

A REPORT ON BEHALF OF
THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION
TASK FORCE ON THE IMPLEMENTATION OF THE FIRST STEP ACT

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First Step Act Implementation Task Force. The Report has not been approved by the
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Introduction

The First Step Act (FSA), signed into law on December 21, 2018, sought to improve criminal justice outcomes, reduce recidivism, and reduce the federal prison population.¹ Since its inception, the FSA and the programs/tools it created have undergone both formal changes and evolutions due to the current pandemic. The ABA is following these developments in an effort to ensure the FSA’s intentions are actualized. In particular, the Criminal Justice Section of the ABA created a Task Force on the Implementation of the FSA shortly after its passage to monitor the progress of realizing the goals of the Act.² Our Task Force includes a diverse cross section of defense attorneys, prosecutors, academics, as well as a judge. The Task Force offers this Report to summarize its efforts to date and to alert stakeholders to our concerns and unanswered questions regarding the implementation of the FSA. The Report offers a brief overview of the FSA, then focuses on a particular aspect of the Act – the Risk and Needs Assessment System — that has caused us the greatest concerns regarding whether the FSA has been implemented with fidelity to its Congressional purposes.

The First Step Act: An Overview

The FSA includes several key parts: 1) amendments to certain sentencing provisions;³ 2) elimination of the Bureau of Prisons’ gatekeeping role for compassionate release petitions;⁴ 3) a

¹ First Step Act (FSA) of 2018, P.L. 115-391, 132 Stat. 5194.

² The membership of our Task Force is attached to our Report as Addendum 1.

³ FSA §§ 401-04, 501-08.

⁴ *Id.* § 603(b).

requirement that the BOP create a risk and needs assessment system for tailoring programs to address incarcerated individuals' needs and the provision of time credits for participating individuals that may result in earlier release from secure custody;⁵ and 4) creation of an Independent Review Committee to evaluate the implementation of the risk and needs assessment system.⁶

Amendments to sentencing provisions. The FSA amended several sentencing provisions, most notably reducing mandatory minimum penalties and changing when they apply.⁷ For defendants with prior serious drug or serious violent felonies under 21 U.S.C. § 841, the FSA reduced certain enhanced penalties for repeat offenders.⁸ Additionally, Section 402 of the FSA broadens the safety valve criteria of 18 U.S.C. § 3553(f), which allows more drug offenders to be relieved of mandatory minimums or receive a reduction in their sentences.⁹ The FSA also eliminated mandatory consecutive sentencing, or “sentence stacking” under 18 U.S.C. § 924(c) for offenses involving using, carrying, possessing, brandishing or discharging a firearm in furtherance of a violent or drug trafficking offense.¹⁰ Further, the FSA provided that application of the reduced penalties for crack cocaine offenses that were enacted under the 2010 Fair Sentencing Act¹¹ could be applied retroactively to sentences imposed before passage of that Act.

Compassionate release. Under the FSA, incarcerated individuals may themselves file motions for compassionate release.¹² The Sentencing Reform Act of 1984 established the opportunity for incarcerated individuals to seek compassionate release and allowed courts to

⁵ *Id.* § 101-06.

⁶ *Id.* § 107.

⁷ 18 U.S.C. § 3632 (2018).

⁸ *Id.* § 3553

⁹ *Id.* § 924(c).

¹⁰ *Id.* § 403.

¹¹ 21 U.S.C. § 841 (2018).

¹² 18 U.S.C. § 3582(c)(1)(a) (2018).

grant reduced sentences for “extraordinary and compelling” reasons.¹³ However, under that Act, prisoners had to petition the BOP to advocate on their behalf for the reduction of their sentence through compassionate release.¹⁴ The FSA removed the gatekeeping role of the BOP.¹⁵

Risk and needs assessment system. As directed by the FSA, the Department of Justice (DOJ) developed a risk and needs assessment tool called the Prisoner Assessment Tool Targeting Estimated Risk and Need (PATTERN) in July 2019.¹⁶ The tool, which has since been revised, is intended to measure an incarcerated individual’s risk of recidivism and assess the needs of the individual to determine relevant programming.¹⁷ It is designed to predict the chance of both general and violent recidivism three years post-release.¹⁸ While incarcerated individuals have long been assessed at intake to determine needs, PATTERN formalizes and standardizes this process.¹⁹

The tool assigns a risk level classification of minimum, low, medium, or high.²⁰ So long as incarcerated individuals have not been convicted of a disqualifying offense,²¹ they are eligible for certain Evidence-Based Recidivism Reduction (EBRR) programs and Productive Activities (PA) to address their needs.²²

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 18 U.S.C. §§ 3631-35 (2018); *see also* U.S. DEP’T. JUST., ATT’Y GEN.’S FIRST STEP ACT OF 2018: RISK & NEEDS ASSESSMENT SYSTEM (July 19, 2019) [hereinafter “FSA REP. (JULY 2019)”], *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

¹⁷ § 3631; *see* FSA REP. (JULY 2019), *supra* note 16.

¹⁸ FSA REP. (JULY 2019), *supra* note 16, at. 42.

¹⁹ §§ 3631-35.

²⁰ *Id.* § 3632(a)(1).

²¹ *See id.* § 3632(d)(4)(D) (list of 68 disqualifying offenses that are largely crimes of violence, sexual offenses, offenses related to national security, and drug offenses where the defendant played a leadership role); *see also* FSA REP. (JULY 2019), *supra* note 16.

²² §§ 3631-35; FSA REP. (JULY 2019), *supra* note 16.

Incarcerated individuals who successfully complete EBRR programs and productive activities earn time credits, depending on their risk classification level.²³ Medium and high risk individuals can earn 10 days of time credit for every 30 days of successful participation in applicable programming and activities, while those in minimal or low risk categories can earn an additional 5 days of time credits for every 30 days of participation.²⁴ Individuals in the minimal and low risk categories can apply these credits to earn early pre-release custody or up to a 12-month sentence reduction.²⁵ Incarcerated individuals in the medium and high risk categories can apply their credits for other benefits such as increased phone and visitation privileges or transfers to institutions closer to the individual's release residence.²⁶ In addition, all incarcerated individuals may lower their risk category through participation in EBRR programs and productive activities.²⁷

Independent Review Committee. The FSA created an Independent Review Committee (IRC), comprised of outside experts, to aid the DOJ with the creation of the risk and needs assessment system as well as the programming to be offered pursuant to these assessments.²⁸ Under the FSA, the IRC is required to submit a report regarding the effect of the BOP's risk and needs assessment system under § 107 of the FSA.²⁹ In this year's report, the statistical information was current as of September 26, 2020; the changes are in their infancy and to date there are no data on long-term post-release recidivism.³⁰

²³ §§ 3631-35; FSA REP. (JULY 2019), *supra* note 16.

²⁴ § 3632(d).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ First Step Act (FSA) of 2018, P.L. 115-391, § 107, 132 Stat. 5194 (as amended in 18 U.S.C. § 3631).

²⁹ *Id.*

³⁰ REP. OF THE INDEP. REV. COMMITTEE REP. PURSUANT TO THE REQUIREMENTS OF TITLE I SECTION 107(G) OF THE FIRST STEP ACT (FSA) OF 2018 (P.L. 115-391) 2 (Dec. 21, 2020) [hereinafter "IRC REPORT (DEC. 2020)"], *available at* <https://firststepact-irc.org/wp-content/uploads/2020/12/IRC-FSA-Title-I-Section-107g-Report-12-21-20.pdf>.

The Development of PATTERN

The DOJ set to work on the development of PATTERN in early 2019, and in April and May of 2019 it hosted “listening sessions” with interested stakeholders. Our Task Force participated in the May listening session, although our ability to provide input was limited because no information had yet been released regarding the DOJ’s work. In general, we pressed for transparency in the data and process to be used to build the tool and expressed a concern that the tool should avoid racially disparate impacts.

On July 19, 2019, as mandated by the FSA, the DOJ released its initial report unveiling PATTERN.³¹ The report described the development of PATTERN and some of the considerations and decisions that underly its creation.³² The report did not release any of the data used to create the tool, but did provide the factors to be scored and the scores for each factor.³³ The factors for both men and women included the following: 1) age at first conviction; 2) age at the time of assessment; 3) infraction convictions within the last ten years; 4) the number of technical and vocational programs completed; 5) drug treatment and education while incarcerated; 7) whether the instant offense was violent; 8) whether the inmate is a sex offender; 9) criminal history; 10) history of violence; 11) history of escape; 12) whether the defendant was permitted to voluntarily surrender after sentencing; and 13) the inmate’s education.³⁴ Additionally, for women only, the factors included: 14) federal prison industry employment; and 15) non-compliance with financial responsibility.³⁵

³¹ FSA REP. (JULY 2019), *supra* note 16.

³² *Id.* at 45-49.

³³ *Id.*

³⁴ *Id.*; U.S. DEP’T. JUST., FIRST STEP ACT OF 2018: RISK & NEEDS ASSESSMENT SYSTEM - UPDATE. 7 (Jan. 2020), [hereinafter “FSA REP. (JAN. 2020 UPDATE)”], available at <https://www.bop.gov/inmates/fsa/docs/the-first-step-act-of-2018-risk-and-needs-assessment-system-updated.pdf>.

³⁵ FSA REP. (JAN. 2020 UPDATE), *supra* note 34.

The DOJ Report also described its methodology for establishing “cut points” – the score thresholds for each of the four categories of risk.³⁶ The cut points were determined relative to the “base rate,” which is roughly the “average” rate of recidivism for the entire data set.³⁷ However, the DOJ did not set the middle cut point – the threshold between low and medium risk – at this base or “average” rate of recidivism. Rather, it elected to set the middle cut point at *one-half* of the base rate.³⁸ The minimum risk category was set at one-quarter of the base rate, while the cut point between medium and high risk categories was set at roughly two-thirds above the base rate.³⁹ The report explains that this set of cut points was one of nearly a dozen that were examined or tested, but the other sets of cut points were not identified. The only explanation given for the cut points selected was the need to balance between maximizing the number of incarcerated individuals eligible to earn early release “while also considering public safety and the risk of recidivism upon release.”⁴⁰

PATTERN calculates two risk scores, a score for general recidivism risk and a score for violent recidivism risk.⁴¹ PATTERN also models men and women separately because of their gender-specific risk factors and pathways to crime.⁴² Other research, as well as the PATTERN’s own dataset, indicate that incarcerated women are outnumbered by men almost 6 to 1, so that if one model were used women’s scores would be centered on men’s characteristics.⁴³ The developers concluded that gender-tailored risk and needs assessments will better address needs.⁴⁴

³⁶ FSA REP. (JULY 2019), *supra* note 16, at 50–53.

³⁷ *Id.*

³⁸ *Id.* at 50-56.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 51.

⁴² FSA REP. (JAN. 2020 UPDATE), *supra* note 34, at 16.

⁴³ *Id.* at 17.

⁴⁴ *Id.*

Following release of its initial report and PATTERN scoresheets, the DOJ solicited additional public comment regarding PATTERN.⁴⁵ The DOJ received almost 200 comments and statements in response.⁴⁶ As a part of this comment process, the President of the ABA sent a letter to the DOJ on August 26, 2019, setting forth a series of questions and concerns regarding, among other matters, the selection of the cut points, the definition of violence, the lack of transparency in the data used to develop the tool, the potential for racially disparate impacts, and other questions regarding the implementation of the overall risk and needs assessment system.⁴⁷ The DOJ did not respond to our letter.

The DOJ also held additional listening sessions regarding PATTERN in September of 2019.⁴⁸ Members of our Task Force participated in a listening session on September 11, 2019. We referenced the matters addressed in the letter from the ABA President and expressed our continuing concerns about the lack of transparency regarding the data underlying the tool. We also reiterated our concerns about the potential for racially disparate impacts due to differing police practices in communities of color, particularly in light of the significance placed by the tool on factors such as criminal history and age at first arrest.

In response to the public comment and continued study, the DOJ released a revised version of PATTERN in January of 2020.⁴⁹ The DOJ's report accompanying the updated version of PATTERN described some of the changes made in the new version.⁵⁰ For example, two additional dynamic factors were added so that incarcerated individuals could have a greater

⁴⁵ U.S. DEP'T. JUST., ATT'Y GEN.'S FIRST STEP ACT SEC. 3634 ANN. REP. 4 (Dec. 2020) [hereinafter ("FSA REP. (DEC. 2020 UPDATE)"] available at https://www.bop.gov/inmates/fsa/docs/20201221_fsa_section_3634_report.pdf.

⁴⁶ *Id.* at 5.

⁴⁷ Letter from Am. Bar Ass'n et. al., to Hon. William P. Barr, Att'y Gen., U.S. Dep't of Just. 1 (August 26, 2019). The letter from the ABA President to the DOJ is attached as Addendum 2.

⁴⁸ FSA REP. (JAN. 2020 UPDATE), *supra* note 34, at 2-3.

⁴⁹ *Id.* at 16.

⁵⁰ *Id.*

opportunity to lower their risk assessment scores through programming and occasional reassessments.⁵¹ First, the new version of the tool considers “the offender’s ‘infraction free’ period during his or her current term of incarceration,” which indicates the period the individual was free of infractions.⁵² The original infraction conviction factor reflecting infractions within the prior ten years was changed to reflect the duration of time in which the individual was infraction free.⁵³ Second, the eligible programs were modified to include certain psychology treatment programs.⁵⁴ The January 2020 report also explained that some factors had been removed in the new version of PATTERN in an effort to mitigate the potential for racially disparate impacts.⁵⁵ The factor for age of first arrest/conviction was removed on the ground it would tend to disadvantage minorities, while the favorable risk factor of voluntary surrender was removed on the assumption it would tend to favor non-minorities.⁵⁶

In reviewing the impact of this version of the PATTERN, the IRC reached two conclusions that call into the question the use of the PATTERN. First, it found that less than half of federal inmates are eligible for the FSA’s earned time credit (ETC) program-participation incentives.⁵⁷ Second, it found no significant differences between the recidivism-risk profiles of BOP’s ETC-eligible and ETC-ineligible inmate populations, which suggests that the BOP’s eligibility criteria are too narrow.⁵⁸

⁵¹ *Id.* at 8.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* “BRAVE, Challenge, Skills Program, Sex Offender Treatment (both residential and non-residential), STAGES, and Step Down programs), the faith-based Life Connections Program (LCP), and the BOP’s Drug Education program to the ‘Number of programs completed (any)’ measure and combine technical/vocational and UNICOR into a new work programming measure.”

⁵⁵ *Id.* at 9. Though this reduced PATTERN’s predictive accuracy by about one percent, the IRC and DOJ decided this is acceptable if it prevents the actual or perceived perpetuation of bias. *Id.*

⁵⁶ *Id.*

⁵⁷ IRC REPORT (DEC. 2020), *supra* note 30.

⁵⁸ *Id.*

Furthermore, the new version of PATTERN included significant changes that were neither acknowledged nor explained by the DOJ in its January 2020 report. In particular, the weight assigned to general criminal history increased by roughly twenty-five percent, while the weight assigned violent criminal history was *doubled*.⁵⁹ The impact of these changes cannot be overstated. For instance, for some individuals the points added for violent criminal history in the new version of PATTERN appear to preclude *any* benefits from undergoing programming, regardless of how many EBRR programs and productive activities they complete. Other than the age of the subject at the time of assessment,⁶⁰ no factor is given more weight in PATTERN than criminal history. The significant changes to this factor in the revision of PATTERN is concerning. That the DOJ has elected to neither acknowledge nor explain these changes is nothing short of alarming. The individuals who will be excluded from securing benefits – which were designed to incentivize incarcerated people to engage in recidivism reducing programming – are the individuals who are considered to pose the greatest risk to public safety. It makes no sense to remove incentives that would encourage them to engage in activities that are designed to reduce their risk of reoffending.

Evaluation of PATTERN

Our Task Force continues to have significant unanswered questions and unaddressed concerns regarding PATTERN. A number of these are highlighted below.

Transparency

Evaluation of the PATTERN's accuracy and potential bias is only possible if the factors it considers, the weights assigned its risk and needs factors, and its underlying statistical analysis are made available. The DOJ's PATTERN update in January of 2020 reaffirms a stated

⁵⁹ *Id.*

⁶⁰ These scores have also been modestly increased in the new version of PATTERN without explanation.

commitment to data transparency, but access to the relevant information remains limited.⁶¹ The BOP has contracted with an outside agency to validate the data practices and it has also committed to an annual report on validation and recidivism data.⁶² Those of us on the outside looking in have several distinct concerns: 1) Will a meaningful number of incarcerated individuals actually benefit from early release? 2) Will there be racially disparate impacts on those who are unable to benefit from early release? 3) Will the data and assumptions underlying the development of the tool be made available to the public and other academics? A particular concern is that the tool’s potential for racial bias and disparity cannot be addressed until data transparency exists and permits analysis of how individuals’ data and group data produce a person’s risk classification.

The Absence of a True Needs Assessment System

In addition to a Risk Assessment tool, the FSA also directed the DOJ to develop a Needs Assessment system (i.e., programs targeted at reducing risk through addressing an individual’s treatment needs). It does not appear that the DOJ has yet complied with this aspect of the Act. Although the DOJ has pointed to an array of practices undertaken by the BOP to identify inmate needs,⁶³ these practices are not, as noted by the Independent Review Committee, “the kind of unified system Congress appears to have had in mind with FSA Title I.”⁶⁴ We urge the DOJ to continue its work and create a true integrated and comprehensive needs assessment system to match assessments of inmate risk with programs and activities tailored to their individual needs.

Too Many Individuals are Disqualified from Participation

⁶¹ FSA REP. (JAN. 2020 UPDATE), *supra* note 34, at 12-13 (Jan. 2020).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ IRC REPORT (DEC. 2020), *supra* note 30, at 4.

In addition to our concerns regarding the implementation of the FSA, we also believe additional legislative action should also be considered to make its benefits more widely available. The FSA included a lengthy list of offenses that disqualify incarcerated individuals from earning time credits.⁶⁵ According to the IRC, more than half of all individuals incarcerated in federal prisons are disqualified by the list.⁶⁶ Significantly, as noted above, the IRC further found that there appears to be no significant difference in the collective risk profiles of those who are eligible for time credits and those who are disqualified.⁶⁷ This suggests a lack of rationality underlying the list of disqualifying offenses. As the IRC has noted, and as discussed further below, the COVID-19 pandemic prompted the BOP to release various individuals – including those guilty of disqualifying offenses under in the FSA. Our Task Force agrees with the IRC⁶⁸ that this presents a “natural experiment” opportunity. If the rates of recidivism among those released does not differ significantly between those convicted of disqualifying offenses and others, Congress may need to revisit the list of disqualifying offenses with an eye toward making the list shorter.

The Empirical Basis and Funding of Programs

The PATTERN risk assessment tool takes into consideration the incarcerated individual’s participation in programming in determining credit for early release. However, there is little information about the empirical evidence supporting the programs that are offered or the extent to which participation in them can reduce risk. The DOJ’s update notes how its needs assessment has been modified to include “psychology treatment programs,” “faith-based” programs, and

⁶⁵ 18 U.S.C. § 3632(d)(4)(D) (2018).

⁶⁶ IRC REPORT (DEC. 2020), *supra* note 30.

⁶⁷ *Id.*

⁶⁸ *Id.* at 7.

technical, vocational, and Federal Prison Industries (UNICOR) work programs.⁶⁹ While additional programming will likely improve the quality of life of currently incarcerated individuals, more information is needed on how these and other productive activities affect recidivism.⁷⁰

The extent to which appropriate programs and activities are made available to prisoners is also cause for concern. The FSA required the BOP to complete a risk and needs assessment of every individual incarcerated in a federal prison by January 15, 2020,⁷¹ and to provide sufficient EBRR programs and productive activities to meet the needs of every incarcerated individual by January 15, 2022.⁷² Based on the BOP's lists of currently available programs,⁷³ it appears that only a fraction of the programming that will be needed is yet in place. Of particular concern is that the BOP provides very few of the lengthy programs that are most likely to improve a prisoner's chance for earlier release or other benefits: of the 60 programs listed on the approved program list, only 14 of them are 240 hours or more,⁷⁴ and only 4 of these 240-plus-hour programs are available at all BOP institutions.⁷⁵ The BOP appears to have a long way to go in the coming year to expand its programs and activities to be in compliance with the FSA.⁷⁶

The Calculation of Credits

Another area of concern is whether the connection between program participation and

⁶⁹ FSA REP. (JAN. 2020 UPDATE), *supra* note 34, at 8.

⁷⁰ James Byrne, *The Effectiveness of Prison Programming: A Review of the Research Literature Examining the Impact of Federal, State, and Local Inmate Programming on Post-Release Recidivism*, FIRST STEP ACT INDEPENDENT REVIEW COMMITTEE (Jan. 2019), <https://firststepact-irc.org/wp-content/uploads/2019/12/IRC-Effectiveness-of-Prison-Programming.pdf>.

⁷¹ 18 U.S.C. § 3621(h)(1)(A) (2018).

⁷² *Id.* § 3621(h)(2)(A).

⁷³ FED. BUREAU OF PRISONS, FIRST STEP ACT APPROVED PROGRAMS GUIDE (Oct. 2020), <https://bit.ly/3nMXITR>.

⁷⁴ FED. BUREAU OF PRISONS, *Evidence-based Recidivism Reduction (EBRR) Programs and Productive Activities*, <https://bit.ly/38K5GJ7> (last accessed Jan. 14, 2021) (“Approved Program List”); *see also* IRC REPORT (DEC. 2020), *supra* note 30, at 6. (“[W]e would urge DOJ, BOP, and others. . . to bear in mind that relatively few of the Bureau’s currently designated EBRPs and PAs involve 240 or more hours of content.”).

⁷⁵ *See* FED. BUREAU OF PRISONS, *First Step Act Approved Programs Guide* (Oct. 2020), <https://bit.ly/3nMXITR>

⁷⁶ IRC REPORT (DEC. 2020), *supra* note 30, at 2-3.

sentence reduction ensures equity for program participants. The BOP has published a proposed rule that would define a day of participation in an EBRR program or productive activity as an eight-hour period of a program or activity without regard for its nature or intensity.⁷⁷ The proposed rule, if applied in conjunction with the information in BOP's published list of EBRR programs and productive activities, would appear to cap the credits awarded for UNICOR employment regardless of its duration. The proposed rule in conjunction with the BOP list also appears to award no FSA credit at all for routine inmate employment outside UNICOR. Yet such employment could readily be considered a productive activity within the meaning of the FSA, and the BOP has offered no explanation for why it has not done so. Further, the proposed rule would provide no time credits for incarcerated individuals whose participation in a program is entirely successful but who are unable to complete the program through no fault of their own, such as when an inmate is transferred to a different facility that does not have the program. Finally, the proposed rule also excludes time credits for incarcerated individuals engaged in programs and activities in a Residential Reentry Center (RRC) or on home confinement, contrary to the requirement in the FSA that all individuals in BOP custody be afforded programs, activities, and credits.

The members of our Task Force believe the proposed rule is unduly parsimonious, at odds with the intent of the FSA, and fails to ensure sufficient FSA credits for inmate employment. A better rule would provide that a day means a day, and that every day an inmate successfully participates in a qualifying EBRRP or PA, including regularly required inmate work assignments, is a day that should count for earning FSA time credits.⁷⁸

⁷⁷ See 85 C.F.R. 75268 (Nov. 25, 2020), <https://www.federalregister.gov/documents/2020/11/25/2020-25597/fsa-time-credits>.

⁷⁸ We are also concerned that there appears to have been some sort of error or errors in the administration and scoring of PATTERN by the BOP. The IRC noted in its December 2020, Report that it was advised by the DOJ of

Definition of Recidivism

The PATTERN risk assessment tool aims to accurately predict recidivism risks so that incarcerated individuals are released when they have engaged in the programming and consequently are less likely to recidivate. A key question is how recidivism is defined. The assessment defines “general recidivism” as a return to BOP custody or a re-arrest within three years of release from BOP custody, as well as driving under the influence (DUI) and driving while intoxicated (DWI) offenses.⁷⁹ Violent recidivism is a re-arrest for a suspected act of violence within three years of release from BOP custody. This latter definition includes, but is not limited to, firearms violations, homicide, child abuse, robbery, sex trafficking, and sexual assault.⁸⁰

Arrests can be driven by police behavior rather than actual reoffending, and arrests that do not result in a charge or conviction are not a true measure of recidivism. Further, the broad definition of general recidivism means that even offenders who are only a risk for committing minor crimes might be refused early release.

Parsimonious Definition of “Low Risk”

Following the recent updates to PATTERN, it has become clear that achieving a “low” and “minimum” risk status is difficult. Every individual receives a “general recidivism” and “violent recidivism” numerical risk score that is then contextualized on a bell curve comprised of all recidivism risk scores of individuals released by BOP (called the recidivism base rate).⁸¹ An individual’s risk category is determined by where the person falls within this bell curve; cut

“certain technical issues” with early PATTERN scoring. IRC REPORT (DEC. 2020), *supra* note 30, at 2–3. The IRC urged the DOJ to disclose the nature of these errors and any steps taken to correct them, but the DOJ has so far declined this suggestion. *Id.* at 3-4. This lack of transparency is disappointing and detrimental to the confidence that can be had in the DOJ’s faithfulness to the FSA’s purposes.

⁷⁹ FSA REP. (JAN. 2020 UPDATE), *supra* note 34, at 12.

⁸⁰ *Id.*

⁸¹ FSA REP. (JULY 2019), *supra* note 16, at 50-51.

points are used to establish categories of risk.⁸² As noted earlier, “low” risk is made up of scores that fall below roughly half the base rate, whereas “minimum” risk is set at just under one-quarter of the base rate.⁸³ Our Task Force is unable to perceive how the election to set the middle cut point between low and medium risk at *one-half* of the base rate is necessary or in keeping with the spirit and intent of the FSA. And given the newly increased scores for criminal history, some incarcerated individuals will never be able to meaningfully benefit from the FSA regardless of how many days, months, or even years they may spend bettering themselves through programming and productive activities.

“Dynamic” Factors Calculated in Risk Assessment

The PATTERN risk assessment tool uses both “static” and “dynamic” factors to calculate a person’s risk assessment, and the tool’s developers emphasize the prevalence of dynamic factors as an advance in assessing risks and needs. Yet among the list of dynamic factors are *history of violence, history of escape and infraction convictions*.⁸⁴ These factors are not dynamic, which the DOJ itself defines as characteristics that “could change with appropriate programming and services or could be affected by the inmate’s behavior.”⁸⁵ Thus, while these types of factors may be relevant to an assessment of risk, they are not relevant to analyzing whether a person has successfully reduced his or her risk.

Need for Additional Dialogue and Input

The PATTERN risk assessment is an evolving tool. The iterations and updates the tool has experienced thus far may hold promise over the long term. But it is essential that conversations around the tool continue, with ample opportunity for commentary and suggestion

⁸² *Id.* at 50.

⁸³ *Id.* at 51.

⁸⁴ FSA REP. (JAN. 2020 UPDATE), *supra* note 34, at 11.

⁸⁵ *Id.* at 7.

based on the actual data used to develop the tool. The United States has for many years led the world in imprisonment. Through transparency that anyone anywhere can follow, the risk and needs assessment system established by the FSA could help teach the world how best to reverse mass incarceration.

PATTERN and COVID-19

Those who work and live in prisons generally have close contact, and because of the prison setup social distancing is not practicable. Due to the proximity in which incarcerated individuals and staff live and work, COVID-19 can quickly spread among the prison population.⁸⁶ According to an ongoing study by The Marshall Project, as of January 22, 2021, there have been a total of 44,957 cases of COVID-19 in the federal prison population.⁸⁷ The first incarcerated individuals in federal custody died from COVID-19 on March 22, 2020 and since then there has been a total of 216 deaths of incarcerated individuals.⁸⁸

Legal authority to respond to the impact of the virus comes from several sources. Federal courts have the authority to reduce an incarcerated individual's sentence and impose a term of probation on supervised release if the court finds that "extraordinary and compelling reasons warrant such a reduction," or that the individual is at least 70 years of age, the individual has served at least 30 years of his or her sentence, and the BOP has determined that the individual is not a danger to the safety of any other person or the community.⁸⁹ The BOP is also authorized to place certain elderly and terminally ill individuals on home confinement.⁹⁰ The Constitution also

⁸⁶ NATHAN JAMES & MICHAEL A. FOSTER, CONG. RESEARCH SERV., R46297, FEDERAL PRISONERS AND COVID-19: BACKGROUND AND AUTHORITIES TO GRANT RELEASE 1 (2020).

⁸⁷ THE MARSHALL PROJECT, <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons> (last visited Jan. 22, 2021). The BOP is also reporting COVID statistics on an ongoing basis at <https://www.bop.gov/coronavirus/>.

⁸⁸ *Id.*

⁸⁹ 18 U.S.C. § 3582(c)(1)(A) (2018).

⁹⁰ 34 U.S.C. § 60541(g) (2018).

gives broad authority to the President of the United States to grant clemency for federal offenses, which can include commuting an individual's sentence to time served.⁹¹

Finally, there is the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), an explicit response to the COVID-19 pandemic in the United States.⁹² The CARES Act is, in part, intended to protect those who are currently in the custody of the BOP through sections pertaining to Expanded Home Confinement, BOP Healthcare Equipment, Free Video, and Telephone Visitation and Video Court Hearings. Of particular note, the determination of eligibility for home confinement under the Act is based primarily on the PATTERN risk assessment tool.

Prior to the passage of the CARES Act, incarcerated individuals were allowed to be released on home confinement for either 10% of their term of imprisonment or 6 months, whichever is shorter.⁹³ On March 26, 2020, just before the CARES Act was signed into law, U.S. Attorney General William Barr (Attorney General Barr) issued a memorandum to BOP Director Michael Carvajal (BOP Director Carvajal) which directed him to prioritize the use of the BOP's various statutory authorities to grant home confinement for individuals seeking transfer in connection with the ongoing COVID-19 pandemic.⁹⁴ Attorney General Barr specifically noted that "there are some at-risk inmates who are non-violent and pose a minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities."⁹⁵

⁹¹ U.S. Const. art. II § 2.

⁹² Coronavirus Aid, Relief, and Economic Security Act *available at* <https://www.congress.gov/116/bills/s3548/BILLS-116s3548is.pdf>.

⁹³ 18 U.S.C.A. § 3624(c)(2) (West 2019).

⁹⁴ Office of the Att'y Gen., "Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic," Memorandum for Director of the Bureau of Prisons (Mar. 26, 2020).

⁹⁵ *Id.*

In assessing which individuals should be granted home confinement, the BOP was told to consider the totality of the circumstances for each incarcerated individual, which included but was not limited to their PATTERN risk assessment categorization. The memo explicitly precluded individuals who receive a medium or high risk score from priority treatment under [the] Memorandum.⁹⁶ Additional factors that needed to be considered included:

- The age and vulnerability of the inmate to COVID-19, in accordance with the Centers for Disease Control and Prevention (CDC) guidelines;
- The security level of the facility currently holding the inmates, with priority given to inmates residing in low and medium security facilities;
- The inmate’s conduct in prison, with inmates who have engaged in violent or gang-related activity in prison or who have incurred BOP violation within the last year not receiving priority treatment under this Memorandum;
- Whether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety, including verification that the conditions under which the inmate would be confined upon release would present a lower risk of contracting COVID-19 than the inmate would face in his or her BOP facility;
- The inmate’s crime of conviction, and assessment of the danger posed by the inmate to the community. Some offenses, such as sex offenses, will render an inmate ineligible for home detention. Other serious offenses should weigh more heavily against consideration for home detention.⁹⁷

On April 3 2020, Attorney Barr issued another memorandum to BOP Director Carvajal which recognized that the “BOP has limited resources to monitor inmates on home confinement and that the U.S. Probation Office is unable to monitor large numbers of inmates in the community.” and thus authorized the BOP to transfer individuals to home confinement even if

⁹⁶ *Id.*

⁹⁷ Attorney General, *supra* note 94.

electronic monitoring was not available “so long as BOP determines in every such instance that doing so is appropriate and consistent with [their] obligation to protect public safety.”⁹⁸

Nonetheless, due in part to dependence on the PATTERN tool, the expanded home confinement initiative has affected only a small portion of the federal inmate population. In December 2020, BOP Director Carvajal reported to the House Judiciary Committee that 18,112 individuals had been transferred to home confinement, with an additional 175 individuals already scheduled to be transferred soon after, about a 200% increase.⁹⁹ Although this number may seem significant, the BOP has 123,105 individuals in its custody;¹⁰⁰ therefore only about 15% of the inmate population has benefitted from being placed on home confinement.

It should also be noted that the DOJ issued a legal opinion on January 15, 2021 providing that individuals who have been placed on home confinement during the COVID-19 pandemic must be returned to prison after the pandemic.¹⁰¹ Only those who are eligible for home detention under pre-CARES Act authority found at 18 U.S.C. sec. 3624 will be allowed to remain on home detention. Whether any of this guidance will change under the Biden administration is unknown.¹⁰²

Criticism of the Use of PATTERN During COVID-19

⁹⁸ Office of the Att’y Gen., “Increasing Use of Home Confinement at Institutions Most Affected by COVID-19,” Memorandum for Director of the Bureau of Prisons (Apr. 3, 2020).

⁹⁹ Michael D. Carvajal, Director of Federal Bureau of Prisons, Hearing on Oversight of the Federal Bureau of Prisons and the U.S. Marshall Service, Statement before the U.S. House of Representatives Committee on the Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (Dec. 2, 2020); *see also* FSA REP. (DEC. 2020 UPDATE), *supra* note 45.

¹⁰⁰ FED. BUREAU OF PRISONS, COVID-19 Coronavirus, <https://www.bop.gov/coronavirus/> (last visited Jan. 18, 2021).

¹⁰¹ Home Confinement of Federal Prisoners After the COVID-19 Emergency, 45 Op. O.L.C. 1,1-2 (2021). “The [CARES] Act authorizes the Director of the Bureau of Prisons to place prisoners in home confinement only during the Act’s covered emergency period and when the Attorney General finds that the emergency conditions are materially affecting BOP’s functioning. Should that period end, or should the Attorney General revoke the finding, the Bureau would be required to recall the prisoners to corrections facilities unless they are otherwise eligible for home confinement under 18. U.S.C. § 3624(c)(2).”

¹⁰² Walter Pavlo, *Department of Justice Lays Plans for Federal Inmates on Home Confinement To Return To Prison*, FORBES (Jan. 21, 2021).

The use of the PATTERN to decide who should be released during the COVID-19 crisis has been criticized on a number of grounds. Critics note that development and validation of the PATTERN did not take into account the threats and abnormalities of the COVID-19 crisis and thus cannot meaningfully assess the public safety risk that transferring an individual to home confinement might present.¹⁰³ Using PATTERN amid the COVID-19 pandemic is also problematic because it is likely to perpetuate racial disparities in decision making.¹⁰⁴

In a letter detailing these and other problems, the Leadership Conference on Civil and Human Rights and other organizations including the American Civil Liberties Union (ACLU), authored a letter to Attorney General Barr asking that he rescind his March 26, 2020 memo.¹⁰⁵ The letter asserted that “the use of a tool like PATTERN to make life or death decisions is alarming and serves to justify leaving tens of thousands of people—mainly people of color—unprotected and at the mercy of the deadly pandemic.”¹⁰⁶ The specific allegations in the letter were several. First, those classified as “minimum” using the PATTERN tool—the only group given priority for home confinement under the BOP’s scheme—accounts for the smallest group of the federal prison population when compared to other groups that are identified as low, medium or high risk.¹⁰⁷ Second, only 7% of black men in the population are classified as “minimum” under the PATTERN tool, compared to 30% of white men.¹⁰⁸ Third, the PATTERN tool does not take into account the fact that people of color have an increased risk of illness and death from COVID-19 because of the structural inequalities in the American healthcare

¹⁰³ Partnership on AI, *Algorithmic Risk Assessment and COVID-19: Why PATTERN Should Not Be Used* 7 (Apr. 30, 2020).

¹⁰⁴ *Id.*

¹⁰⁵ Letter from The Leadership Conference on Civil and Human Rights et. al., to Honorable William P. Barr, Att’y Gen., U.S. Dep’t of Justice 1 (Apr. 3, 2020).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see also FSA REP. (JULY 2019), *supra* note 16 at 62.

system.¹⁰⁹ Fourth, and most generally, predictions of recidivism and historical arrest data are much less relevant to any assessment of public safety risk during this unprecedented pandemic.¹¹⁰

Finally, the letter noted, a key factor in generating a PATTERN score is the individual's participation in programming, but incarcerated individuals have not had enough time since the implementation of PATTERN to participate in programming that will have any meaningful effect on their initial PATTERN scores.¹¹¹ Additionally, with the limited movement in federal prisons resulting from efforts to slow the spread of COVID-19, programming at various facilities may not be as readily available as it was pre-COVID-19 and may have been stopped altogether.¹¹²

CONCLUSION

The FSA was intended to incentivize prisoners to engage in recidivism-reducing activity. By its express terms, the law holds great promise to accomplish the early release of appropriate prisoners. Every eligible prisoner “shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities” and minimum or low risk prisoners “shall earn an additional five days of time credits for every 30 days” of such participation.¹¹³ Our Task Force has followed the implementation of these provisions and has many unanswered questions and continuing concerns.

¹⁰⁹ Letter from The Leadership Conference on Civil and Human Rights et. al., *supra* note 106 at 4.

¹¹⁰ *Id.*

¹¹¹ *Id.* at n.11. According to the Department of Justice, as of January 15, 2020 every person currently incarcerated received an “initial” PATTERN score and was “assigned to participate in evidence-based recidivism reduction programs.” Less than three months have passed since that date—to little time for those incarcerated to have been reassessed based on the completion of programming.

¹¹² Beth Bienvenu, *Arts in Corrections During the Time of COVID-19*, NATIONAL ENDOWMENT FOR THE ARTS (Nov. 10, 2020), <https://www.arts.gov/stories/blog/2020/arts-corrections-during-time-covid-19>.

¹¹³ 18 U.S.C. Section 3632(d)(4)(A).

- Need for greater transparency – The data underlying the development and validation of the risk and needs assessment system should be disclosed. Why have some of the factors been so significantly changed in the January 2020 revision of PATTERN? When and how will we know whether PATTERN is resulting in racially disparate impacts? What additional suggestions of the IRC have not yet been implemented?
- Need for a Needs Assessment Tool – Measuring risk is only the first step under the FSA; the critical next step is to evaluate the needs of our prisoners and develop and provide programs and activities to meet those needs. By ignoring this piece, the DOJ is making the assumption that existing programming will reduce a person’s risk. But in reality, unless the person’s criminogenic factors are addressed – those needs that related to reoffending and that can be addressed through intervention – there is no evidence to suggest that a person’s risk to reoffend will actually be lowered. The BOP is doing no better than using the FSA as a tool to require prisoner engagement in programming to keep them busy. The DOJ’s work must continue until it has completed a Needs Assessment Tool of the kind “Congress appears to have had in mind.”
- Removal of Obstacles and Parsimonious Implementation Choices – Numerous choices have been made in the implementation of the FSA that are unduly parsimonious and should be revisited. Too many prisoners are disqualified from eligibility. There are not enough eligible programs available, and the BOP’s proposed time credits rule would dramatically reduce the benefits for participation in the programming and activities that are available. The PATTERN tool lacks sufficient dynamic factors, uses an unnecessarily broad definition of recidivism, and then deploys parsimonious cut points that eliminate a further swath of prisoners from having any early release benefits to

show for their rehabilitative efforts.

We issue this Report with the hope that our questions and concerns will be considered, and that the full promise of the First Step Act will be accomplished through further – and more faithful – implementation.

ADDENDUM I

**THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION
TASK FORCE ON THE IMPLEMENTATION OF THE FIRST STEP ACT
ROSTER**

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ADDENDUM II

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

August 26, 2019

Page 3 of 3

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

Implementation

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,



Judy Perry Martinez