771(a)(2),(4).
[11] 18 U.S.C. 3771(a)(4).
[12] 18 U.S.C. 3771(a)(8). While these are public hearing rights, as the Crime Victim's Rights Act did not contemplate the First Step Act, it is assumed that this body and Bureau of Prisons would honor those rights in determining assessment of the accused.

statements.[13] The Report also uses the word in the biographical information of the only IRC

member who appeared to have any experience with victims[14] and in one footnote.[15]

Despite the consistent and overlapping points made by all the victim organizations who

testified, the body of the report mentions victims only twice. Once is with regard to a

defendant's "willingness to pay restitution."[16] Regrettably, the entire summary of the comments

of all the victim groups who spoke is as follows: "some participants emphasized the need to take

account of the harms suffered by crime victims."[17] This does not do justice to the information

given to the Department at the listening sessions.

Consequently, I will use my time to repeat some of the aforementioned points and make

additional ones in light of the Report.

Victims Must Have Input Into the Assessment

PATTERN itself lists as factors to consider in risk assessment a history of violence, a

history of escapes, and whether the instant offense is violent.[18] Given that more than half of the

violent victimization in the Criminal Victimization report were committed by people known to

the victims,[19] victims could be a tremendous source for this information. Yet, nowhere in the

Report is there a requirement that victims be a source for this data. Indeed, in the list of sources

for assessment information, victims are excluded.[20]

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[13] The Report at 15-16.
[14] Id. at 10.
[15] Id. at 73, note 7.
[16] Id. at 45.
[17] Id. at 16.
[18] Id at 45, 48, 56.
[19] 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. 10-May-19).
[20] The Report at 75.

Additionally, the touchstone for eligibility continues to be the "crime of conviction." While limiting culpability based on that may make sense for punishment purposes during an initial sentencing, in terms of assessing risk, the Congressional Research Service noted that understanding the facts of the criminal event itself is essential.[21] Relying upon police reports or simply a conviction is inadequate – particularly with over 97% of convictions resulting not from a trial, but a guilty plea.[22] Through these pleas, charges will be dropped and any assessment which measures the criminal event solely on crime of conviction will undoubtedly be inaccurate. The result of such a system is that a defendant who actually committed a disqualifying offense will benefit due to a plea. Therefore, it is essential that the actual facts of the offense be known to those assessing risk, not simply the charge on which an offender is convicted.

The V.A.G. recognizes the difficulty in obtaining this information for a review hearing. However, the V.A.G. recommends obtaining the information during a critical point of information gathering: either (1) the initial assessment or (2) re-assessment. The VAG notes on page 75 of the Report a suggestion that the U.S. Probation Office supplement the Pre-Sentence Reports (PSR) with more detailed information about a defendant's learning needs. We urge this supplement to not be limited to obtaining more information about an offender's needs. Rather, we suggest it be supplemented with an in depth interview of the victim about the details of the offense and any other information regarding the offender for the purpose of an assessment of risk.

Similarly, page 72 references accepting information from the United States Attorney's Office (U.S.A.O.), but only information about the offender. We suggest perhaps mandatory information

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[21] Nathan James, Risk and Needs Assessment in the Federal Prison System, CRS R44087, at 4 (July 2018)
[22] Overview of Federal Criminal Cases Fiscal Year 2017, U.S.S.C., at 4 (June 2018).

about the offense and offender from the victim or other witnesses familiar with the offender be

obtained by U.S.A.O. and be part of paperwork sent with the offender to the prison. Police

reports and defendant's self-serving descriptions alone are inadequate to assess risk. Therefore,

a comprehensive interview of the victim for the purpose of assessing risk must be done and

should be assembled at the time of the resolution of the case when the victim's whereabouts are

ascertainable and he is involved with the system.

Participation in prison programs

Among the dynamic factors utilized in the tool, PATTERN includes the offender's

involvement in prison programs. In May we urged this body not to make mere completion of

such programs the only criteria for credit towards early release, as this would become a system

wherein if the "box is checked off" the offender would get the credit whether or not he

meaningfully participated in a program. The Report is ambiguous as to whether this will be the

case. The V.A.G. was pleased to see in some sections of the Report a suggestion that officials

will engage in a substantive evaluation of a prisoner's participation in a program by obtaining

"feedback from program areas."[23] However, other sections of the Report suggest that

"participation" equates with "completion" sufficient to obtain credit, with no standards for

ensuring that completion was meaningful.[24] Furthermore, the discussion of the automation of

these records, causes concern that completion is all that will be recorded. We reiterate that the

system should be executed in such a way that an offender must meaningfully participate in a

prison program in order to earn any decrease of his sentence.[25]

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[23] The Report at 75.
[24] Id. at 45.
[25] Id. at 79.

Restitution

While the V.A.G. was pleased to see willingness to pay restitution as a relevant risk assessment factor, such payment almost seemed permissive at times. For example, the Report states that "an offender's willingness to use income earned during incarceration for payment toward victim restitution and dependents was indicated with the created 'non-compliance with fiscal responsibility' measure."[26] This concern of the VAG is compounded by the reference to restitution in the implementation section of the Report. Here the Report discussed the value of a prison work assignment as follows:

> This requirement confers several benefits to inmates and institutional operations, including development of vocational and pro-social skills, the earning of money to repay criminal fines and victim restitution and purchase desired commissary items, and the reduction of inmate idleness.[27]

Restitution should <u>never</u> be equated with buying items from the commissary. The V.A.G. wishes to underscore that restitution is a court order, not a voluntary act. It is also a right guaranteed by the Crime Victims' Rights Act. A failure to understand that and follow the law or a court order surely is an indicator of a risk to become a recidivists.[28]

Notice

While our discussion is limited to PATTERN itself, mechanisms for release must be addressed. Consistent with the law, victims must have both notice of such changes and an opportunity to be heard.[29]The report notes several new policies and regulations that must be modified or adopted to adjust to the Act. The V.A.G. asks that these policies and regulations

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[26] Id. at 45.
[27] Id. at 91.
[28] 18 U.S.C. 3771(a)(6).
[29] Id.

include the aforementioned steps, particularly surrounding the requirement to obtain victim input and notify victims of any changes in status or release.

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.

NINA J. GINSBERG
President

September 10, 2019

William Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Mr. Attorney General:

The National Association of Criminal Defense Lawyers (NACDL) appreciates this opportunity to present our initial reaction to the release of PATTERN, the Risk and Needs Assessment System developed by the Department of Justice as required under the First Step Act of 2018. NACDL supported passage of the First Step Act because it would reduce sentences for thousands of defendants and prisoners. In addition, NACDL supports systematic, evidence-based practices to reduce our prison population and prepare incarcerated persons to reenter society. Algorithmic decision-making, however, is fallible. Moreover, it is only as good as the data it crunches. And, in the criminal justice context, it reproduces and thus exacerbates racial and socioeconomic disparities that often reflect disparate policing and prosecutorial practices, systematic implicit bias, and limited access to fully resourced defense counsel. These observations drive our concerns about the fairness and predictive accuracy of PATTERN's risk score system. Additionally, NACDL is concerned that the core construct of the tool disproportionately emphasizes youth as an aggravator and fails to give enough weight to demonstrable evidence of rehabilitation.

Criminal History

PATTERN's heavy emphasis on criminal history disproportionately increases the risk scores of the poorest and the people of color in the federal prison population, making it *more difficult* for them to obtain early release. Indeed, most of PATTERN's "static" factors relate to criminal history, and the points assessed for these factors can overwhelm the ameliorating potential of the "dynamic" factors. Because criminal history is often a function of policing practices that historically disadvantage minorities, the weight given to that history perpetuates disparate impact.

For example, consider a typical drug offender, one of 47% of the BOP's prisoners, and more likely than not, a person of color and/or from a low socioeconomic background.

- If he was convicted of a crime - even a misdemeanor - before he was 18 years old, PATTERN assigns him **12 points**.
- Assuming, conservatively, just one felony conviction for a street-level drug sale a few years later, he is likely in Criminal History Category III under the Sentencing Guidelines, yielding an additional **12 points** under PATTERN.
- If he is then convicted in his late 20s of a federal drug offense (even as a minor, non-violent participant), he gets an additional **24 points** during his initial assessment upon entry into the BOP system.
- As a drug offender, he was likely remanded upon conviction (if he had ever been granted bail in the first place), and accordingly, he does not get to reduce his score by 12 points for self-surrender.
- His PATTERN score on static factors upon prison entry totals **48 points**, classifying him as high risk. Had this hypothetical offender sustained another felony drug conviction in his twenties or perpetrated any violence in his past, no matter how remote in time, the PATTERN score can skyrocket further.

As other groups have pointed out, PATTERN's factors replicate structural and racial biases. Extensive research has established that systematic biases operate at all points in the criminal justice process, from arrest decisions to bail determinations to the ultimate disposition of the case. Racial and socioeconomic factors, including the cognitive biases of law enforcement professionals and lack of access to adequately resourced defense counsel, play pivotal roles in whether an individual is arrested, charged, charged with a misdemeanor or a felony, granted bail, offered diversion, sentenced to probation or prison, revoked on probation, etc. So even if PATTERN's predictive validity is confirmed, its potential to replicate and exacerbate inequities conflicts with the admonition in the First Step Act to avoid unwarranted disparities.

Disproportionate Emphasis on Youth at Time of First Conviction

The heavy scoring for age, with the assessment of 12 points for **any** conviction prior to the age of 18, regardless of the nature of the offense or the passage of time before a subsequent conviction, disproportionately penalizes youthful mistakes, without any showing of a nexus to current risk. At a minimum this factor should be significantly discounted or eliminated if there

has been a significant interval without further convictions. In calculating criminal history scores, the Federal Sentencing Guidelines exclude convictions that occurred beyond certain time frames (either 10 or 15 years, depending on seriousness).

Additionally, the current construct fails to adequately take into account the emerging recognition in the developmental sciences that brain development and the accompanying maturity continues until an individual is in their mid-20s. Under the current iteration, a first offender who is under 18 would start off with 42 points (12 for age at time of conviction + 30 for age at time of assessment), even though the individual has never been imprisoned before and their unlawful conduct may have been an aberration.

Inadequate Recognition of Evidence of Rehabilitation

Given the First Step Act's emphasis on factors "that can reasonably be expected to change in prison" and mandate that "all prisoners at each risk level have a meaningful opportunity to reduce their classification," NACDL does not think PATTERN strikes the right balance between static and dynamic factors. As compared to the static factors, PATTERN's dynamic factors adjust the risk score downwards far less generously. A prisoner can receive a 12-points reduction for programming, but this assumes program availability, an assumption belied by the shortage of BOP's program offerings. (Notably, PATTERN provides no allowance for prisoners with disabilities, who may not be capable of participating in available programming). Remarkably, a prisoner only receives a six-point reduction for completing the BOP's flagship nine-month residential drug treatment program, and a mere one-point reduction for completing a technical or vocational course. Male prisoners get no points off for working in UNICOR and no prisoner gets a reduction for doing any other kind of work, such as unit orderly or food service. For all inmates, irrespective of gender, a solid work history is a factor that should be given substantial weight.

More generally, consideration should be given to the range of in-prison indicators of progress that might be utilized to assess risk. As noted above, two criteria that could be made much more robust are technical/vocational courses and employment. Davis, Lois M., Robert Bozick, et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND Corporation (2013). NACDL urges the DOJ

to increase the weight given to these factors and to consider incorporating related criteria (e.g., length of steady employment, performance, etc.).

Undue Weight to Infractions

NACDL has serious concerns about the relative weight of infractions and the failure to distinguish older infractions. While PATTERN does separate run-of-the-mill infractions from serious of violent infractions, NACDL notes that the former category includes actions that are trivial, stem from misunderstandings, or manifest other mitigating circumstances. Assuming these incidents have any predictive value for risk-assessment purposes, NACDL believes the level of increase is excessive. In the First Step Act, Congress specifically limited the consequences of rule violations and required that prisoners be allowed to restore credits lost due to such conduct. PATTERN's treatment of infractions runs counter to this more measured approach.

Under PATTERN scoring, the first minor infraction negates one completed program, and successive infractions increasingly outweigh additional program participation. It is the rare prisoner who does not sustain at least two infractions during his experience of incarceration, especially in the early years of a lengthy sentence. DOJ should not only reconsider these levels but also provide some additional benefit for prisoners who go extended periods without any infractions, thereby adding a much-needed dynamic factor to the instrument. Indeed, after the passage of some time period, remote infractions should not result in any point assessment.

Transparency

Finally, NACDL cannot assess, based on the limited information in the DOJ report, whether PATTERN "has a high level of predictive performance," as the DOJ report attests, or whether it is based on flawed assumptions or flawed data. It is imperative that the full dataset underlying PATTERN be released so it can be independently analyzed to determine its false positive and negative rates and its predictive value. Relatedly, DOJ must publicly disclose the definitions used to determine the applicability of risk factors (e.g., "serious" and "violent").

The concerns outlined above place even greater weight on the DOJ's expeditious development of "evidence-based recidivism reduction programs or productive activities." Access to

programming is key to unlocking the benefits of the First Step Act. NACDL also urges DOJ to take an expansive approach to what constitutes "evidence-based recidivism reduction programs or productive activities." This is even more necessary when applying PATTERN to the current population, as these prisoners did not have the benefit of conforming their prison lives to take advantage of the new law and policies.

The First Step Act is a meaningful step away from our retributive model of punishment to one based on rehabilitation, one that has generated hope for thousands of prisoners and their families. NACDL commends the DOJ for working expeditiously to meet the deadline for developing PATTERN and urges full transparency and adjustments in keeping with input from stakeholders and impacted communities.

Sincerely,

Nina J. Ginsberg
President

Session September 11, 2019
Day 2

1. Sentencing Resource Counsel Project, Federal Public and Community Defenders – Laura Mate

2. Charles Koch Institute – Jeremiah Mosteller

3. The Leadership Conference on Civil and Human Rights, The Leadership Conference Education Fund – Antoine Albert III

4. Vanderbilt University Law School – Christopher Slobogin

5. FreedomWorks – Sarah Anderson

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Statement of Laura E. Mate
Sentencing Resource Counsel Project, Federal Public and Community Defenders
DOJ First Step Act Listening Session on PATTERN
September 11, 2019

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Thank you for inviting the views of the Federal Public and Community Defenders. My name is Laura Mate, and I am Sentencing Resource Counsel with the Defenders.

The First Step Act provides us with hope that there may someday be an end to this country's mass incarceration crisis. According to a report from the Sentencing Commission last week, Courts have shortened sentences for almost 1,700 individuals, finally providing relief from crack-powder disparities. And the Bureau of Prisons has identified 3,100 individuals eligible for release under the good time fix.

The First Step Act also brings hope with its goal of helping individuals succeed in their communities after they are released from prison. The Act contemplates a risk and needs system will help ensure individual success, by assessing needs, and providing incentives to participate in appropriate programming. It's that system we discuss today in light of the Department's release of PATTERN. We'll focus on three areas: Programming, Transparency and Fairness.

First, programming. Programming is at the crux of the Act's goal of helping individuals succeed in their communities after release from prison. Without adequate programming, the rest is irrelevant. The Department must turn its attention quickly to expanding the programming available in BOP. There is significant evidence that current programs are inadequate to satisfy the congressional mandates in the First Step Act. In addition to reports of long wait-lists to participate in many BOP programs, the Department's study of the developmental sample for PATTERN shows that very few individuals in BOP custody participate in programs of any kind. Approximately half of the developmental sample completed no programs while in BOP custody, and over half received no drug treatment despite indication of need.

Second, transparency. It is critical to the success of the First Step Act that PATTERN not be another black box algorithm. PATTERN will directly affect how much time many of our clients spend in prison. That makes it a high-stakes tool, and means external testing for accuracy and bias is crucial for equity purposes. The Department must release the dataset. Assessment by the developers of the Area Under the Curve is not sufficient. Independent researchers need the data to assess validity and algorithmic fairness using a variety of measures and calculations. For example, it will be important to complete 2x2 contingency tables for each cut-point and by age, gender, race and ethnicity groupings to determine various rates including false negatives and false positives. In addition, more information is needed about the developmental sample, weighting, overrides and a host of definitions and scoring decisions. And since risk assessments are not simply math, more information is needed regarding the various policy decisions inherent in PATTERN, such as the broad definition of recidivism and the selection of cut-points. Indeed, the First Step Act mandates the Department of Justice develop and release publicly the risk and needs assessment system.

Third, fairness. It is critical that this high-stakes risk tool that directly affects how much time many individuals will spend in prison be scrutinized by independent researchers for any unintentional bias across age, gender, race, and ethnicity. Some of the available data raises concerns that the tool may have a racially disparate impact and serve to exacerbate racial disparity in the federal prison population. For example, available data shows that more than half of white males fall in the minimum and low categories, compared with just over a quarter of black males. This matters because these are the categories that are eligible for higher rates of earned time credits and eligibility for supervised release and prerelease custody. More information is needed to assess other measures such as the relative rate index (which is only reported comparing whites to non-whites) and rates of false positives across all race and ethnic groups, including Native Americans.

Our time today is short so we will submit more detailed written comment later this week. In it we will outline much of the additional information necessary for independent researchers to assess the validity and fairness of the tool. Additional information will allow for better feedback from Defenders and other stakeholders, and is essential to securing public confidence in PATTERN. We hope there will be additional opportunities for feedback and discussion after more information has been provided. Thank you.

Verbal Testimony of Jeremiah Mosteller from the Charles Koch Institute
Submitted to the U.S. Department of Justice, Office of Justice Programs, National Institute for Justice
Regarding the Department of Justice's implementation and development of PATTERN risk assessment

Introduction

On behalf of the Charles Koch Institute, I am honored to submit written testimony regarding our views on the implementation of the First Step Act by the Department of Justice and the development of the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN).

We recognize the important and complicated task that the National Institute for Justice has completed by creating the PATTERN risk assessment tool.[i] We would like to thank the members of the Independent Review Committee and consultants Dr. Grant Duwe and Dr. Zachary Hamilton for their commitment and contributions to this process. We also want to thank the Department of Justice for the opportunity to serve as a contributing partner alongside other attendees of these listening sessions.

PATTERN Risk Assessment

The report released by the U.S. Department of Justice in July goes into significant detail about the methodology for the development of PATTERN and efforts to implement the First Step Act.[ii] This report should have a positive, long-term impact on trust in the tool because of the high level of transparency displayed in its content.[iii] In this testimony, I would like to respond to three key points made in this report and provide some additional comments relevant to the future implementation steps still required under the First Step Act.

First, we applaud the determination to distinguish individuals based on their gender by designing separate risk models for both males and females.[iv] This is important because research consistently confirms that women and men have distinctly different risks and needs in our justice system and that they respond differently to currently existing prison programming.[v] By ensuring more of our justice system policies and procedures are gender-responsive we can increase restoration and lower recidivism in our justice system.[vi]

Second, we request that the Bureau of Prisons and the National Institute of Justice strictly adhere to the detailed plans related to re-validation of the PATTERN risk assessment tool.[vii] Long-term trends show that the composition of the federal prison population is significantly impacted by policy decisions made by Congress, the current Presidential Administration, and the Department of Justice itself.[viii] The composition of the federal prison population has changed during only the four years since 2015, the last year of data utilized to build PATTERN.[ix] Constant changes in the federal prison population support the need to re-validate the tool because research from the United States Sentencing Commission confirms that both demographic characteristics, like age, and the crimes for which individuals are incarcerated

have an impact on an individual's likelihood of recidivism.[x] This reassessment of PATTERN should be based on data collected about the federal prison population, outcomes from its use, and the latest research to ensure or improve reliability of the tool.[xi]

Lastly, we strongly recommend that the Department of Justice allow a group of independent, external researchers to analyze the data used to develop the PATTERN and confirm its predictive validity before full implementation by the Bureau of Prisons.[xii] The effectiveness of PATTERN is vitally important to both society at large and the individuals being evaluated by the tool. The practitioners utilizing this tool, those who are incarcerated, and external stakeholders must hold the utmost confidence in the outcomes produced by this tool if it is to be effective. While the report released by the Department of Justice presents positive results from the analysis completed by Dr. Duwe and Dr. Hamilton, independent replication of these results could significantly improve the confidence of relevant stakeholders in the tool.[xiii]

Implementation

The next step in implementing the First Step Act will require the Bureau of Prisons to properly implement PATTERN and utilize it in adherence with best practices. We are encouraged that the National Institute of Justice has selected Dr. Angela Hawken to serve as a consultant and want to thank Dr. Hawken for her commitment to work alongside the Department of Justice to improve the federal criminal justice system.

Recent research from a variety of jurisdictions displays the danger of improper implementation of risk assessment tools in our justice system and how a failure to properly implement such tools can result in outcomes contrary to those envisioned during its adoption.[xiv] To achieve the results Congress intended, the Bureau of Prisons must be vigilant to ensure that all staff are properly trained and understand the operational details of the tool.[xv] Doing so will help alleviate any concerns users of PATTERN have about the tool itself and ensure they are properly and uniformly utilizing it as intended.

Conclusion

The U.S. Department of Justice has been tasked by Congress to develop entirely new risk and needs assessments for the federal prison system and implement new policies that will provide incentives for individuals who complete programming that will position them for success upon reentry. We respectfully ask the Department of Justice, the National Institute for Justice, and the Bureau of Prisons to thoughtfully consider the perspectives of the various stakeholders convened for these listening sessions and implement reasonable feedback in their efforts to implement the First Step Act. If implemented properly, the policies contained in this legislation can help victims achieve restoration, ensure respect for human dignity in federal prisons, and increase public safety in our communities.

[i] 18 USC § 3632 (2019).

[ii] Office of the Attorney General, *The First Step Act of 2018: Risk and Needs Assessment System*, U.S. Department of Justice (2019), https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system.pdf.

[iii] Brandon Garrett, *supra* note **Error! Bookmark not defined.**; 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.

[iv] Office of the Attorney General, *supra* note ii.

[v] Vivienne de Vogel, et al., *Gender-Sensitive Violence Risk Assessment: Predictive Validity of Six Tools in Female Forensic Psychiatric Patients*, 46 Crim. Just. Behav. 528 (January 2019); Preeta Saxena, et al., *Who Benefits From Gender-Responsive Treatment?: Accounting for Abuse History on Longitudinal Outcomes for Women in Prison*, 41 Crim. Just. Behav. 417 (January 2014); Tim Brennan, et al., *Women's Pathways to Serious and Habitual Crime: A Person-Centered Analysis Incorporating Gender Responsive Factors*, Crim. Just. Behav. 1481 (November 2012); Emily M. Wright, et al., *Gender-Responsive Lessons Learned and Policy Implications for Women in Prison: A Review*, 39 Crim. Just. Behav. 1612 (September 2012); Nena Messina, et al., *A randomized experimental study of gender-responsive substance abuse treatment for women in prison*, 38 J. Substance Abuse Treatment 97 (March 2010); Patricia Van Voorhis, et al., *Women's Risk Factors and Their Contributions to Existing Risk/Needs Assessment: The Current Status of a Gender-Responsive Supplement*, 37 Crim. Just. Behav. 261 (February 2010); Emily M. Wright, *Predicting the Prison Misconducts of Women Offenders: The Importance of Gender-Responsive Needs*, 23 J. Contemp. Crim. Just. 310 (November 2007); Kristy Holtfreter & Rhonda Cupp, *Gender and Risk Assessment: The Empirical Status of the LSI-R for Women,* 23 J. Contemp. Crim. Just. 363 (November 2007); Kaitlyn Wardrop, et al., *Developing a risk/need assessment tool for women offenders: a gender-informed approach*, emerald insight (*forthcoming in Jounral of Criminological Research, Policy, and Practice*, 2019), available at https://www.emerald.com/insight/content/doi/10.1108/JCRPP-03-2019-0017/full/html; Patricia Van Voorhis, et al., *Achieving Accurate Pictures of Risk and Identifying Gender Responsive Needs: Two New Assessments for Women Offenders*, National Institute of Corrections (January 2008), https://s3.amazonaws.com/static.nicic.gov/Library/022844.pdf.

[vi] Wright, *supra* note v; Messina, *supra* note v; *See also* Gale D. White, *Gender-Responsive Programs in U.S. Prisons: Implications for Change*, 27 Soc. Work Pub. Health 283 (April 2012).

[vii] Office of the Attorney General, *supra* note ii at 84-85.

[viii] *See e.g.* Mark Motivans*, Immigration, Citizenship, and the Federal Justice System, 1998-2018*, Bureau of Justice Statistics (August 2019), https://www.bjs.gov/content/pub/pdf/icfjs9818.pdf (95% of the increase in federal arrest during the past 20 years have been due to immigration offenses); Office of the Inspector General, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons*, U.S. Department of Justice (February 2016), https://oig.justice.gov/reports/2015/e1505.pdf (Inmates aged 50 or older are the fastest growing population in BOP-managed prison institutions).

[ix] Analysis of Bureau of Justice Statistics (BJS) and Bureau of Prisons (BOP) data by authors reveals that both some of the demographic characteristics and the types of crimes individuals have been convicted of has changed significantly between the 2015 data provided by BJS and the current data provided by the BOP. *See* E. Ann Carson & Elizabeth Anderson, *Prisoners In 2015*, Bureau of Justice Statistics (December 2016), https://www.bjs.gov/content/pub/pdf/p15.pdf; Federal Bureau of Prisons, *Population Statistics*, Federal Bureau of Prisons (September 2019), https://www.bop.gov/about/statistics/population_statistics.jsp; Federal Bureau of Prisons, *Inmate Ethnicity*, Federal Bureau of Prisons (August 2019), https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp; Federal Bureau of Prisons, *Inmate Gender*, Federal Bureau of Prisons (August 2019), https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp; Federal Bureau of Prisons, *Offenses*, Federal Bureau of Prisons (August 2019), https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp; Federal Bureau of Prisons, *Inmate Race*, Federal Bureau of Prisons (August 2019), https://www.bop.gov/about/statistics/statistics_inmate_race.jsp.

[x] Matthew J. Iaconetti, et al., *Recidivism Among Federal Firearms Offenders*, United States Sentencing Commission (June 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190627_Recidivism_Firearms.pdf; Kim Steven Hunt, et al., *Recidivism Among Federal Violent Offenders*, United States Sentencing Commission (January 2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/20190124_Recidivism_Violence.pdf; Kim Steven Hunt & Billy Easley II, *The Effects of Aging on Recidivism Among Federal Offenders*, United States Sentencing Commission (December 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171207_Recidivism-Age.pdf; Tracey Kyckelhahn & Trishia Cooper, *The Past Predicts the Future: Criminal History and Recidivism of Federal Offenders*, United States Sentencing Commission (March 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170309_Recidivism-CH.pdf; Louis Reedt, et al., *Recidivism Among Federal Drug Trafficking Offenders*, United States Sentencing Commission (February 2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170221_Recidivism-Drugs.pdf; Kim Steven Hunt & Robert Dumville, *Recidivism Among Federal Offenders: A Comprehensive Overview*, United States Sentencing Commission (March 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf; *See also* Mariel Alper & Matthew R. Durose, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)*, Bureau of Justice Statistics (May 2019), https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf; Mariel Alper, et al., 2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014). Bureau of Justice Statistics (May 2018), https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf.

[xi] MODEL PENAL CODE: § 6B.09(1) (AM. LAW INST., Proposed Final Draft 2017); 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; 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; *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.

[xii] A lack of independent, external validation is one of the biggest criticisms of many risk assessments currently used in local, state, and federal justice agencies. *See* Partnership on AI, *Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System*, Partnership on AI (2019), https://www.partnershiponai.org/report-on-machine-learning-in-risk-assessment-tools-in-the-u-s-criminal-justice-system/; Sarah L. Desmarais & Jay P. Singh, *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States*, Council of State Governments Justice Center (March 2013), https://csgjusticecenter.org/wp-content/uploads/2014/07/Risk-Assessment-Instruments-Validated-and-Implemented-in-Correctional-Settings-in-the-United-States.pdf; S*ee also* The Leadership Conference on Civil and Human Rights, *The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns*, The Leadership Conference on Civil and Human Rights (July 2018), http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf.

[xiii] Best practices in fields such as medicine and public health require an independent, external validation that replicate the results found in the initial design evaluation. *See* Seena Fazel & Achim Wolf, *Selecting a risk assessment tool to use in practice: a 10-point guide*, 21 Evidence-Based Mental Health 41 (2018); C.M. Oliver, et al., *Risk assessment tools validated for patients undergoing emergency laparotomy: a systematic review*, 115 Brit. J. Anesthesia 849 (December 2015); *See e.g.* Qianqian Luo, et al., *External validation of a prediction tool to estimate the risk of human immunodeficiency virus infection amongst men who have sex with men*, 98 Med. 1 (July 2019); Katya Masconi, et al., *Independent external validation and comparison of prevalent diabetes risk prediction models in a mixed-ancestry population of South Africa*, 7 Diabetology Metabolic Syndrome 1 (2015).

[xiv] Megan Stevenson, *Assessing Risk Assessment in Action*, 103 Minn. L. Rev. 303 (2018); Brandon L. Garrett & John Monahan, *Judging Risk*, 108 Cal. L. Rev. ___ (forthcoming 2019, working paper on file with SSRN), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3190403.

[xv] Vincent, *supra* note xi; Casey, *supra* note xi (2014); Casey, *supra* note xi (2011).

Good morning Dr. Muhlhausen, Deputy Attorney General Bacon, Bureau of Prisons Directors Sawyer and Hurwitz, and fellow program participants. I am Antoine Prince Albert III from both The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations working to build an America as good as its ideals, and our sister organization, The Leadership Conference Education Fund. We filed joint comments before this session and share many of the same concerns as the American Bar Association and NACDL.

Pervasive, unequal treatment of people of color and people of modest means undermines our democracy's founding promise of equality under the law. In our correspondence with Congress leading up to the passage of the FIRST STEP Act, we criticized the bill for "using risk assessment tools in an unconventional manner [because they] are unreliable and exacerbate racial and socioeconomic disparities."[1] We predicted that the law's risk assessment provisions would result in incarcerated people being unable to decrease their risk category in order to earn credits toward early release.[2] After its passage, we see our fears coming true. Now, we urge the National Institute of Justice, the Federal Bureau of Prisons, and the Department of Justice, to acknowledge and correct the racial and gender biases in the Prisoner Assessment Tool Targeting Estimated Risk and Needs– better known by its acronym "PATTERN." Ultimately, we request that the agencies adjust the _risk score system_ and secure _independent expert validation_ before using PATTERN to assess anyone in federal prison. Until the scoring adjustment and the validation are completed, we ask the Department of Justice to suspend the use of PATTERN until it adequately addresses the following 5 concerns:

First, PATTERN's origin in the Bureau Risk and Verification Observation - Recidivism tool ("BRAVO-R") merits more explanation and more transparency. Although the NIJ report references BRAVO-R as the legacy system upon which PATTERN was made, remarkably little information is publicly available about the development, effectiveness, or accuracy of BRAVO-R. A full evaluation of PATTERN and the process by which it was developed demands far greater transparency regarding the tools that led to it. The absence of such information frustrates efforts to properly evaluate PATTERN, raising significant questions about its utility.[3] More can and must be done to make PATTERN's design, architecture, and training data open to independent research, review, testing, and validation.[4]

Second, the claim that PATTERN achieves a "high level of predictive performance" in forecasting recidivism suffers from two overlapping problems. The first problem is that PATTERN is over-reliant on mere arrest data, and does not consider whether or not the arrest led to a negative disposition for the person arrested. In other words, PATTERN assumes that an arrest itself is proof of a crime without any Due Process. The second problem with the NIJ's assertion is that the main evidence for the claim that "PATTERN achieves a high level of predictive performance" appears to be statistical scores from the Area Under the Curve (or AUC).[5] Only reporting AUC scores does not suffice as evidence of predictive utility because it does not capture how well a risk assessment tool's predictions accord with actual observed risk.[6] Hence, these algorithmic programming assumptions do not achieve fair and equitable results grounded in truth.

Third, NIJ's assertion that "PATTERN. . . makes greater use of "dynamic factors" is misleading at best, and several factors deserve more scrutiny. The fact of the matter is, in PATTERN, the static factors always outweigh the dynamic factors, which directly contravenes the intent of the statutory text in the FIRST STEP Act. So, touting greater weight to dynamic factors is misleadingly overpromised to lower recidivism scores. In our comments we include an example of how an incarcerated person's sustained behavioral improvement and rehabilitative programming will not improve their standing for early release. Our example is similar to the example given by Mr. Reimer. Despite their best efforts to lower their recidivism score and reintegrate into society, the static factors will consistently outweigh any subsequent progress. The heavy weight of static factors discourages incarcerated persons from participating in rehabilitation programs because their efforts ultimately will have negligible impact on their eligibility for release.

The definitions and calculations of some dynamic factors should be scrutinized, like the "non-compliance with financial responsibility" factor and the "number of technical or vocational courses" factor due to vagueness and opaque application. Our comments highlight a ubiquitous example of women being routinely forced to choose between paying restitution or purchasing hygiene products. Yes, while BOP changed its policy in August 2017 to offer these products to women for free,[7] PATTERN's "non-compliance with financial responsibility" dynamic variable was developed on and based on historical data — when incarcerated women were required to pay exorbitant rates for basic menstrual hygiene products. PATTERN _risks_ continuing to penalize those who

may have otherwise directed earned income toward victim restitution and dependents, but instead choose necessary hygiene products.

Our concerns about the dynamic factor considering rehabilitative programming are compounded when we consider the limited availability of rehabilitative programming in the Bureau of Prisons. None of the Bureau's 102 federal detention facilities offers all 17 rehabilitative programs.[8] For example, the waiting list for the BOP's literacy program is 16,000 people.[9] The process of awarding program placement to people in prison is opaque, infused with too much discretion, and hampered by limitations on program availability to make participation a reliable measure of one's fitness for release.[10]

Fourth, NIJ's claim that PATTERN's "predictive performance is unbiased across racial and ethnic classifications" ignores historical and enduring patterns of racial bias and discrimination that infect the data upon which PATTERN relies. In truth, the NIJ's claim that PATTERN is "unbiased across racial and ethnic classifications" is dependent on a constrained definition of racial bias as a statistical matter. We encourage the NIJ to consult with computer scientists and data scientists working on fairness, accountability, and transparency and to adopt their recommendations for equitable outcomes. Without addressing this problem, the Department should not move forward with implementing PATTERN.

Our fifth and final concern evokes serious constitutional questions around the creation of separate risk assessment algorithms for men and women. In *Craig v. Boren*, the U.S. Supreme Court held that it has *"consistently rejected the use of sex as a decision-making factor even though the statutes in question certainly rested on . . . predictive empirical relationship[s]")*.[11] We urge the NIJ to abandon gendered risk assessment models altogether because we believe they are unconstitutional.

We, The Leadership Conference and Education Fund, look forward to hearing from you and working with you on realizing the true promise of the FIRST STEP Act.

Thank you.

[1] The Leadership Conference on Civil & Human Rights, *Vote "No" on The FIRST STEP Act*, May 8, 2018, https://civilrights.org/resource/vote-no-first-step-act/.

[2] *Id.*

[3] Matt Shipman, Research Finds Offender Risk Assessment Tools in U.S. Are Promising, but Questions Remain, North Carolina State University (Jun. 2016), https://news.ncsu.edu/2016/06/offender-risk-assessments-2016/. Sarah L. Desmarais and Kiersten L. Johnson, North Carolina State University; Jay P. Singh, Global Institute of Forensic Research, Performance of Recidivism Risk Assessment Instruments in U.S. Correctional Settings".

[4] Partnership on AI, *Report on Algorithmic Risk Assessment Tools in the U.S. Criminal Justice System*, at 29. ("the training datasets, architectures, algorithms, and models of all tools under consideration for deployment must be made broadly available to all interested research communities— such as those from statistics, computer science, social science, public policy, law, and criminology, so that they are able to evaluate them before and after deployment.")

[5] (Noting that the report "[r]el[ies] on the AUC as the primary metric for evaluating predictive validity…") at 50.

[6] Jay P. Singh, Predictive Validity Performance Indicators in Violence Risk Assessment: A Methodological Primer, Behav. Sci. Law 31: 8–22 (2013).

[7] Federal Bureau of Prisons, Operations Memorandum, "Provision of Feminine Hygiene Products," August 1, 2017, https://www.bop.gov/policy/om/001_2017.pdf

[8] *See id.* (listing the limited number of facilities at which particular programs are available).

[9] FY 2019 Performance Budget: Congressional Submission, United States Department of Justice Federal Prison System, available at: https://www.justice.gov/jmd/page/file/1034421/download

[10] *See, e.g.,* Federal Bureau of Prisons, Federal Bureau of Prisons Education Program Assessment: Final Report 22 (Nov. 29, 2016) at 39 (finding with regard to BOP's English-as-a-Second Language Program that "[t]he Admissions and Orientation interview is not a formal, standardized instrument or protocol" and that "[t]t is unclear how the interviewer determines an inmate's English proficiency").

[11] *See* Craig v. Boren, 429 U.S. 190, 202 (1976) (noting that the Supreme Court has "consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on . . . predictive empirical relationship[s]").

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September 12, 2019

David Muhlhausen
Director, National Institute of Justice

Dear Dr. Muhlhausen,

     I am a chaired professor at Vanderbilt University Law School, a member of the American Bar Association's Risk Assessment Task Force, and Director of a program at Vanderbilt, partially funded by the Koch Foundation, that studies sentencing. I thank you for this opportunity to provide this written version of the remarks I made on September 11, 2019, regarding the First Step Act of 2018 Risk and Needs Assessment System, or PATTERN.

     I have two general comments. First, along with the other presenters on September 11, I want to emphasize the need for more transparency with respect to the research underlying the PATTERN. The developers of most well-known risk assessment instruments—instruments like the Violence Risk Appraisal Guide, the HCR-20, and the Legal Services Inventory—have made available their underlying data, which was then cross-checked statistically and evaluated with respect to construct validity, ease of application and various other factors; this evaluation, in turn, led to modifications and corrections (as indicated by the fact that all of these instruments are now in their second or third iteration). Yet this peer review process is not possible with the PATTERN, because neither the data nor the regression analysis underlying that instrument or its predicate, the BRAVO, has been provided. This kind of evaluation is crucial. If the developers misinterpreted the raw data, modeled their regressions improperly, or failed to take into account certain variables (such as the time since the last criminal act or, as referenced further below, the precise nature of that act), the dispositions of tens of thousands of federal prisoners could be negatively affected.

     My other comment is about the outcome measure the PATTERN is designed to predict.   Ideally, a risk assessment instrument should be specific about four factors: the probability P, that behavior X, will occur during time period Y, unless intervention Z takes place. See Christopher Slobogin, Principles of Risk Assessment, 15 Ohio St. J. Crim. L. 583-593 (2018), available at ssrn.com/abstract=3131027. The report describing how the PATTERN was developed is obscure about how it arrived at its conclusions concerning three of these four issues. The report is clear about the third fact: the PATTERN is meant to assess the risk of recidivism within a three-year window, and this follow-up period is not an unreasonable one given the data showing that most recidivism occurs within two or three years of release. However, the report is not clear about the rationale for the first, probability variable: why are the high, medium, and low risk cut-scores in the PATTERN set relative to the population sample rather than the absolute probability of recidivism? The PATTERN's method of setting cut scores means that individuals with a 12% probability of committing a violent crime are considered medium risk (see p. 51

of the report). A probability level that low is, at best, only justifiable if "violent crime" is defined narrowly.

That raises a concern about the second factor that is important in defining recidivism—the type of behavior being predicted. The PATTERN distinguishes between violent recidivism and general recidivism, and assigns many more points to a history of violent crime than non-violent crime; thus the definition of violence is very important. But nowhere does the report define "violence." A simple assault, which often results in no jail time, is quite different from a rape, robbery or murder, and should not count as a violent crime either for the purpose of scoring or as an outcome measure. Similarly, "general" recidivism is defined as any arrest or return to the Bureau of Prisons. Does that mean that an arrest for *any* misdemeanor and detention for *any* parole violation would count as recidivism? Given the trivial nature of many of these offenses, and the strong possibility of their arbitrary enforcement, a broad definition of general recidivism is very problematic.

So while the PATTERN's prediction period of 3 years is explicable, the PATTERN is unclear both about why it defines probability of recidivism the way it does, and how it defines the behavior being predicted. These are significant omissions. Also significant is the lack of clarity with respect to the fourth variable that a good instrument addresses, which is the type of intervention that can reduce the probability of risk. The developers of the PATTERN commendably include a number of dynamic risk factors in the analysis, an effort which is aimed at enabling a prisoner to change his or her risk score by successfully completing substance abuse treatment, vocational training, and the like. However, the PATTERN assigns so little weight to these dynamic risk factors (often in the 0 to -3 points range) and so much weight to criminal history (often well over 10 points) that many medium and high risk prisoners will, as a practical matter, have great difficulty reducing their score. One reason we need to see the data underlying the PATTERN and understand how it defines recidivism is to figure out whether this lopsided treatment of static and dynamic risk factors is really borne out by the data. My guess is that it is not; given the uneven availability and implementation of treatment programs in the federal prison system, the data are not likely to fairly indicate how good rehabilitation programs can reduce risk. If I'm right, dynamic risk factors should be assigned much more weight in the PATTERN than they currently are.

There is much more to say about the PATTERN, but the other presenters covered the most important topics. I emphasize these concerns about how recidivism is conceptualized because they were not raised by other presenters. Thank you for your attention.

Sincerely,

Christopher Slobogin

Statement of Sarah Anderson

Federal Affairs Manager, FreedomWorks

U.S. Department of Justice Listening Session

Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) Listening Session

Wednesday, September 11, 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 you all are well aware, advocacy groups like FreedomWorks and key players in Congress, along with President Trump, are committed to seeing the success of the First Step Act. To better public safety and ensure that the good promised from the First Step Act comes to fruition, it is essential that the process led by you is transparent and open such that stakeholders may offer our input. So again, thank you for that opportunity.

Before getting into the specifics of PATTERN, I want to reemphasize how critical it is for full funding to be given to the Bureau of Prisons to implement the First Step Act. Yesterday, more than a dozen groups sent a letter to the Chairman and Ranking Member of the Senate Subcommittee on Commerce, Justice, Science, and Related Agencies urging just this. The full amount as written in the text of the First Step Act — $75 million annually over the next five years — we understand to be critical to your ability to faithfully implement the law as passed by Congress.

Clearly, as per the report released on the National Institute of Justice website on July 19th, much hard work has already gone into developing the PATTERN assessment. Assurance of funding into the future is necessary to make sure that some of the changes going forward that we believe need to be made to PATTERN are able to be made. Because, unfortunately, PATTERN as currently written evidently fails in a few critical ways to the mission of the First Step Act.

First and foremost, this is the incorporation of dynamic factors into the risk assessment. As stated explicitly three separate times in the text of the First Step Act, it is of utmost importance that the assessment crafted is "based on factors including indicators of progress and of regression, that are dynamic and that can reasonably be expected to change while in prison."

In the July 19th report, it is made clear that the Department of Justice understands that dynamic factors are critical to the assessment. However, we believe that PATTERN mistakenly treats some factors as "dynamic" that, although they can reasonably be expected to change while in prison, are not truly dynamic in nature.

For some, like infraction convictions while incarcerated, this is because they are not treated, under PATTERN, as "indicators of progress and of regression," but only as indicators of the latter. For others, like completed technical and vocational courses or drug treatment, this is because they are simply based on completion, and not based on the potential further needs of a particular inmate. This disables the inmate from being able to further change his or her score on these certain factors, making them effectively static.

This is of particular concern because, while the July 19th report seems to be certain that PATTERN does a sufficient job of incorporating the correct amount and type of dynamic factors into its assessment, it in fact does not, with education level appearing to be the only true dynamic factor included. Therefore, we would recommend that the Department of Justice seek further counsel from existing research, that we would be happy to direct you toward, that identifies more appropriate dynamic factors to be incorporated into PATTERN.

Additionally, the point assignments outlined in PATTERN seem to place too much emphasis on scores from static factors and not enough emphasis on dynamic factors. For example, males and females aged between 18 and 25 years old receive 30 and 15 points respectively simply for the static factor of his or her age. Completing ten or more recidivism reduction programs, however, only enables an inmate to lower his or her score by 12 and 8 points, respectively, through that means, with ten programs being the absolute maximum for which the score can still change. Therefore, we also recommend reworking some of the point weights on various factors, especially as new factors are hopefully incorporated that are more truly dynamic.

Without doing these things, it is unclear how, as stated in the July 19th report, "99 percent of offenders have the ability to become eligible for early release." While that is a bold and many would say laudable number to strive for in terms of how many inmates may be able to benefit from the First Step Act, it is difficult to imagine it true given the way that PATTERN is currently written.

This leads to the next chief concern that FreedomWorks has with PATTERN, which is the lack of emphasis on "needs." Of course, it is intended to be a "risk and needs assessment," as outlined in the First Step Act. Although the July 19th report refers to PATTERN as "risk and needs assessment," there is unfortunately little present in the report that mentions how the unique needs of each inmate will be met with the newly implemented assessment.

Of course, it is apparent that each inmate has certain needs to help him or her succeed in rehabilitation. This should not — and must not — be glossed over. Largely, the July 19th report mentions "risk and needs" often throughout it, but in its explanation of PATTERN, focuses only on the "risk" side of the equation, offering little to nothing on the way in which needs will be assessed.

Throughout the process of the First Step Act being drafted, amended, passed, and signed into law, it was critical to proponents and to those voting for the legislation that each prisoner be able to participate in recidivism reduction programming that fits his or her unique needs. It should be obvious why such a policy is critical to the success of the First Step Act, which is that

programming will only be effective in reducing recidivism — and enhancing public safety — if it is beneficial specifically to that individual.

We at FreedomWorks see these issues to be the most pressing in terms of the immediate state of play regarding PATTERN. There are other concerns including predictive bias and the potential for disparities to be created by PATTERN, but other partners in this space are more intricately interested and able to address those. I have heard them addressed today. Of course, it is also imperative that the Department of Justice continue to see that the other provisions of the First Step Act are carried out as well, from the sentencing reforms in Title IV to the various changes made in Title VI. Fortunately, many of these reforms have already proven successful.

As we expressed during the last listening session held here, "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." This still remains true. We are thankful for the opportunity to continue to offer input on this important issue and hope that the Department will take into consideration the recommendations of FreedomWorks and of our various allies alongside me here today.

September 2019
Session Written Statements
Submitted to NIJ

1. Network for Victim Recovery of DC – Bridgette Stumpf

2. American Conservative Union Foundation – David H. Safavian

3. Deloitte Consulting LLP

4. Gerald G. Gaes, criminal justice consultant

5. The JFA Institute – James Austin

6. American Bar Association – Judy Perry Martinez

7. NCS Pearson, Inc. – Llana Williams

8. Brandon L. Garrett and Megan T. Stevenson

September 13, 2019

In re: The First Step Act

To the U.S. Department of Justice:

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 restorative and holistic lens.

NVRDC has participated in two of the First Step Act listening sessions, and has previously submitted a written statement to the National Institute of Justice about its concerns regarding the law's implementation. As was expressed by other victim advocates in the September 10, 2019, listening session, we are gravely disappointed by the absence of any substantive mention or consideration of crime victims and their rights in the First Step Act report that was published by the U.S. Department of Justice in July of 2019.

While we are tremendously appreciative of the collaborative efforts made across agencies to improve the criminal justice system, we have noticed the continued absence of the consideration of crime victims, even despite laws requiring such consideration. The crime victims and advocates that have participated in the listening sessions seem to all share similar concerns about the First Step Act's implementation and the development of the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN). Our concerns can be summarized as follows:

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 if 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).

While we feel strongly about the policy reasons supporting crime victim inclusion in criminal justice reform efforts, as crime victims' attorneys and advocates, our concerns go beyond our advocacy interests and are rooted in defending the rights that are already afforded to crime victims under federal law.[1] The failure to incorporate crime victims' rights into the First Step Act is to potentially put these laws in conflict, and to unintentionally undermine the advances made in the crime victims' rights movement.

As expressed in our previous submission to the First Step Act's Independent Review Committee,[2] 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. "Justice" does not always mean "incarceration;" however, it should never mean the exclusion of the voice of the individual whose life was forever changed by the commission of a crime.

We thank you for your time and consideration of our concerns. We are available for any questions you may have.

Sincerely,

Bridgette Stumpf

Bridgette Stumpf
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Director of Legal Services
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[1] See Crime Victims' Rights Act 18 U.S.C. § 3771.
[2] Our previous submission is attached for your convenience.

June 13, 2019

First Step Act, Independent Review Committee

To the Committee:

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 restorative 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.[3]

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.[4] 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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[3] 18 U.S.C. § 3771(a)(1)-(4).
[4] §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,

Bridgette Stumpf

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September 12, 2019

The Honorable David Muhlausen
Director, National Institute of Justice
Office of Justice Programs
810 Seventh Street, N.W.
Washington, D.C. 20531

Ms. Kathleen Hawk Sawyer
Director, Bureau of Prisons
United States Department of Justice
301 First Street, N.W.
Washington, D.C. 20534

Ms. Antoinette T. Bacon
Associate Deputy Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
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Mr. Hugh Hurwitz
Assistant Director, Bureau of Prisons
United States Department of Justice
301 First Street, N.W.
Washington, D.C. 20534

Ladies and Gentlemen:

The *American Conservative Union Foundation* ("ACUF") is one of the Nation's oldest grassroots educational organizations. With its origins going back to 1964, ACUF works to educate Americans and advance economic freedom, liberty, and limited government. Six years ago, ACUF launched the Nolan Center for Justice. The Nolan Center focuses on criminal justice reform in general, and policies that advance public safety, government accountability, and human dignity in particular.

Beginning in February 2017, the Nolan Center worked to develop and advance concepts that would ultimately become the *First Step Act*. We were proud to support President Trump, Senate Judiciary Chairman Charles Grassley, Senator Mike Lee, Rep. Doug Collins, and scores of other policymakers in their work to reduce recidivism and improve public safety.

On September 11, 2019, the National Institute of Justice held one of two "listening sessions" dealing with the Prisoner Assessment Tool Targeting Estimated Risk and Needs ("PATTERN"). While we did not provide oral testimony, we would like to address two specific issues that relate to the implementation of PATTERN or some alternative: (1) Use of a prisoner's arrest record as a proxy for his/her criminal history; (2) the need for additional federal data sets to evaluate the predictive value of dynamic risk assessment factors.

Use of Arrest Records to Assess Recidivism Risks

The current iteration of the PATTERN tool relies on arrests as a proxy for criminal history. This is problematic, as arrests "are some of the least procedurally protected instances of contact with the

criminal justice system."[1] Moreover, multiple analyses of arrest data have demonstrated credible claims of disparate impact and systemic racial bias.[2]

To be sure, discussions about race and the criminal justice system have brought about much needed recognition and improvement in recent years. But the issue remains that using historical records of arrests potentially cements in place the impact of biased arrest practices, notwithstanding recent reforms. In short, relying on arrest records rather than convictions prolongs harms committed years – sometimes even decades – ago.

Equally problematic is that the use of arrest records (rather than final case dispositions, *i.e.,* criminal convictions) presumably includes instances where charges against a defendant have been dropped, where the defendant had been found not guilty, or he/she was ultimately exonerated due to post-conviction relief. The number of people each year who have been arrested – but never convicted of the charge for whatever reason – are not insubstantial. Thus, using prior arrests when they do not necessarily correlate with actual criminogenic behavior creates unnecessary hurdles to re-entry for some.

We do recognize that arrest data is cheap and easy to obtain. Indeed, some commentators cite those factors as to why various assessment tools rely on arrest data.

> Tool creators frequently include arrests, charges, and instances of contact with the criminal justice system because they are available. Arrests provide a cheap, easy, and accessible data set for researchers to pull information.[3]

Yet, "cheap" and "easy to obtain" are not sufficient standards when the government is making a risk evaluation that will impact the success or failure of an individual's re-entry into society. The standard should be data "beyond a reasonable doubt" in terms of past behavior. On this point alone, we believe criminal history should be measured by crimes for which an individual has been actually convicted.

The Need for Additional Data Sets to Test the PATTERN Tool

Some have argued that the Department of Justice needs to accumulate additional data from the *federal* criminal justice system to further test the predictive value of so-called dynamic factors. This could delay the full implementation of the *First Step Act* by years.

We concur with the need to test dynamic factors when assessing recidivism risks. However, Texas,[4] Pennsylvania, and a number of other states have been successfully using dynamic factors – along with anti-recidivism programming – to provide greater insight into the risks of an individual re-offending. We strongly urge you to look to these states to analyze the value of dynamic factors in assessing recidivism risks.

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[1] Jessica M. Eaglin, *Constructing Recidivism Risk*, 67 EMORY L.J. 59 (2017), <u>citing</u> Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 779 (2012).

[2] Radley Balko, *There's overwhelming evidence that the criminal-justice system is racist. Here's the proof,* THE WASHINGTON POST*, Sept. 18, 2019 (updated April 10, 2019), found at*: https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof/?noredirect.

[3] See, Eaglin, *supra* at note 247, <u>citing</u> Eisha Jain, *Arrests as Regulation*,67 STAN.L.REV. 809, 818 (2015).

[4] Robert D. Morgan, Ph.D., Daryl G. Kroner, Ph.D., Jeremy F. Mills, Ph.D., *Re-Entry: Dynamic Risk Assessment*, National Criminal Justice Reference Service, Doc. Number 238075, March 2012, found at: https://www.ncjrs.gov/pdffiles1/nij/grants/238075.pdf.

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We anticipate the argument that the offender populations at the state level are starkly different from those in custody by the U.S. Bureau of Prisons. Under this faulty line of reasoning, state data would not provide meaningful insight into recidivism risks of federal offenders.

Because state prisons house more people convicted of *violent* crimes than their federal counterparts, It comes as no surprise that state recidivism rates tend to be higher than those for people coming out of BOP. Thus, if there is any correlation error attributable to the use of state data, it would be *overestimating* recidivism risk, which does not put the public in greater danger.

Of course, we want the most accurate risk assessment tool to be used to implement the *First Step Act*. But given the importance of timely implementation of the law, we caution you on 'letting the perfect be the enemy of the good.' We urge you to use state data to assess dynamic factors now, and then re-assess using federal data in the future.

Conclusion

The importance of recidivism reduction cannot be overstated. Every case of recidivism is another crime, another prosecutor's file, another victim, and often another prison cell. The *First Step Act* was developed to incentivize the hard work of self-improvement that has been proven to reduce recidivism, which is a significant driver of crime. As such, we urge you to complete your work with alacrity. Lives literally depend on it.

It is worth noting that groups on the right (*FreedomWorks* and *Stand Together*), left (*ACLU*, *the Leadership Conference on Civil and Human Rights*, and *#Cut50*), and center (*US Justice Action Network* and *National Association of Criminal Defense Lawyers*) voiced similar concerns about the current iteration of PATTERN. In an era of polarized politics, the fact that these voices are unified underscores the compelling need for changes to the risk assessment tool.

We recognize that implementation is difficult. As such, we applaud your efforts to date. Thank you for holding the listening sessions on September 10th and 11th. More importantly, thank you for the hard work of implementing the *First Step Act*.

Should you have any questions, or if there is a way for the *American Conservative Union Foundation* to assist you in your efforts, please feel free to contact me at: 202-347-9388.

Sincerely,

David H. Safavian
General Counsel

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Written Statement for First Step Act Listening Session
September 10, 2019

Director Muhlhausen,

Thank you for the opportunity to submit this statement for the record on the development and implementation of the Risk and Needs Assessment System component of the First Step Act of 2018.

Deloitte Consulting LLP has worked with the Department of Justice and Bureau of Prisons to complete assessments of educational programming in federal prisons and residential reentry centers (RRCs). In addition, Deloitte has worked with agencies across the criminal justice system, including the U.S. Courts Probation and Pretrial Services Office. Through this work, Deloitte has developed an understanding of the common challenges individuals in the criminal justice system often face in successfully reentering their communities after incarceration.

One conclusion from our RRC assessment was that the resident experience could be made more effective by treating the first day of incarceration through the last day of probation as a single path to reentry. Our recommendations stem from this finding, which is described in more detail in our report: *"To [be able to improve reentry outcomes] requires close coordination between BOP institutions, RRCs, and the U.S. Probation and Pretrial Services to create a more consistent reentry experience that is reinforced at each step. To efficiently provide continuous care, all reentry stakeholders should share critical information on inmates' risks and associated needs. This could be achieved through administering a common risk assessment at key points during incarceration (e.g., each time an individual is transferred) or, at a minimum, ensuring that the assessments used at each step result in common identifiable needs that are shared with downstream stakeholders as individuals move closer to release. With needs identified, the Bureau should ensure those needs feed a reentry planning tool that follows an individual starting at day one at an institution and all the way through probation."*[1]

We focus on two recommendations: 1) use and share information to help strengthen risk and needs assessments and improve individualized programming decisions, and 2) automate the sharing of this information to save time and improve data fidelity.

Early plans for implementation of the First Step Act appear to echo our recommendations as they identify both the need to improve risk and needs assessments to better prepare individuals for reentry, as well as the need for automation to enhance the quality of information sharing. Specifically, NIJ's "The First Step Act of 2018 Risk and Needs Assessment System" report discusses the need for collaboration between BOP and U.S. Courts in determining sources of data for PATTERN and the improvements to the current needs assessment. The report states that *"BOP has held preliminary discussions with the US Probation Office about supplementing the presentence report with more detailed education information about learning needs"*. The report also emphasizes "*the need for automation in implementing the risk and needs assessments to expedite the processing of tasks and to eliminate errors*"[2].

In efforts to improve both PATTERN and the needs assessment, it will be important for the Department of Justice to take a holistic view of current data collected at different points in the criminal justice

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[1] Bureau of Prisons Residential Reentry Centers Assessment, Deloitte Recommendations Report
[2] The First Step Act of 2018: Risk and Needs Assessment System

system and to automate the sharing of this information to make the implementation of the risk and needs assessment as seamless as possible.

Recommendation 1: Use and share information to help strengthen risk and needs assessments and improve individualized programming decisions.

We recommend that both DSCC staff and the Unit Management Team staff use information in the **presentence report** to populate data in PATTERN and the needs assessment. For example, the presentence report includes information on education history, employment history, and criminal history, all of which are important elements in PATTERN and a needs assessment.

The FSA requires BOP to assign inmates to appropriate evidence-based recidivism reduction programs and productive activities based on those risk and needs determinations.[3] To have the most effective programming, BOP should customize the programming plan for each individual, which can be a time-consuming process. By using the presentence report data to pre-populate the needs assessment, the Unit Management Team would not be starting from scratch.

BOP can then pass along the information they have collected through PATTERN and the needs assessment to both RRCs and Probation to help inform decision making, including the completion of the Individualized Programming Plan (IPP) and the Post-Conviction Risk Assessment (PCRA). Additionally, in thinking about measuring outcomes beyond recidivism (e.g., securing employment, housing, etc.), BOP can work with the RRCs and Probation to integrate their data into BOP's validation process to determine the effectiveness of the risk and needs assessments and their programming.

As BOP builds its risk and needs assessments, it will be important to improve or build systems that will allow for this type of data sharing. The below figure provides an example of how information can be shared and used to inform ongoing decisions throughout the criminal justice process.
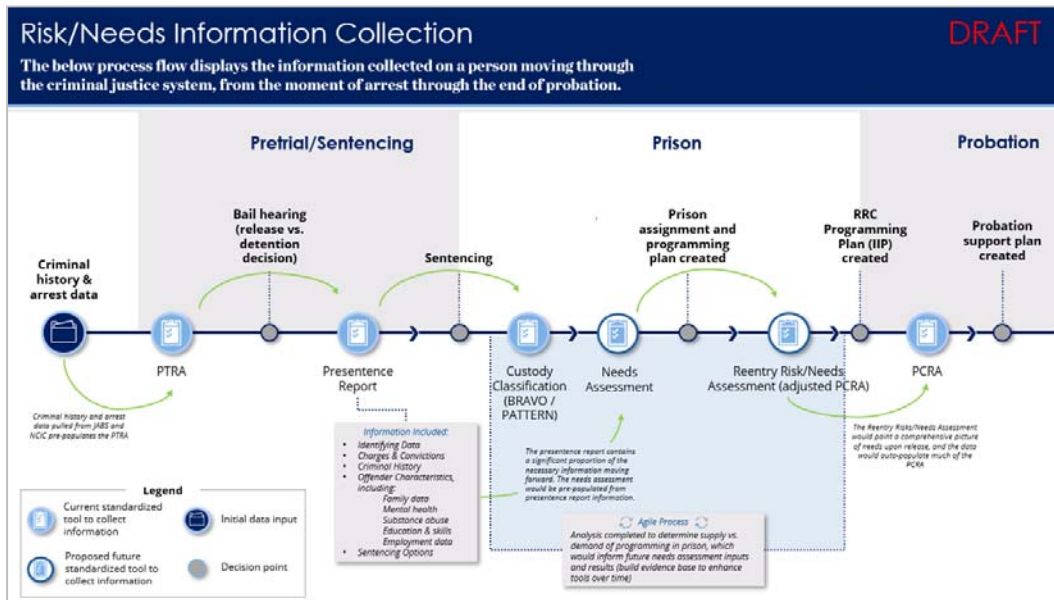
Source: Deloitte Consulting LLP, 2019

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[3] Text of First Step Act

Recommendation 2: Automate the sharing of this information to save time, help improve data fidelity, and increase efficiencies.

Automating the collection and sharing of information can benefit BOP in the implementation of the FSA. First, BOP can pre-populate both PATTERN and the needs assessment with information from the presentence report. Information, such as education history from the presentence report, can automatically feed into PATTERN and the needs assessment so that BOP employees can spend their time on collecting new, dynamic information, rather than focusing their time on data entry of historical information.

Automating the connection between the risk and needs assessment results and the programming plan to generate initial programming recommendations will enable Unit Management Team staff to focus on creating customized plans for each person. In order to do this effectively, BOP will need to first determine an initial alignment of programming to each risk and needs factor. Once these connections are determined, the system can generate an initial set of program recommendations based on the results from PATTERN and the needs assessment. The Unit Management Team staff can use these recommendations as a starting point and, combined with their human judgement, develop a customized programming plan for each individual. Not only will this automation help Unit Management Team staff create individualized plans, it will provide an automated feedback loop to track progress in programs as the risk and needs factors are continuously tracked. This can be designed to flag for BOP staff when certain indicators are falling short, which will enable BOP to track certain benchmarks and course correct quickly if programming is falling short for an individual.

This automated feedback loop will give BOP the opportunity to learn what works in programming and to build evidence over time. This information can then be used to determine if the set of programming for each risk/need is appropriate and if BOP has the most effective set of programs in place. It would also help BOP identify supply and demand: what programs are identified most frequently and what is the capacity to provide those programs? This information is important for BOP to determine how to prioritize resources for new programs and how those programs could be delivered.

Finally, automating the sharing of information between BOP and US Courts will enable Probation and Pretrial Services to automatically pre-populate the PCRA with information from an individual's time in prison and an RRC.

Fully automating the process will enable BOP to more easily process the earned good time credits and other incentives offered for program participation (which will be particularly important for individuals deemed higher risk that are not eligible for earned good time credits under FSA) by pulling in data from several sources.

Conclusion

Through sharing of information, BOP can enhance the ability of both DSCC staff and Unit Management Team staff to create individualized programming plans in an efficient and timely manner. Ensuring that this information continues to be shared throughout a person's contact with the criminal justice system will create a more holistic picture of each individual's reentry needs. Finally, automation will enable a more seamless process of creating programming plans and tracking earned good time credits.

Comments on the Development and Validity of PATTERN

Gerald G. Gaes, Ph. D.

September 9, 2019

I retired from the Bureau of Prisons as Director of Research in August 2002, and have remained active as criminologist, both as Visiting Professor at Florida State University, College of Criminology and Criminal Justice, and as a criminal justice consultant. I am also a member of Her Majesty's Prison and Probation Service (HMPPS) Correctional Services and Advice Panel (CSAAP) that is used to accredit HMPPS programs and review evaluation research.

I have reviewed Chapter 3 of *The First Step Act of 2018: Risk and Needs Assessment.* This contains the crux of the Pattern development. Given the time constraints faced by both the Independent Review Committee (IRC) and PATTERN developers, I applaud their effort. A lot was accomplished in very little time. I do agree that the dynamic factors should encourage inmates to participate in programs and remain misconduct free. However, I suggest an alternative to the assessment of misconduct to make this a more pronounced feature.

In the spirit of constructive criticism, I provide comments and suggestions. I did not find anything that could be construed as a fatal flaw in the PATTERN development. I offer suggestions for potential improvements and clarifications. Each of my criticisms has a "<u>Background</u>" section and then a "<u>Suggestion</u>" section.

<u>Comprehensiveness of Chapter 3 in the Report</u>

<u>Background:</u>

The report is well written, and I realize was partly written for a less technical audience. For an academic criminologist like myself, I think a more technical report is necessary. There is a lot missing from the report. For example, there is no technical discussion of the estimation procedures. There is little discussion of how the weights were translated into a scoring mechanism. There is no discussion of how ensemble methods (boosting, bagging, random forests) might have improved prediction. K-fold validation was discussed, but there is no reporting of those results. I am quite sure the developers are aware of all of these issues but had little time to produce a technical report.

<u>Suggestion:</u>

The PATTERN authors should produce a technical report that could reside on the US Department of Justice (USDOJ) or Bureau of Prisons (BOP) web site as a stand-alone product.

AUC's versus Confusion tables

<u>Background:</u>

The most common accuracy measurement for classification is called area under the curve (AUC). The authors do a credible job of describing AUC's. AUC's can range from 0 to 1 where 0.5 is equivalent to a random prediction. Unfortunately, the AUC is <u>not</u> an intuitive measure of accuracy. Neither does it inform the user/reader of the types of misclassification errors. Berk and colleagues (2018) have advocated using a confusion table. A confusion table provides much more intuition on not only the predictive success of a classification procedure but on the nature of the misclassifications. Table 1 is borrowed from Berk, Heidarai, Jabbari, Kearns, and Roth (2018). The "Truth" rows indicate whether recidivism occurred in some specified time frame, and the Recidivism Prediction columns indicate whether the classification instrument predicted recidivism or no recidivism. This results in four possible combinations of outcomes shown in the table as True positives, False positives, False negatives, and True negatives.

Table 1. Example of a confusion table

	Instrument Prediction		
Truth	Recidivism	No Recidivism	Conditional Procedure Error
Recidivism	a = 600￼ True positives	b = 400￼ False negatives	b/(a+b) = 40%￼ False negative rate
No Recidivism	c = 200￼ False positives	d = 300￼ True negatives	c/(c+d) = 40%￼ False positive rate
Conditional use error	c/(a+c) = 25%￼ Recidivism prediction error	b/(b+d) = 57%￼ No Recidivism prediction error	(c+b)/(a+b+c+d) = 40%￼ Overall procedure error

An AUC is actually a summary of all possible confusion tables at different thresholds for success and failure. But once a threshold is chosen, the confusion table[1] (should be called a clarification table) underscores where classification errors are occurring. So, for the Table 1 example I borrowed from Berk et al., (2018, P. 7), we see that the prediction instrument has a recidivism prediction error of 25%. In other words, the instrument fails 25% of the time in predicting a true recidivist. It has a No-recidivism prediction error of 57%, meaning 57% of the time it does not successfully predict no recidivism. The false negative and positive rates (percentages) for this hypothetical instrument are both 40%. In other words, 40% of the time the instrument incorrectly predicts no recidivism when in fact someone does recidivate and incorrectly predicts recidivism when in fact the person does not recidivate. This table can be generated on the test (validation) data set and later on future recidivism occurrences.

A confusion table provides an overall picture of where the instrument succeeds and where it fails. Policymakers can address additional concerns. Are they more interested in reducing recidivism prediction errors or no-recidivism prediction errors? This can be assessed by adjusting thresholds and inspecting the confusion table. Confusion tables provide much more insight than an AUC.

The BOP or PATTERN developers could develop an overall confusion table using the threshold between low and medium risk. Confusion tables could also be generated for each threshold between minimum and low, low and medium, and medium and high. For example, the confusion table for the medium versus high threshold would show the correct and incorrect prediction of recidivism between people having a medium or lower risk score and those having a high-risk score.

Suggestion:

Produce both AUC's and confusion tables for PATTTERN. This will satisfy scholars who prefer AUC's and help policymakers understand the implications of their choices for thresholds. Unless an instrument perfectly predicts success/failure outcomes, there will be errors.

Prediction of violent versus general recidivism

Background:

In general, PATTERN achieves a very good level of accuracy based on the AUC's and does a proper job of classifying both general and violent recidivism.

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[1] According to Berk et al., (2018), the term confusion table (also confusion matrix) arises from the machine learning literature.

Pattern was designed to predict both general and violent recidivism. According to footnote 15, violence is defined as an arrest for homicide/aggravated assault, weapons/explosives, sexual assault, assault, robbery, or other violent offense. The recidivism proportions after 3 years were 15% for violent and 47% for any general arrest or return. These are the base rate values. Separate prediction models were developed for general and violent recidivism as well as gender categories, so there were four models. Thresholds (cut points) for the four levels of risk were also established separately for violent and general recidivism. For example, the low risk cut point for general recidivism was set at half the base rate for general recidivism – 24%, and at two thirds of the base rate for violent recidivism – 12%. Table 1 which is a compilation of data from the report show the cut points relative to the base rates. The report does not explain the basis for setting the cut points and a confusion table may help in this regard.

Table 2.

	General Risk	Male Threshold General	Violent Risk	Male Threshold Violent	Overall Risk Classification
Minimum	10% = ¼ of BR	10	5% = ⅓ of base rate	21	Min. Violent, Min. general
Low	24% = ½ of BR	33	12% = ⅔ of base rate	35	Low violent, Low General
Medium	24% - 80%	45	12% - 33%	40	Med. Violent, Med. General
High	80% = ⅔ of BR⅔	46+	33% = 2 times the BR	41+	High Violent, High general

** Early release based on achieving a min or low category

Table 5 of the report shows the relation between risk level based on the thresholds in Table 1, the proportions of the samples that fall in these risk levels, and the recidivism proportions for those risk levels. I reproduce that table here as Table 3.

Table 3.

PATTERN RLC	Population	Recid.	Violent Recid.	Recid OR	Violent OR
Minimum	20	9	1		
Low	28	31	6	0.14	0.12
Medium	17	51	13		
High	35	73	30		

Since minimum and low risk offenders can be released early, this shows that based on First Step Act requirements, about 48% of the people will qualify for good time credits advancing their release date. The table also shows that, on average, the medium and high-risk offenders are much more likely to commit violent recidivism and general recidivism. The odds ratios indicate a substantial reduction in the likelihood of recidivism for minimum/low inmates relative to medium/high for both general and violent recidivism.

<u>Suggestion:</u>

After discussion with Bureau of Prisons, Office of Research staff who provided the data for PATTERN development, I was convinced that PATTERN might be simplified without loss of predictive validity.[2] ORE research staff were able to use PATTERN's general and violent recidivism scales to test the predictive validity of violent recidivism. These are shown in Table 4.

Table 4. AUC's for the Prediction of <u>*Violent Recidivism*</u> Using Violent and General Recidivism Scales

	AUC	
Scale	Males	Females
Violent Recidivism	.7674	.7656
General Recidivism	.7647	.7657

There is very little difference between the predictive validity for males or females if the Bureau of Prisons used only the general recidivism score. If this is confirmed with a new validity sample, the BOP could drop the scoring for violent recidivism simplifying the task and reducing the potential burden on staff.

A further analysis was conducted by BOP ORE staff in which they cross tabulated the Violent risk categories with the General risk categories. This was done separately for males and females. I highlighted the 0.00% cells in Table 5 showing the cells where there is no one who qualifies as violent risk when there are people who qualify as general risk.

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[2] My thanks to ORE staff Jason Gwinn, Miles Harer (Director of Research and Evaluation) and Neal Langan for providing this analysis and insight.

Table 5.

Male	Violent Risk Level					
General Risk Level	Minimum	Low	Medium	High	Total	Overall Risk Level*
Minimum	17.75%	**0.00%**	**0.00%**	**0.00%**	17.75%	17.75%
Low	20.96%	3.35%	**0.00%**	**0.00%**	24.31%	24.31%
Medium	5.56%	11.90%	0.14%	**0.00%**	17.60%	17.60%
High	0.35%	22.44%	8.40%	9.15%	40.34%	40.34%
Total	44.62%	37.69%	8.54%	9.15%	100.00%	100.00%

Female	Violent Risk Level					
General Risk Level	Minimum	Low	Medium	High	Total	Overall Risk Level
Minimum	45.23%	**0.00%**	**0.00%**	**0.00%**	45.23%	45.23%
Low	32.77%	0.05%	**0.00%**	**0.00%**	32.82%	32.82%
Medium	14.79%	0.66%	0.02%	**0.00%**	15.47%	15.47%
High	3.24%	2.65%	0.45%	0.15%	6.49%	6.49%
Total	96.03%	3.36%	0.47%	0.15%	100.01%	100.00%

*Overall risk level is equal to either the general risk level or the violent risk level, whichever is highest. This is applied to the FSA early-release decision and to the FSA law more generally.

Table 5 shows that for both males and females, if someone is classified as minimum or low risk based on the general recidivism scores (cut points), they will not be excluded from qualifying for good time credits based on their violent risk score. The violent risk score does not seem to have any implication for good time credits under the current PATTERN scoring. This suggests that the violence scaling is redundant and possibly unnecessary.   PATTERN developers might consider addressing this issue prior to implementation. This does not mean that violent recidivism is not an important dimension, but that once one constructs a valid instrument for general recidivism, it can also be used for violent recidivism. This has some support in the literature by Campbell, French and Gendreau (2007) and by Bonta, Blais, and Wilson (2014) for mentally disordered offenders.

For staff or administrators who are concerned about violent versus general recidivism, once the tool is automated, the algorithm can produce both a violent and general recidivism estimate. These would be predicted probabilities of committing a violent or general recidivism offense within three years. This probability could easily be automated as a by-product of scoring the risk tool. Based on the tables I have shown above, these two risk scores should be highly correlated.

Community supervision level

Background:

Scholars of more sophisticated and methodologically sound classification studies recognize the relationship between classification level and assigned level of supervision (Berk and de Leeuw, 1999; Rhodes, 2011). For example, someone who receives a higher level of prison classification is assigned to a higher level of supervision. So, there is the possibility that the supervision level mitigates the predicted misconduct. There is also the possibility that supervision level exacerbates prison misconduct. For example, someone assigned to a high security prison is surrounded by more aggressive inmates and may have to become more aggressive to reduce threats or extortion from other inmates. As Rhodes argues, the typical method of estimating the predictive validity of an instrument using a training and test sample "… does not estimate the inherent risk posed by an offender to recidivate, but rather, it estimates a combination of inherent risk and correctional response (Rhodes, P. 70)." Rhodes recommends a method that "purges" the control/correctional response from the combined effect of risk and control.

Berk and de Leeuw approached the problem by separately measuring the inherent risk component and the correctional response component. Berk and de Leeuw (1999) used a regression discontinuity design to estimate the impact of the classification score in relationship to the possible suppression effect of placement in a higher security level prison. They found that the highest security level placement suppressed the odds of misconduct by almost 50%, while a change of 10 points in the risk scale was associated with a change in the odds of misconduct of 1.22.

The same correctional response process applies to people released to levels of supervision in the community. Higher risk releasees will be placed under higher levels of community supervision.

Suggestion:

The BOP does not set the risk level for community supervision nor the level of supervision. This is under the control of U. S. Probation and Pre-trial Services. Therefore, in order to implement these more rigorous designs, the BOP and PATTERN developers will have to get cooperation from the U. S. Probation and Pre-trial Services to get the risk and community supervision level data. This is an important enough issue that an effort should be made to get this data and reanalyze PATTERN to account for a potential suppression/correctional response effect.

Concern about revocation returns

Background:

One of the problems associated with using arrests as the measure of recidivism is that if the analyst does not account for censoring due to a return for a revocation, the estimation could be biased. The Chapter 3 discussion of PATTERN indicates that the developers used arrest as the recidivism indicator, but there was no discussion of the possibility of a revocation return removing someone from the risk pool. The BOP ORE staff who provided the data clarified to me that the recidivism measure was an arrest or return for any reason. So, revocation censoring is not an issue.

Suggestion:

In the next version of a PATTERN report, this should be clarified. It will assuage methodologist who may be concerned about competing events.

Felony versus misdemeanor arrests

Background:

I have learned from BOP staff that the Independent Review Committee (IRC) suggested re-analyzing PATTERN using felony arrests rather than any arrest or return. If the developers do that then they must confront the competing risks problem. If a person is arrested for a misdemeanor and returned to prison or they are returned for a community supervision violation prior to the occurrence of a felony arrest, then this "competes" with a felony arrest. Competing events complicate the PATTERN analysis because it requires a survival model in which the competing event is treated as a type of censoring event. While a typical censoring event in survival analysis such as the end of the study period is assumed to be uncorrelated with the study outcome, there is a high probability that there is a correlation between the factors that predict a misdemeanor arrest and a felony arrest. This complicates the analysis further because the correlation cannot be observed, and you need a bounding solution where you observe different values of the outcomes under different assumptions about the correlation between misdemeanor and felony arrests. My colleague Bill Rhodes and I have written a manuscript for the Bureau of Justice Statistics showing a method to address this problem in the context of parole revocation policies, but it has not yet been approved for circulation. I am quite sure that the US

Department of Justice or the BOP does not want more than one classification prediction for an individual under different assumptions about the correlation between the competing events.

Suggestion:

Stay with the current dependent variable. Afterall, even if someone is returned for a violation or misdemeanor, I would want my prediction instrument to take this into account. Perhaps the BOP, or NIJ will sponsor research into competing risks survival models for criminal justice applications in the future.

Typographical Errors and/or Potential Scoring Issues

Background:

There are obvious typographical errors in Chapter 3 of the USDOJ Report. The footnotes in the text indicates number 16 when it should be 15. I checked at least one other footnote and it was misaligned. A close examination of Table 2 in the report which shows how points were assigned also has at least one error. It shows that if the inmate took more than 1 technical or vocational course, he/she would receive 0 risk points, but the inmate who took no courses would get a reduction in risk score points. This has to be inverted. Taking courses should reduce risk.

There are a few other peculiarities. Is it true that men do not receive a risk reduction for their education level, while women do? Furthermore, no points are awarded to men for participating in industrial work opportunities (UNICOR) but points are awarded to women. Is this supported by the prediction model?

Why aren't point reductions given for no misconduct. To make this more dynamic, the instrument can be developed to evaluate the amount of time someone is misconduct free. Similar to the redemption literature (Blumstein and Nakamura, 2009), the more time someone is misconduct free, the less likely they will commit misconduct, and the less likely they will recidivate. I suspect this feature was not evaluated in the PATTERN model.

Suggestion:

Produce an addendum or corrigendum that corrects the errors. Incorporate time without misconduct as a predictor. If people with short sentences are at a disadvantage because the time amount of misconduct free time is shorter than people with longer sentences, analysts can experiment with time free of misconduct based on expected sentence length. As the redemption literature shows, once a

person achieves a threshold of time without a criminal contact, that person looks very much like someone without any criminal contact. I suspect the same is true of prison misconduct.

Gender and Racial/Ethnic Equity

Background:

The approach taken by the PATTERN authors to demonstrate gender and ethnic/racial equality is to compare AUC's for the different subpopulations. Table 7 in the report shows the AUC's for gender and racial/ethnic subgroups are about the same. Therefore, there is parity in the predictive validity. The article I mentioned by Berk, Heidarai, Jabbari, Kearns, and Roth (2018) as a resource for confusion tables is actually a methodology for comparing equity and fairness among different subgroups. The confusion table approach provides insight the AUC's do not. However, the bottom line is that total fairness is hard to achieve unless you have a highly artificial situation.

The confusion table approach allows the analyst to assess whether the false negative and false positive proportions are equivalent for groups such as black versus white. Berk et al provide an example from research on court proceedings. A prediction instrument was used to forecast whether someone will commit a violent crime if they were released pending trial. The instrument was tuned so that both blacks and whites had the same conditional use accuracy. Conditional use accuracy assesses the instrument's prediction of no arrest for a violent crime after release. For whites and blacks this was 93% and 94% respectively. But as Berk shows, even when conditional use accuracy is equivalent, there were tradeoffs. The false negative and false positive rates for blacks and whites under these conditions were very different. The false negative rate for whites was 95%, while for blacks it was 49%. Recall, the false negative rate is the percentage of false negatives (the instrument predicted no recidivism but the person recidivated) out of all of the recidivism events.   False positive rates for blacks was 24% while for whites it was 2%. Recall, the false positive rate is the proportion of false positives (recidivism predicted but no recidivism occurred) out of all the No recidivism events. As Berk et al noted, "The false negative rate is much higher for whites so that violent white offenders are more likely than violent black offenders to be incorrectly classified as nonviolent. The false positive rate is much higher for blacks so that nonviolent black offenders are more likely than nonviolent white offenders to be incorrectly classified as violent (Berk et al, 2018, P. 31)." The example amplifies the tradeoffs one needs to consider when examining parity.

This is a much more meaningful way to compare parity than simply examine AUC's.

Suggestion:

Future evaluations of gender and racial/ethnic parity for PATTERN should use confusion tables in addition to AUC's. One noteworthy finding in Berk et al's., (2018) paper was that the prediction instruments were developed separately for blacks and whites and there were different structural differences in the factors. Berk et al used the random forest ensemble method to make predictions, finding different variables had different influences for blacks and whites. I think PATTERN was developed with logistic regression, but I cannot be sure since there was no technical discussion of methodology. As Berk has shown, ensemble methods are better at prediction if there are substantial nonlinearities between predictors and the outcome.

Re-validation of PATTERN

Background:

Chapter 4 primarily describes the needs assessment process. However, on page 84 there is a discussion of ongoing re-validation of PATTERN. The report indicates that evaluators will use a 1-year rather than 3-year follow-up. The report notes how this is incongruent with the development and validation of the current tool.

Suggestion:

Rather than use a 1-year follow-up, I suggest using a rolling 3-year follow-up. Rather than use the 1-year outcomes for 2016 when they are available, use the 3-year follow-up for releases from 2014, 2015, and 2016. The development sample can also us a rolling framework.

Summary

PATTERN will be an integral part of the BOP's policies and practices. Since it has ramifications for release decisions and gender and race equity, and classification errors have consequences shown in the confusion table, every effort should be made to improves its capability before implementation.

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Comments on First Step Risk and Needs Assessment System

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The JFA Institute

Background

As part of the First Step Act legislation passed by Congress and Signed by President Donald Trump in December 2018, a risk and needs assessment was to be developed and implemented within the Bureau of Prisons (BOP). Such systems should be designed to be applied to people being admitted to a correctional system to a) develop a case plan that will address some of the issues that led to the person's involvement in criminal behavior and 2) address those issues by participating in risk reduction programs. The net result should be reduced levels of recidivism and lower correctional populations.

On July 19, 2919, the U.S. Department of Justice released a report entitled **The First Step Act of 2018: Risk and Needs Assessment System** which presents the results of the Department's efforts to comply with the requirements of the legislation. The U.S. Department has requested comments from the public on this report to help guide further developments of the risk and needs system which is preferred to as Prisoner Assessment Tool Targeting Estimated Risk and Needs or *PATTERN*. This report summarizes the JFA Institute's review of the report and the design of *PATTERN.*

About the JFA Institute

The JFA Institute is a private non-for-profit organization based in Denver, Colorado that was formed in 2002. The JFA mission is to conduct theoretical and applied research on the causes of crime and the justice system's responses to crime and offenders. JFA receives funding solely from outside sources including federal, state, and local governmental agencies, as well as from foundations interested in developing and evaluating innovative crime prevention, law enforcement, sentencing and correctional policies and programs designed to reduce crime and to improve the quality of the adult and juvenile justice systems. Our major private funders are the MacArthur Foundation, the Charles Koch Foundation, Open Society Institute, and the Public Welfare Foundation.

JFA's primary areas of research and technical assistance include policy and program evaluation, planning studies, recidivism studies and risk assessments, population forecasting, and classification studies. Our research includes numerous national, multi-site initiatives requiring a high degree of organization and coordination. JFA's staff has extensive experience in conducting evaluations of a broad range of prison, probation, parole, and community corrections processes and programs.

Relative to risk assessment systems, JFA has developed and or evaluated pretrial risk systems for the states of Nevada, Virginia, and Kentucky, and the counties of Charleston, SC, Montgomery (MD), Baltimore (MD), Broward (FL), Harris (TX), San Francisco (CA), and Bexar (TX). We have developed prison and parole risk and needs assessment systems for Maryland, Arkansas, Texas, Nevada, Rhode Island, Louisiana, Kentucky, Oklahoma, West Virginia, and Pennsylvania.

Review of the PATTERN System

Much of the PATTERN system is based on the already existing and well performing BOP BRAVO-R assessment system which is used to assess the risk of prisoners to re-arrested or returned to the BOP within three years of being released from prison. The overall recidivism rate is 47% for any event and only 15% for a re-arrest. If the recidivism was based on convictions the rates would even lower as there is a significant drop from arrests to convictions.

Both the existing BRAVO-R and PATTERN perform at the same level of predictability in terms of assessing the risk for being re-arrested after release (see Table 3, page 52 in the report). There some differences between the two instruments but none that provide a significant or substantial improvement in the AUC scores. In other words, either the existing BOP BRAVO-R or the proposed PATTERN would be equally effective which raises the question of why the expense and time spent to develop an "new" instrument that is already in place.

In terms of the PATTERN's design, it consists of 17 items of which 8 are measures of conduct while incarcerated. There are no major methodological issues with the factors used, their weights, or the cut-off points. *It should be emphasized that a large proportion (48%) of the prisoners released are low or minimum risk to be rearrested and an even higher proportion (84%) are unlikely to be rearrested for a violent crime (see Table 4, p. 58).*

As such it actually is more of the type of system that either a parole board or a parole agency would use determine either a) parole release from prison by a parole board or b) supervision level by parole agents. Since people sentenced to the BOP are under a determinate sentencing structure where there is no parole decision making, it is unclear how PATTERN would be applied since it uses so many prison conduct variables. It does provide for an initial risk assessment at the time of prison admission. There are such factors in both BRAVO-R and PATTERN that can be used for an initial risk assessment but the current report does not present one.

There is also no structured needs assessment system. This is needed so that in combination with the initial risk assessment a case plan can be established which outlines for the prisoner what programs or structured work assignments would be beneficial in terms of lower the risk assessment made at admission to prison. The report notes that this component has not yet been fully developed and will not be ready for presentation until next year.

The delay in developing the needs assessment is somewhat puzzling since the BOP already conducts a variety of needs assessments in the areas of substance abuse, education, employment/vocational training and mental health. Further all people admitted to prison (and

probation) have a very detailed and exhaustive pre-sentence investigation completed prior to being sentenced. This lengthy report provides detailed information in the very same areas.

Incentives for Participating in Risk Reduction Programs and Structured Work Activities

An incentive based system that encourages prisoners to engage in risk reduction programs and exhibit positive institutional behavior. The figure below depicts the key elements of this approach. In essence, this model encourages people sentenced to prison to engage in activities and programs that will reduce their risk of re-offending. The system rewards these inmates by increasing their chances of being released sooner and thus reducing their length of imprisonment. Shorter prison stays and lower recidivism rates result in a smaller and safer prison population.

It is not unlike the medical model where a physician assesses a patient's medical risk for key diseases (e.g. heart disease or cancer) and then develops a plan (e.g. exercise or diet) that will lower the person's risk. If the patient follows the plan, the risk is reduced and his or her life is extended and healthier. If a patient does not follow the plan, the risks increases or remains high.
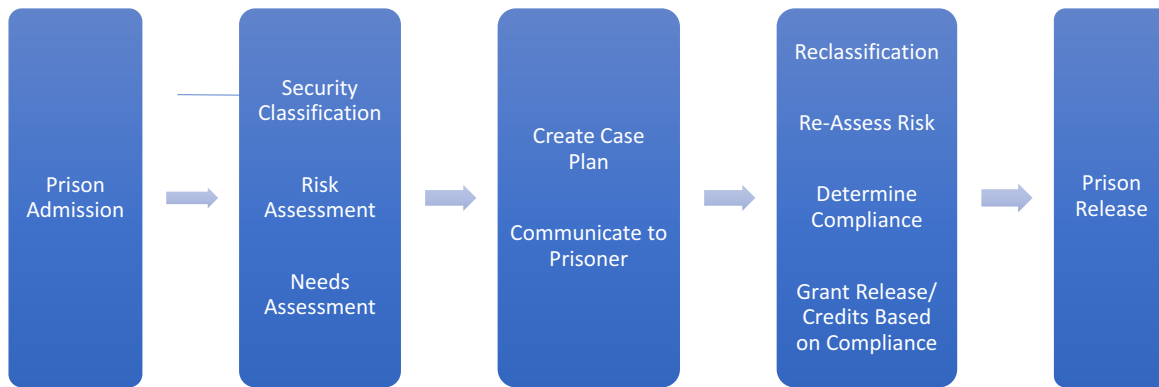
In order for the PATTERN system to have significant impact on prisoners, the BOP and public safety, meaningful incentives are needed to encourage prisoners to participate in risk reduction activities for people classified as moderate to high risk. Prior to the adoption of determinate and truth in sentencing (TIS) in the 1990s, inmates were sentenced under an indeterminate sentence where the U.S. Parole Commission determined suitability of release. Under that system, inmates could be granted parole at higher rates who were complying with prison rules and participating in structured programs. This is the model being used by Maryland with great success (Austin, 2019).

Under determinate sentencing the primary incentive would be the awarding of significant amounts of good-time credits to prisoners who are compliant with their case plans which would reduce the amount of unnecessary lengths of imprisonment for people who have lowered their risk levels. However, it is not clear in the report what amounts of good-time credits would be awarded to whom. Under currently most credits are only available to prisoners who are already in minimum custody of whom a large proportion are already low risk to re-offend. What is needed are incentives for prisoners in the moderate and high-risk categories.

This need to develop an incentive based system where prison terms can be safely and significantly reduced has also been noted by the well-respected Urban Institute as noted below:

> **"Incentivize participation in risk-reduction programming:** Reconsider all the carve-outs under First Step that exclude people from earning and using time credits. Expand First Step eligibility for early transfer to prerelease custody to include people assessed at medium or high risk. Earned time credits for early prerelease custody could benefit those at higher risk levels who are in the greatest need of support before release. Authorize earned time credits to be used to reduce the prison term itself" (Samuels et al, 2019).

Incentive-Based Corrections Process

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┌──────────┐    ┌──────────────┐    ┌──────────────┐    ┌──────────────┐    ┌──────────┐
│          │    │   Security   │    │              │    │Reclassification│  │          │
│          │    │Classification│    │ Create Case  │    │              │    │          │
│          │    │              │    │    Plan      │    │Re-Assess Risk│    │          │
│  Prison  │ →  │    Risk      │ →  │              │ → │              │ →  │  Prison  │
│Admission │    │  Assessment  │    │Communicate to│    │  Determine   │    │ Release  │
│          │    │              │    │   Prisoner   │    │  Compliance  │    │          │
│          │    │    Needs     │    │              │    │Grant Release/│    │          │
│          │    │  Assessment  │    │              │    │Credits Based │    │          │
│          │    │              │    │              │    │on Compliance │    │          │
└──────────┘    └──────────────┘    └──────────────┘    └──────────────┘    └──────────┘
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The Science of Reducing Prison Terms

Can we reduce both prison terms, prison populations and recidivism rates? Simply stated "yes". Over the past four decades several studies and the Bureau of Justice, U.S. Department of Justice have shown that there is no relationship between a prisoner's LOS and recidivism rates (Austin, 1986, Berecochea et al., 1981, Rhodes et al., 2018, Guzman, 2008, and Jaman, 1972). In other words, whether a person serves 12, 24, 36, or 48 months in prison, the recidivism rate is essentially the same.

Relative to the BOP, a recent U.S. Department of Justice study showed that the average length of stay for BOP prisoners could be reduced by 7-8 months without impacting existing recidivism rates. Such a reduction in the LOS would reduce the current BOP population by 33,000 inmates (Rhodes et al., 2018). Maryland has found that its incentive based system has helped lower its over-all recidivism rates and its prison population by over 20%. At the same time its state crime rate has dropped by over 40%. The dual decline in both prison populations and crime rates has been noted in New York, New Jersey, and Michigan (Austin, 2019.

Summary

The proposed PATTERN system will perform at the same level of predictability as the existing BOP BRAVO-R system. Implementing it will neither enhance nor diminish the BOP's current risk assessment capabilities.

What remains to be implemented is a structured needs assessment process that, in combination with the risk assessment, will produce a meaningful case plan that if followed by the prison will reduce the initial risk assessment level. Here again the BOP currently has the capability to a) complete a needs assessment and b) and case plan. As suggested in the NIJ report, the prisoner would have his/her compliance with the case plan reviewed. Prisoners who have been following their case plans and thus have lowered their risk levels would be rewarded by good-time credits that would serve to significantly lower the existing BOP prison population. The next result would be lower recidivism rates and enhanced public safety.

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August 26, 2019

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: ABA Questions Regarding the Proposed Risk and Needs Assessment System

Dear Mr. Attorney General:

On behalf of the American Bar Association (ABA), which has more than 400,000 members
representing all aspects of the legal system, I write to respectfully submit questions for consideration
during the current study period for the Prisoner Assessment Tool Targeting Estimated Risk and
Needs (PATTERN), as described in your report, *The First Step Act of 2018: Risk and Needs
Assessment System.* As you know, the First Step Act (P.L. 115-391) required creation of this tool to
assist correctional officials to provide programming, make treatment referrals, and determine
individuals who may be suitable for early release. The tool will also help officials assess an
individual's criminogenic needs so that their likelihood of recidivism may be reduced.

Preliminarily, given the time frame in which PATTERN was developed, we commend the reported
predictive accuracy of the tool within the sample population between genders and among races. We
further appreciate your commitment to public engagement during the evaluation process, which may
strengthen public confidence in the assessments that PATTERN renders. In furtherance of your
department's work, we have identified areas requiring consideration or clarification to help ensure
that PATTERN continues to produce accurate, individualized outcomes that remain racially,
ethnically, and gender neutral.

The ABA's Criminal Justice Section in an interdisciplinary group of experts that includes over
16,000 federal, state, and local prosecutors, private and public defense counsel, appellate and trial
judges, law professors, correctional and law enforcement officials. It produces publications, runs
education programs, develops model practices, and promulgates standards covering each stage of the
criminal justice system, including corrections. It is from this expertise that we submit the following
questions for your consideration:

Cut Points in Risk Assessment

1. Concerning PATTERN cut-off points among high, medium, and low risk categories, why are
    they set relative to the population sample rather than the absolute probability of recidivism

(pp. 50-53)? The current method may categorize as high or medium risk people whose risk of violent recidivism is well below 50 percent. Are there further analyses not included in the report to ensure that each category is a defined set, not overlapping the next category?

2. Does a person have to be low risk in both general and violent categories to be considered low risk? What risk level is assigned when a person is low risk in one category and a higher risk in the other category?

3. Have tests been conducted to determine whether the cut points are such that a person's risk level will meaningfully change with program completion? If so, will that data be made available for review?

Violence

1. What is the definition of "violent" recidivism (p. 50)? Does it include any crime against a person? Does it include any property or drug offenses? What is the definition of "general" recidivism? Does it include all crimes? Does it include *any* parole or probation violation?

2. Does the definition of "violent" vary depending on the context (e.g., when looking at infractions during imprisonment (p. 45) as opposed to new offenses)?

3. Is there data to support the addition of risk assessment points for those convicted of violent offenses or sex offenses? Is this a policy decision to prevent low scores for such offenders?

4. Will precise information, including statistical data, be made publicly available on the risk or protective factors included in PATTERN and their relative weights?

5. Will there be any effort to refine the definition of prison "infraction" (e.g., pp. 45, 54)? What type of due process is contemplated for determining whether one has occurred?

Needs and Program Access

1. Is there any specific criteria on which types of offenders will be assigned to which types of programs?

2. How does the system, which incentivizes participation in programs to earn credit towards early release, maximize optimal program assignment? For instance, how does it ensure that a moderate risk person takes programs addressing his or her own criminogenic needs and not merely any programs that produce a better score?

3. Under the tool, a prisoner receives fewer points if he or she takes *fewer* vocational courses, which seems to indicate an inverse relationship between such program completion and risk. Can this be explained?

4. Contrary to the statement on p. 56, Area Under Curve (AUC) values do not provide data about the accuracy of a re-offense probability, but rather indicate the probability that a

recidivist in the sample received a higher score than a non-recidivist. Is there data available about tool sensitivity and selectivity?

<u>Implementation</u>

1. Who will monitor the validity of the tool and the effectiveness of the programs? With what regularity will that data be released? Who will ensure these programs are implemented with fidelity across the Bureau of Prisons (BOP)?

2. Given that 57% of people who needed drug treatment did not receive it during incarceration (pg. 47), how will the BOP ensure that inmates who score high on the risk assessment will still have a meaningful opportunity to engage in treatment?

3. While it appears that predictive validity is similar for both blacks and whites (p. 60), are the false positive rates produced by PATTERN of black and white prisoners also similar?

4. May PATTERN scores be appealed, including to challenge potential errors in the calculation of one's score or erroneous information in one's history?

5. What are the privacy guidelines to be applied to PATTERN-created data?

6. While the needs assessment tools are under development (pp. 75-76), is it known how the Adverse Childhood Experience questionnaire might be integrated into the instrument (p. 77)? What other measures might be included?

7. Do the multiple categories of ineligible offenders described on p. 79 make up only 1% of the BOP population (given the statement on p. 55 that 99% of offenders are eligible)? Why are Adam Walsh and other civil committees excluded from eligibility for participation in treatment programs?

Thank you for considering these questions. If the ABA can be of assistance during or after PATTERN's study and public comments periods, please contact Kenneth Goldsmith in the ABA Governmental Affairs Office at (202) 662-1789 or kenneth.goldsmith@americanbar.org.

Sincerely,

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RE: Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) system

September 13, 2019

Dear Director Muhlhausen:

On behalf of Pearson, I am responding to the National Institutes of Justice listening sessions held on September 10–11, 2019, to solicit feedback on the Department's implementation of the First Step Act and development of the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN) system.

We commend the Department for its rapid development and implementation of plans pertaining to the dyslexia screening component of PATTERN in the very short timeframe mandated by the First Step Act. However, we encourage the Department to revisit the proposed approach for screening tools to focus on the importance of transparency, equity, and fairness by using evidence-based tools rather than unvalidated questionnaires, especially for dyslexia screening.

A nationally standardized, scientifically validated screener benefits the Department and incarcerated individuals by providing demonstrated proficiencies:

- Helping prison officials ensure the intended screening requirement is delivered accurately, reliably, and defensibly

- Permitting collection of screening metrics to inform next steps for those at risk while also demonstrating clear governance of the program

- Integrating the screening measure with overall educational programming and intervention plans for incarcerated individuals

- Helping the Department demonstrate its success in meeting Congress' presumed expectations that the program will improve the lives of affected individuals, represent a sound use of taxpayer funds, and contribute to the understanding of how best to reduce recidivism, including by addressing illiteracy and one common cause—dyslexia

Scientifically validated screeners are most effective when they are developed with the following rigor[1]:

- Based on evidence established through peer-reviewed research

- Targeted to the population to be assessed

- Built on items and scoring that are measured and published with defensible research establishing reliability and validity

- Proven to discern those with dyslexia from those without it by testing the tool on both groups

Working with over 300,000 psychologists and practitioners in school, medical, and government institutional settings across the country, Pearson Clinical's scientifically validated assessments provide valuable insights, helping to screen and determine abilities, develop effective interventions, track progress, and ensure access and success.

Our experts focus on the development, delivery, scoring, and reporting of assessments at scale. Reliable and valid assessments have been the foundation of these professional collaborations encompassing programs that screen and assess individuals at risk of, or identified as, having dyslexia.

We would welcome the opportunity to discuss our thoughts on dyslexia screening at scale, and how the Department and Federal Bureau of Prisons can capture the benefits mentioned briefly here as they build out the PATTERN system.

It was a pleasure to attend the listening sessions. Thank you for the opportunity to do so and to provide these comments.

Yours Sincerely,

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[1] American Educational Research Association, American Psychological Association, & National Council on Measurement in Education. (2014). *Standards for educational and psychological testing,* Washington, DC: American Educational Research Association.

Comments on PATTERN
Brandon L. Garrett and Megan T. Stevenson
September 12, 2019

Introduction

We are grateful to have been requested to provide feedback on the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN). The Department of Justice was made aware of our work on this issue by the Charles Koch Institute, whose representatives have engaged in eduction on risk assessments and related criminal justice related topics. The institute's affiliate, the Charles Koch Foundation, is a charity that has provided grants supporting our broader criminal justice research. The views presented here are offered independently and have not been discussed with any of our supporters, nor have we received any compensation for providing them. We are not writing as representatives of any institution, but as scholars who study the use of risk assessment in criminal justice.

We applaud the U.S. Department of Justice (DOJ) for holding a 45-day public comment period, permitting review and comments on the PATTERN system in order to "consider ways in which it may be improved."[i]   The report states that while operating "under an extremely short timeline," the tool achieves a "high level of predictive performance and surpasses what is commonly found" in risk assessment tools used in the U.S.[ii] While we understand the constraints of a short timeline, the report does not provide enough detail for us to evaluate the methodology with anything approaching the rigor of a "peer-review" process, and without access to the underlying data we are unable to verify claims regarding predictive performance or fairness. Our response, therefore, addresses general issues with the tool and its implementation as we understand it from the report. We offer these comments in the spirit of supporting efforts to use risk assessment to reduce incarceration for individuals who could otherwise be in the community.

Issue 1: Selecting Risk Cut-Offs

While the Act states that the federal Bureau of Prisons (BOP) must use a new risk assessment instrument to assign inmates to one of four risk categories—minimum, low, medium, and high— the statute does not define those categories. The DOJ Report that announced the development of the PATTERN describes how the experts who developed it made certain key decisions concerning the risk thresholds that separate these groups. However, no information is provided in that Report about how those thresholds were set. Determining how many individuals are rated minimum or low risk, and therefore get the many benefits associated with this designation, is one of the most influential decisions pertaining to the risk assessment tool.

Crucially, "[t]he ultimate description of a defendant's risk as low, moderate, or high in a given jurisdiction is a policy decision, not a scientific one."[iii] It is important that this central policy decision be transparent and supported. It also crucially important that the public and policymakers have confidence that the choice made to select those thresholds was a sound one. BOP administrators will be relying on those thresholds to classify every eligible federal

prisoner. That is a burdensome, momentous, and important task. The BOP too must have confidence that a considered and fully transparent decision was made to select those cutoffs.

We are concerned that the thresholds currently chosen will unnecessarily limit the opportunities for early release for defendants that pose little risk to the community. As it currently stands, the threshold for being placed in the moderate risk category is a 24% probability of rearrest or technical violation within three years. Therefore, an individual who has a 75% chance of complete success upon release – not even a minor arrest or violation – would not be able to accrue the benefits of a low risk classification.

We recommend that the decision of where to place the risk-thresholds for each risk category be made in a transparent manner, with a clearly specified rationale. We recommend expanding the minimum and low risk category so that more defendants can take advantage of the benefits of the First Step Act.

Issue 2: What Type of Risk?

While the Act calls for the development of a risk assessment tool to predict recidivism, it does not clarify which measure of recidivism should be used. PATTERN currently defines recidivism in two ways: the risk of any sort of arrest or technical violation ("general recidivism"), and the risk of arrest for a new violent crime ("violent recidivism"). No information is provided on why these specific recidivism measures were chosen, although we understand that data limitations may have precluded using conviction as a measure instead of arrest.

We are concerned about the general recidivism measure. The risk of serious or violent crime is of clear concern, but the risk of committing minor offenses or technical violations is much less central to decisions around early release (or to the other proposed uses of PATTERN). Yet the general recidivism risk score does not distinguish between the two. In fact, it is likely capturing much more of the latter than the former. Among federal prisoners, roughly 2/3 of rearrests within 8 years are for nonviolent offenses.[iv] While some nonviolent offenses are serious, many are not. Nationwide, among arrests for which charges are filed, the vast majority are misdemeanors.[v]

The inclusion of minor offenses and violations means that the general recidivism score will be less accurate at predicting those at risk of serious crime. Instead, those who score high in the general recidivism score will be disproportionately the type of people who tend to get arrested for misdemeanors or violate technical terms of parole: those who struggle with mental health, homelessness, and substance abuse issues.

A risk assessment tool that includes low-level arrests in its recidivism measure is also expected to be more racially biased. While people of all races jaywalk, appear intoxicated in public, and possess marijuana, not all are arrested for such activities. Arrest for low level offenses is more likely if such behavior occurs in police presence or is revealed by way of stop-and-frisk. Since minority neighborhoods are often more heavily policed, the probability of arrest, conditional on engaging in minor illegal behavior, is particularly high for people of color.

While PATTERN also includes a violent recidivism risk score, the low risk classification that automatically triggers expanded access to early release requires a minimum or low risk ranking in *both* the general and violent recidivism risk assessments. Based on the thresholds described in the Report, we expect that many people will be blocked from receiving the expanded good-time credits by their risk of "general recidivism", even if they are at low risk of violent crime. This adds further opacity to the risk threshold method, since the overall classification depends on the threshold selected for both risk assessments as well as the correlation between the two. And it results in the exclusion of First Step Act benefits to those who pose little risk of engaging in serious crime.

We suggest that recidivism be defined to exclude arrest for minor crime or technical violations. If multiple risk assessments are used, risk thresholds should be adjusted so that the requirement of minimum or low risk scores in *both* risk assessments does not unnecessarily exclude too many individuals from the advantages outlined in the Act.

Issue 3: Insufficient Resources

An additional question is whether adequate resources will be made available for programming. An inmate cannot change the static factors used to calculate the PATTERN score, by definition. Beyond simply aging, the only way that an inmate can improve a score is through completion of various programs in federal prisons.

Unfortunately, not all inmates will be able to access these programs. Indeed, there may be far greater demand for these programs once they are linked to the possibility for early release.

Resources for rehabilitative programming in federal prisons is a longstanding need. The Inspector General's audit of the reentry programming in the BOP raised a similar problem, regarding a lack of resources to conduct sufficient reentry programming. During the consideration of the Act, the American Federation of Government Employees, AFL-CIO, and Council of Prison Locals called for sentencing reforms, but raised the concern as to the use of risk assessment, that federal prisoners are suffering from "sustained cuts" to staffing levels, which reduces access to rehabilitative programming.[vi] The Act calls for $75 million in funding per year, including for expanding such rehabilitative programming, as well as an expansion of reentry programming such as halfway housing. [vii] However, in addition to the funding needed to expand such programming, some part of the available funding may need to be expended on implementing the risk assessment tool itself. The Act passed after a budget had already been finalized, and therefore it is not yet clear whether, in future budgets, the full $75 million will be requested or obtained from Congress. [viii]

This resource problem has hampered risk assessment efforts at the state level as well. In a study of Virginia sentencing, researchers found that eligible offenders did not receive the alternative sentences for which they were recommended. Many judges explained, in responses to a survey by the same research team, that they had resource constraints on their ability to follow the risk assessment recommendations.[ix]

Considering the substantial weight that is placed on age in PATTERN, we are particularly concerned that young individuals will not be able to adequately lower their risk score through participation in rehabilitative programming. A male prisoner who is under the age of 25, and whose first conviction was under the age of 18, is at the high end of the moderate risk range even if their criminal history scores are zero and they have no other aggravating factors. They would need to engage in a substantial number of programs in order to reduce their risk score to a lower classification. In fact, they would need to complete greater than 10 programs simply to cancel out the effect of having their first conviction under the age of 18. (A first conviction under the age 18 adds 12 points to the risk score; the maximum number of points that can be deducted from the risk score by participating in programs is 12.)[x] If their facility does not have the resources to provide such programs, and also to ensure meaningful opportunities to complete programs that are provided, then they would be stuck with the higher risk classification until they age into a lower one.

We recommend that the BOP present a plan for individuals to be able to gain access to the benefits of a low risk classification if resources for programming are inadequate.

Conclusion

While there are many laudable aspects of the First Step Act, it is important to get the details right if the adoption of the risk assessment is going to support reducing incarceration for individuals who pose little public safety risk. We note two cautionary tales based on prior federal implementation of risk assessment:

Consider the use of the federal Pretrial Risk Assessment (PTRA), which was implemented in 2009, and is currently used in most federal districts. Adoption of this instrument does not appear to have increased pretrial release rates; in fact, pre-trial release rates have declined over the past decade. (Researchers at the Probation and Pretrial Services Office of the Administrative Office of the U.S. Courts confirmed that the decline is observed even if one controls for changes in the federal defendant population, such as the increase in immigration filings and the decrease in financial crime filings. Even defendants with light criminal history profiles saw higher detention rates.[xi])

Or consider a setting in which the BOP has been involved. The BOP had been using risk and needs assessments to decide whether to place federal prisoners in residential reentry centers (RRC), or halfway houses, as well as direct home confinement, while serving the remainder of their sentences, pursuant to the Second Chance Act of 2007. The DOJ's Office of Inspector General conducted an audit of that program in 2016, following DOJ efforts to improve reentry programs in the federal system. The auditors concluded that inmate risk and needs were not being carefully considered: "contrary to BOP policy, BOP guidance, and relevant research, BOP's RRC and home confinement placement decisions are not based on inmate risk for recidivism or need for transitional services." They also found that the BOP was underutilizing direct home confinement for low-risk prisoners, which also meant that there was not room in RRCs for higher-needs and higher-risk prisoners before their release dates.[xii]

There is ample evidence that simply adopting a risk assessment tool does not automatically bring benefits. To maximize the likelihood of success, great care needs to be given in developing the tool and designing its implementation. We believe that the DOJ should not adopt an instrument without adequate vetting by the research community. The report released does not permit such an assessment of the PATTERN.

Biographies

Brandon L. Garrett is the L. Neil Williams Professor of Law at Duke University School of Law, where he has taught since 2018. He was previously the Justice Thurgood Marshall Distinguished Professor of Law and White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law, where he taught since 2005. His research and teaching interests include criminal procedure, wrongful convictions, habeas corpus, corporate crime, scientific evidence, civil rights, and constitutional law. Garrett's work, including several books, has been widely cited by courts, including the U.S. Supreme Court, lower federal courts, state supreme courts, and courts in other countries. Garrett also frequently speaks about criminal justice matters before legislative and policymaking bodies, groups of practicing lawyers, law enforcement, and to local and national media. Garrett attended Columbia Law School, where he was an articles editor of the Columbia Law Review and a Kent Scholar. After graduating, he clerked for the Hon. Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit. He then worked as an associate at Neufeld, Scheck & Brustin LLP in New York City. Garrett has participated for several years as a researcher, and now principal investigator, in the Center for Statistics and Applications in Forensic Science (CSAFE), as well as a principal investigator in an interdisciplinary project examining eyewitness memory and identification procedures supported by Arnold Ventures. Supported a grant from the Charles Koch Foundation, Garrett directs the Center for Science and Justice at Duke Law, an interdisciplinary empirical research group focused on criminal justice.

Megan T. Stevenson is an Assistant Professor of Law at George Mason University's Antonin Scalia Law School. Her research uses econometric methods to evaluate criminal law and policy in areas such as bail, pretrial detention, risk assessment, and juvenile justice. Her studies have been published in top journals in both law and economics, such as the Stanford Law Review and the Review of Economics and Statistics. She was the 2019 winner of the Oliver E Williamson prize for best article, chosen from all articles published in the Journal of Law, Economics, and Organization within three years. Her research on bail was cited extensively in a landmark federal civil rights decision, O'Donnell v. Harris, and has received widespread media coverage. In addition to legal scholarship, Professor Stevenson has written a number of op-eds for news outlets such as the Houston Chronicle and the Philadelphia Inquirer. Her research has been funded by the National Science Foundation, the Russell Sage Foundation, and the Laura and John Arnold Foundation. Stevenson has been an Assistant Professor of Law at George Mason University's Antonin Scalia Law School since 2017. In that capacity she has worked with George Mason's Law and Economics Center, which is funded by the Charles F. Koch Foundation. Prior to joining the law faculty at George Mason, she was a fellow at the Quattrone

Center for the Fair Administration of Justice at the University of Pennsylvania Law School (2015-2017). She holds a BA in Interdisciplinary Studies (2009, with highest distinction) and a PhD in Agricultural and Resource Economics (2016), both from the University of California, Berkeley. She teaches Law & Economics and Criminal Law.

[i] U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System* (2019).
[ii] Id. at 43.
[iii] Sarah L. Desmarais and Evan M. Lowder, *Pretrial Risk Assessment Tools: A Primer for Judges, Prosecutors, and Defense Attorneys*, SAFETY AND JUSTICE CHALLENGE 4 (Feb. 2019).
[iv] United States Sentencing Commission, *Recidivism among Federal Offenders: A Comprehensive Overview,* March 2016

[v] Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 101 (2018) at 746.
[vi] See The American Federation of Government Employees, AFL-CIO & Council of Prison Locals, Letter to Chairman Grassley, Ranking Member Feinstein, Chairman Goodlatte, Ranking Member Nadler, and Senator Durbin, (May 8, 2018).
[vii] FIRST STEP Act of 2018, 115 P.L. 391 § 104(a).
[viii] Maggie Haberman and Annie Karni, *Trump Celebrates Criminal Justice Overhaul Amid Doubts it will be Fully Funded*, N.Y.Times, April 1, 2019.
[ix] Brandon L. Garrett, Alexander Jakubow & John Monahan, *Judicial Reliance on Risk Assessment in Sentencing Drug and Property Offenders: A Test of the Treatment Resource Hypothesis, Criminal Justice and Behavior*, 46 CRIM. JUSTICE & BEHAVIOR 799 (2019).
[x] [x] U.S. Department of Justice, *The First Step Act of 2018: Risk and Needs Assessment System* (2019) at 53, 54.
[xi] Matthew G. Rowland, *The Rising Federal Pretrial Detention Rate, in Context*, 82 Fed. Probation 13, 13 (2018).
[xii] *See* U.S. DEPARTMENT OF JUSTICE OFFICE OF INSPECTOR GENERAL, AUDIT OF FEDERAL BUREAU OF PRISONS' MANAGEMENT OF INMATE PLACEMENTS IN RESIDENTIAL REENTRY CENTERS AND HOME CONFINEMENT ii (Nov. 2016), https:/ /oig.justice.gov/reports/2016/a1701.pdf.