What Does Fairness Look Like? Conversations on Race, Risk Assessment Tools, and Pretrial Justice

October 2018

In November 2017, our organizations hosted a two-day convening to discuss racial equity, algorithmic prediction, and pretrial justice reform. We sought to create space for a robust inter-disciplinary conversation, as well as to further explore the debate around various definitions of algorithmic "fairness," particularly from a racial justice lens. We also hoped to further enhance our understanding of these issues by learning from participants—who brought their relative expertise in mathematical prediction, civil rights, the administration of pretrial systems, and the criminal legal system—and, in so doing, to share that discussion with partners in a candid environment.

Over the course of the day, a few points of agreement—particularly around desired outcomes—were identified. In particular, participants seemed largely to agree on the need for community oversight and accountability wherever pretrial risk assessment ("PRA") algorithms are used. Additionally, there was broad consensus around the need for any pretrial risk assessment instrument ("PRAI") introduced to serve as a tool to promote release and decarceration.

Finally, given the framing of the convening, participants agreed that racial bias and inequity are critically important considerations that must be countered by pretrial justice systems. The effort to reach broad consensus around these concerns underscored the need for further exploration of several questions that must be taken up by the collection of advocates, stakeholders, and experts engaged in the design and implementation of pretrial risk assessment instruments. Among those questions are: what "risks" should be measured, and how, in a pretrial release decision; how should the design of pretrial risk assessing instruments respond to realities of racial disparity in our criminal legal system; what role—if any—should these instruments play in determining an individual's pretrial liberty; and what is the necessity of risk assessment tools to bail and pretrial reform?

All told, the convening provided a space for dynamic conversation, information-sharing, and an opportunity to share varying perspectives on bail reform and risk assessments. We believe it marks an important beginning, and that further collaboration would be fruitful to continued progress.

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Executive Summary

The primary goals of the convening were (1) to gather leading experts on mathematical prediction, algorithmic discrimination, pretrial policy, and the criminal legal system to seek new insights into the issues surrounding algorithmic pretrial risk assessment and race, and (2) to wrestle with—and, ideally, come away with coherent frameworks about—the various ways algorithms can and cannot account for the racial disparities throughout our criminal legal system.

In inviting participants to come together for this discussion, we set forth a handful of additional, "key goals." We hoped to (1) identify areas of agreement and disagreement with respect to the permissible boundaries of preventive pretrial detention, (2) arrive at a shared and explicit vocabulary regarding the potential definitions of algorithmic fairness in the pretrial sphere, (3) develop coherent frameworks for identifying and expressing concerns with racial bias in the pretrial system, as well as the extent to which predictive tools can and cannot account for racial bias, (4) derive principles for the proper role of algorithmic risk assessment instruments in a pretrial release or detention decision, including their impact on racial disparities in the carceral system, and (5) identify priority areas for further research and advocacy.

Several of these goals were met. The convening successfully brought together an inter-disciplinary group of experts, with different opinions about the path forward for pretrial justice, for a robust discussion about pretrial risk assessment. Feedback from our participants seemed clearest on this front: it was a worthwhile effort to bring people together for conversation. Areas of agreement and disagreement were also identified throughout the day's discussion.

As hoped, the convening and discussion revealed points of consensus among attendees. While convening participants described more disparate views in a follow-up survey, some overarching themes remained relatively common and are worth exploring further as unifying goals.[1] Chief among these points of consensus were the following: (1) any use of PRAs should support our shared goals of decarceration, (2) any PRA scheme should affirmatively have a goal of reducing racial disparities, and (3) conversations around the implementation, validation, use, and monitoring of PRAs must include meaningful involvement from people impacted by the criminal justice system and their communities.

Our effort to grapple with the role of race in predictive tools underscored the need for further collaboration, conversation, and analysis. While attendees agreed that the influence of race was of critical importance to the design, implementation, and use of risk assessment tools, we did not reach a consensus on the finer points associated with that concern. For example, attendees had divergent views regarding the various fairness metrics or the trade-offs at play in choosing one metric over another. And the mechanics of building algorithms that prioritize racial equity, while of great import to attendees, is an issue in need of greater attention.

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[1] As detailed in the following section, the convening was "closed door" in order to facilitate candid discussion. In light of that ground rule, the surveys were anonymous and, in many cases, completed by groups rather than individuals. We have not reproduced them here but will make them available upon request.

All told, we hope that the convening represents a launching point for partnership and collaboration amongst a community of incredibly dedicated experts and advocates. The most salient takeaway from a day spent in conversation was the sense of shared goals and purpose: uniformly, participants felt a sense of urgency around (1) dramatically reducing—if not eliminating—our country's use of pretrial incarceration, (2) reducing or eliminating the racial disparities in pretrial detention, bail, and surveillance, (3) the need for independent and community oversight over the design, implementation, and auditing of risk assessing tools, including members of the community on whom any risk assessing tool will be used, and (4) the need for tools to be transparent and clear regarding the factors they use and the way they report their outputs.

Overview of the Discussion

To promote candid, open discussion and given the sensitivity of the topic, we made a decision that the convening would be "closed-door." All attendees feel passionately about, if not highly personally invested in, the topics of pretrial justice, racial equity, and the role of algorithmic pretrial risk assessment in that context. To respect the trust participants vested in us by attending and discussing these topics openly and honestly, we provide a high-level overview of the discussion in this report but have omitted personal identifying details regarding who spoke when, other than those who served as presenters as detailed in the agenda.

An agenda of the two-day event is included in Appendix A below.

Ground Rules

Our ground rules for the discussion were chiefly: (1) first and foremost, to resist the temptation to attribute personal animus or ill intent to anyone in their discussions of race, particularly given the fraught nature of conversations on race and the ubiquitous nature of racism in American society, (2) to be mindful of our relative expertise and lack of expertise on various topics, (3) to take stock of our relative power in this movement and discussion, and (4) to respect the nature of the conversation as closed-door.

Realities of Pretrial Incarceration

Speakers Bill Cobb, ACLU Campaign for Smart Justice, and Teresa Hodge, Mission: Launch, spoke at the opening dinner and reception for the event. Both described their experiences in the criminal legal system, the realities of pretrial incarceration, and the ways racism fostered their involvement with the system. In a discussion facilitated by Vincent Southerland, NYU Law Center on Race, Inequality, and the Law, both spoke candidly of the horrors of incarceration in our nation's jails, including acts of violence, intimidation, and misconduct by jail and prison staff and other incarcerated individuals. By sharing their experiences, convening participants entered a focused discussion of risk assessing algorithms mindful of (1) the historic and structural realities of racism, particularly against black and brown people, that infects America's criminal justice system, (2) the significance of a decision to put anyone in jail, and (3) the presence of many complex details of a given person's life that may lead to interaction with the justice system but which may be difficult to capture in static data.

Participants noted that it was valuable to hear Cobb's and Hodge's stories, particularly as they shed light on the thousands of human "factors" we are unable to see in predicting behavior through machine learning and/or algorithms, as well as the significant human toll of even one person's incarceration, particularly where that person may show only as one "data point" among many in an algorithmic design setting.

Shared Definitions

To start the full convening day, we offered the following "shared definitions" as a possible starting point. These definitions were sourced from various experts, most of whom attended the convening. We asked for participants to be explicit, if they used these or similar terms in a different way, and explain what they meant.

Actuarial The study of historical data of individuals to understand aggregate risk. Actuarial tools typically assume that demographic categories of people carry different levels of risk but often don't examine the cause of such differences. So, for example, life insurance used to charge black people more in premiums because of a shorter life expectancy among black persons, thereby representing higher costs for life insurance.

Algorithm Algorithms are mechanisms that predict future success based on historical data patterns. To build an algorithm, we need two things: first, historical data that display patterns of what initial conditions later led to success, and second, a definition of success. This definition will also incorporate the penalty for failures, both false positives and false negatives.[2]

Data Data are a formal archive, usually in digital form, of historical information. Data consist of that information that we think to keep, that is typically relatively easy to capture, and that usually stands as a proxy for what we actually want to record.

Institutional Racism Institutional racism occurs within and between institutions. Institutional racism is discriminatory treatment, unfair policies, and inequitable opportunities and impacts, based on race, produced and perpetuated by institutions (schools, mass media, etc.). Individuals within institutions take on the power of the institution when they act in ways that advantage and disadvantage people, based on race.

Structural[3] **Racism** Structural racism in the US is the normalization and legitimization of an array of dynamics—historical, cultural, institutional, and interpersonal—that routinely advantage whites while producing cumulative and chronic adverse outcomes for people of color. It is a system of hierarchy and inequity, primarily characterized by white supremacy—the preferential treatment, privilege, and power for white people at the expense of black, Latino, Asian, Pacific Islander, Native American, Arab, and other racially oppressed people.

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[2] This was the definition for "algorithm" we offered during the convening, although we recognize that this may be more descriptive of a predictive model than of an algorithm.
[3] While both institutional and structural racism can be created and driven by personal animus, by definition, personal animus is not necessary to perpetuate it once these institutions and structures are in operation.

Validation Validation is the process of assessing the predictive ability of a pretrial risk assessment instrument. The purpose of validating an instrument is to determine the extent to which it measures what it is intended to measure, typically court appearance and new arrest.

The process of assessing the predictive ability—or validity—of a pretrial risk assessment looks at the individual and combined ability of risk factors to distinguish between levels of "risk" of an outcome occurring. Validation first involves examining the individual risk factors and their relationship to the outcome of interest. Bivariate analyses, a test of an individual risk factor and the outcome, are run to determine whether any observed differences in outcomes are statistically significant and not due to chance or random occurrences. Next, multivariate analyses, tests of multiple risk factors and the outcome simultaneously, are run to determine whether the risk factors, as a group, are able to distinguish between pretrial success and failure. Multivariate analysis helps determine the predictive ability of the risk factors as a group. Finally, risk scores and outcomes are examined.

"Valid" instruments yield risk scores such that persons who score the lowest on the assessment produce failure rates lower than all other risk scores and persons who score the highest on the assessment experience the highest failure rates. Two-variable tests are again used to determine if differences in failure rates observed across risk scores are statistically significant and not due to chance. The results of a validation are used to refine the instrument by adjusting the inclusion of factors as well as their respective weight to increase the predictive validity of the instrument.

Terms We Did Not Define

Fairness There are different ways to evaluate what makes a PRAI "fair," as well as differences of opinion about which is most important. Many of the materials circulated before this event touched on those differences (*see* Kleinberg *Inherent Trade-Offs*, Chouldechova *Fair Prediction*, *Disparate Impact*, Corbett-Davies *An algorithm was labeled biased… it's not that clear*, both Angwin pieces, Mayson *Bias in, Bias Out*). It was our hope to unpack a few of the possible approaches to "fairness" during this convening, both to create common understanding of the mechanics of algorithmic PRAI tools, and in the hopes that the varied expertise in the room (on the algorithmic design side and the criminal justice side) can help inform future decisions about what forms of "fairness" PRAI tools could and should prioritize.

Risk Both the *kinds* of risk (e.g., failure to appear, flight, arrest, commission of a violent act, witness tampering) and the *levels* of risk (e.g., a 50 percent chance of FTA? a 20 percent chance? over six months? a year?) that are considered and tolerated in determining whether to release an arrestee pretrial remain largely undefined. The answers to the question "what risks matter pretrial?" (and how much?) vary based on jurisdiction and require further discussion. We spent some time specifically discussing the landscape of "what risks matter," as well as how PRAIs should define "risk," during the convening.

Conversation One: Defining Risk and the Current Legal Landscape

Brandon Buskey, ACLU Criminal Law Reform Project, described the existing legal landscape regarding "what risks matter" if the government seeks to detain someone pretrial. Buskey offered that we should approach the question of "who should be released?" as the inverse of the question

"who should be detained?" and that when we come to answers about "who should be detained?" those answers should define what risk assessment tools measure and do.

Buskey outlined the limited legal landscape on bail and pretrial release. The presumption of innocence, while mostly applied in the context of trials to hold the state to its burden of proof beyond a reasonable doubt, was linked to pretrial release by the Supreme Court in 1951 in *Stack v. Boyle.* In *Stack*, the Court explained that a robust right to pretrial release is important to protect the presumption of innocence. This presents an important normative starting point to the discussion around risk assessment and preventive detention. In light of the presumption of innocence, the mere idea of preventive detention is un-American and problematic; but Buskey offered that there is not solid guidance from the Supreme Court or lower courts on the specific parameters. Historically, there has been a cultural assumption that it is permissible to detain people accused of capital offenses, and courts have assumed an inherent authority to detain in order to preserve the ability to have a trial.

In the 1980s, amidst debate around the authority to detain someone—prior to trial—based on their potential "dangerousness," the 1984 federal Bail Reform Act was passed. The Act purports to restrict the government's ability to detain people pretrial to only those individuals charged with "serious offenses." Under the Act, clear and convincing evidence was required in order to use dangerousness as a rationale for detaining someone. In 1987, the Supreme Court upheld the Act's constitutionality against a facial challenge in *U.S. v. Salerno*, 481 U.S. 739. The Court held that there was no 8th Amendment violation, finding that bail can be set so long as it is not "excessive," and that it may be used for issues other than flight risk. In its decision, the Court also recognized that freedom before trial is the norm, and detention should be treated as the "carefully limited exception." This language has proven helpful for reform advocacy, even if that was not the Court's intention.

Buskey noted that *Salerno* left many questions unanswered. Importantly, the Court did not define *what* individual is deserving of pretrial detention, and set no levels of "risk" or "dangerousness" as standards to be applied. These issues remain in debate, and some states have begun to create their own definitions.

The ensuing discussion confirmed that lingering questions, such as "what risks really matter?" or "what types of people 'ought' to be detained pretrial?" pose complicated challenges. Many pretrial systems around the country either authorize, or implicitly presume through the setting of unaffordable money bail, detention for an array of charges including domestic violence or drug charges. Moreover, arrest, even for a violent or serious crime, reflects only a police officer's determination made by probable cause: detention should require a higher legal standard, particularly given the presumption of innocence. Thus, before a history of arrest is used to inform a detention determination, more would need to be established.

A fundamental question exists whether or not to use algorithms to make predictive pretrial measurements, and whether they undertake the appropriate inquiry. Various concerns arose in conversation: that an actuarial algorithm cannot likely effectively measure a given individual's risk of non-appearance, or that the likelihood of court appearance (as distinct from an individual's likelihood to flee) should not be considered a relevant inquiry. It was noted that if someone misses court, it is likely not because they have fled but rather it may be because they are in need of assistance

with transportation, childcare, or coverage for work. And an algorithm is unlikely to capture the more complex, human reasons that an individual does not appear for court.

There was some discussion as to whether intentional flight ought to be treated differently than general failures to appear for court (also described as "willful" versus "non-willful" failures to appear), with differing viewpoints expressed: while there seemed to be agreement that intentional flight is different from a failure to appear, some participants worried about the message that all failures to appear communicate regarding accountability and/or judicial economy. Given that there was still a strong interest in treating "willful" or "intentional" flight differently than general failures to appear, participants wondered how to determine, measure, and monitor the distinction. One participant suggested that current data and criminal justice systems are not yet equipped to delineate between "types" of failures to appear, which are treated generally.

It was also noted that, aside from whether or how these "risks" of various types of failures to appear should be assessed or handled, some simple interventions may help facilitate court appearance in general. Some participants noted the efficacy of text message reminders or free rides to court but that these practices have not gained much traction. One participant believed that legal intervention under such theories as substantive due process and voluntariness may be more fruitful.

Conversation Two: The History and Future of Pretrial Risk Assessments

Kristin Bechtel, of the Arnold Foundation, and Hannah Sassaman, from the Media Mobilizing Project, expanded upon Brandon Buskey's introductory framing for the day's conversation by providing more context on the history, current form, and potential future of existing pretrial risk assessments. To begin, Bechtel reviewed how methods including professional and judicial discretion, consensus tools, and actuarial instruments have been used to inform pretrial release decision-making. These methods have been applied to assess two primary outcomes: failure to appear and future arrest.

Today, actuarial pretrial risk assessments span across city, county, state, and federal systems. For instance, pretrial risk assessment tools are used across the federal system. Several states including Virginia, Colorado, Ohio, Kentucky, and Connecticut have implemented their own systems as well. Counties from Kansas to Minnesota, as well as the District of Columbia and New York City, have implemented models. While some of these assessment systems have undergone revisions since the original version was adopted, many have not.

Bechtel noted both the strengths and limitations of current pretrial risk assessments. One such strength is the predictive accuracy of tools, compared to human judgments. Continued research offers considerable support that the factors used in many existing tools are strong predictors of failure to appear or re-arrest. Moreover, jurisdictions to introduce risk assessment as a component of reform have seen promising initial results: increasing pretrial release and decreasing FTA and arrest rates. Bechtel also noted that current tools have several observed limitations. First, few make it through any type of peer review process. Additionally, an instrument will often use one scale to look at several different types of outcomes. For example, many tools forecast an individual arrestee's likelihood, *either* of failing to appear *or* of being arrested, in one composite "risk score." Yet the risk of a failure to appear and risk of arrest involve different behaviors and different risk factors, and

likely require different interventions to mitigate. Moreover, Bechtel observed that there is room for a substantial amount of work simply studying the various reasons people fail to appear for court, the ways that failure to appear data are collected and defined, and how communities respond to support justice-involved individuals with court appearance (e.g., court reminders, transportation).

Bechtel indicated that further investigation is needed to assess the various ways that these tools are being implemented (including scoring, decision-making, etc.) and monitored for bias. Right now, there is not much consistency in terms of how the tools are tested for predictive bias. If this evaluation is occurring, it is not being recorded in peer-reviewed papers or other sources.

One model, the Public Safety Assessment (PSA) launched by the Arnold Foundation, aims to use the strongest predictors for failure to appear, new arrest, and arrest for violence during the pretrial period. The PSA uses predictive indicators to make three separate projections: likelihood of failure to appear, likelihood of arrest, and likelihood of arrest for a crime of violence. The model does not require an interview with the accused, and aims to maintain predictive accuracy across jurisdictions by continuing to engage researchers in auditing the PSA. Prior to the PSA's development, a 2013 study out of Kentucky indicated that the risk assessment scale performed just as well without relying on risk factors gathered from an interview, supporting the PSA's design without an interview.

The PSA has been launched in 33 sites, and there were seven initial pilot jurisdictions along with Kentucky. When a jurisdiction introduces the PSA, the Arnold Foundation provides considerable training and technical support before launch. Since 2013, there have been approximately 600 inquiries into the assessment. It is packaged to judges as simply one part of the decision-making toolkit, not a panacea. Bechtel reported that, to date, jurisdictions to introduce the PSA, including New Jersey, have seen positive initial results, including increased pretrial release rates, decreased jail populations, and lower FTA and arrest rates. Bechtel emphasized, however, that the PSA was just one element of a package of changes in those jurisdictions.

Hannah Sassaman continued the presentation on existing risk assessment models to offer a perspective from an organizer's vantage point. Many organizers are concerned that bail reform and risk assessment have been inextricably coupled, leading to a widespread view that the two necessarily go hand in hand. Furthermore, the algorithms draw their data from a racist history of criminal justice policy and practice. From the organizer's perspective, the goals that guide bail reform, as well as the development of risk assessment tools, should always be to reduce jail populations, reduce racial disparities, and center control within the community.

There are a variety of existing risk assessment tools, including tools developed in Virginia, Ohio, and Colorado. Beyond the better-known tools such as the PSA or the VPRAI (in Virginia), there are numerous other models, including the ORAS used in Ohio; the CPAT used in Colorado; and tools made on the county level, as in Richland County.

There are several concerns with some of the existing risk assessment models. First, the measured risks are often grouped together into a composite score, as Bechtel discussed. Another issue is that,

under many tools that prioritize predictive accuracy, black people are much more likely to be labeled as "high-risk" than are white people, a concept sometimes referred to as the "ProPublica Debate," dealing with the realities of false positives. Where there are disparate rates of false positives among people of color, white people tend to benefit from errors (because they may be deemed less risky than they in fact are), whereas people of color are negatively affected (because they may be deemed more risky than they in fact are, leading to increased bail amounts, incarceration, and/or monitoring).

Sassaman noted that it is essential that jurisdictions and key stakeholders really understand how the tools being introduced and used in their communities work, and how they can be calibrated to match the needs of the community. Community members need to be able to have oversight, which requires access to underlying data. Often, this underlying data are not made publicly available. The nature and character of the data fed into the tool are among the key concerns about the propriety of risk assessment instruments.

The ORAS (Ohio) includes as inputs employment, housing status, and drug use. Some of these factors are often tainted by structural racism and inequality. The CPAT (Colorado) includes questions regarding cell phone ownership, which, again, elevates the risk scores of persons marginalized by structural inequality and who cannot afford to own a cellular phone. And county-based tools, like the one created for Richland County, sometimes include subjective assessments, like Richland's inclusion of "attitude" of the accused as well as inquiries into issues that may bear no relevance to one's risk of flight, like child support obligations.

Throughout these systems, there are overarching concerns with how little communities are involved in the calibration of these tools, and uncertainty regarding how elements of structural racism and inequality are being accounted for. The question was posed: how often are communities, besides criminal justice stakeholders, apprised of what are the values of the score of a given risk assessment tool? It was suggested that the community where a tool is being used has the right to decide what "high-risk" means in the pretrial release determination, as it is a moral evaluation.

From the perspective of community organizers, efforts to implement risk assessment tools need to include community participation, decarceral decision-making, a focus on ameliorating needs (not just identifying risks), and collaboration with racial justice movements, and should be centered on the impact of race.

Further discussion among participants revealed a great deal about the design, oversight, and implementation of risk assessment tools. Among the points of emphasis were: the need to use different kinds of arrests differently as predictive measures; the value of ensuring that companies involved with technology procurement that could feed into data collection (like body cameras) be accountable to the communities being judged and assessed; the need for tools to label their outputs in clear and technical terms rather than with labels such as "high" or "low" risk; and the value of having a separate cohort of unaffiliated and independent data scientists to audit these tools. The need

for broad, multilayered oversight of the input and output of risk assessment tools resonated across the commentary.

Conversation Three: What Does Fairness Look Like?

The question of fairness in the context of pretrial risk assessments raised a host of concerns for advocates, institutional stakeholders, and tool designers. Those concerns generally fell into four categories: (1) racial bias in the data, (2) the limited legal parameters to address that bias, (3) the current state of pretrial justice, and (4) the implementation of pretrial risk assessments in reform efforts elsewhere.

The Technical Side of Risk Assessments

Jon Kleinberg with Cornell University and Suresh Venkatasubramanian with the University of Utah provided an overview of how predictive algorithms can and cannot account for bias in their construction.

Fundamentally, algorithms provide a process to transform inputs—generally data—into some result—an output. Predictive algorithms use data (input) to forecast, or predict, one's behavior (output). The mere operation of a predictive algorithm raises questions for advocates, institutional stakeholders, and tool designers. Estimating the probability of a future outcome can be derailed by difficulty in: defining the features or characteristics of an individual that are relevant for purposes of the prediction the tool will purportedly attempt to make; defining what outcome it is one is trying to predict; and determining when and how an institutional actor who uses the tool exercises his or her discretion to make a decision.

Fairness

When it comes to algorithms, fairness can be defined in a number of ways. For purposes of this convening, consideration was given to three definitions as introduced by Kleinberg and Venkatasubramanian:

(1) <u>Calibration Within Groups</u>: This definition is referred to as "predictive parity," that is, a score of x means the same likelihood of a "positive" result (in this setting, "positive" usually means "positive for pretrial failure") across groups.

(2) <u>Balance for the Positive Class</u>: The average score of positive members in group A is the same average score of positive members in group B, so that across groups, the average scores of people who have a pretrial failure are the same.

(3) <u>Balance for the Negative Class</u>: The average score of negative members in group A equals the average score of negative members in group B, so that across groups, the average scores of people who do not have a pretrial failure are the same.

The latter set of definitions is most readily understood as "error rate balance," the premise of which is that no singular racial group bears the burden of mistakes made by the predictive tool.

Among the most vexing problems with these measures of fairness is the fact that it is mathematically impossible to achieve all measures for all groups at once. That is the case when the feature to be

predicted is distributed unevenly between groups. For example, if racial group A is arrested at a higher rate than racial group B, a tool designed to predict who will face arrest will label group A as more likely to be arrested than group B. In other words, the tool will tell decision-makers to expect some imbalance in who is arrested. If one tries to adjust the tool, such that the mistakes made by the tool are evenly distributed across races—following an error rate balance approach—the adjustment undermines the predictive parity of the tool.

Although the inherent trade-off here between accuracy and fairness is expressed as a math problem, it forces a choice in values—is it better to treat everyone equally or to ensure that no one racial group bears the burden of errors by the tool?

As discussed, solutions to this conundrum are not immediately obvious. Kleinberg and Venkatasubramanian outlined that it is possible to build a risk assessment tool that takes race into account, but doing so would require tool makers to choose among several options: adjusting the data used to train the model; modifying the algorithm; or building a model that is oblivious to data and modifying the outputs. While none of these questions lend themselves to simple answers, what is clear is that the path forward will be informed by the values that the risk assessment-focused community chooses to advance in the movement for pretrial justice.

From the Technical to the Practical

After Kleinberg and Venkatasubramanian presented, brief presentations were given by Marie VanNostrand with Luminosity, Alexandra Chouldechova with Carnegie Mellon, and Mark Houldin with the Defender Association of Philadelphia discussing some of the practical and systemic implications of these technical realities, and group discussion followed.

There is wide agreement that pretrial decision-making—and pretrial justice in general—is in need of significant reform. Far too many people are unnecessarily detained pretrial, either because they cannot afford to post bail or are improperly deemed a risk to public safety, or both. In a system grounded on individualized justice and the presumption of innocence, the state of pretrial justice is deeply troubling. The inequity and injustice of the status quo drove reform efforts, which have largely focused on improving decision-making by systemic actors. Risk assessment instruments have been designed and implemented to address ad hoc and unfair bail determinations. The goal is to supplement, not replace, human decision-making with instruments that guide discretion in ways that decrease bias.

Against this backdrop, all those concerned with pretrial justice must consider whether risk assessment instruments can meet that goal given the myriad problems they may present. There is broad consensus and understanding that criminal justice data is infected with racial bias. Arrest statistics, which are generated by historically biased patterns of criminal law enforcement, provide a prime example of how bias can be intertwined with the data. An excessive police presence in communities of color naturally fosters more contact between those communities and law enforcement. Greater police contact leads to more arrests, creating the impression that heavily policed communities are more prone to crime.

The problem is found not only in what the arrest data measure—crimes stemming from interactions between police and particular communities—but in what the data fail to measure: crimes that are committed by those who reside in communities that are not subjected to police scrutiny. At bottom, data informed by arrests are actually better indicators and predictors of police behavior—where they decide to patrol, who they interact with, and who gets arrested—than they are of the future behavior of individuals facing criminal charges. And, unfortunately, in jurisdictions where arrests play a role in the pretrial process as an indicator of one's risk to public safety or flight, biased policing patterns and the resultant data will unfairly overstate the risk of those from overpoliced communities.

The current legal landscape presents another set of thorny issues for those concerned about fairness in algorithmic decision-making and risk assessment instruments. Attempts to explicitly correct for racial disparities through race-conscious measures are generally disfavored under the United States Supreme Court's interpretation of the constitution's equal protection clause. Notwithstanding valid concerns about the legitimacy of an anti-discrimination doctrine that eschews race consciousness, advocates must find ways to shield measures to correct the racial bias in the data from legal attack.

The experiences of other jurisdictions that have implemented risk assessment instruments as part of pretrial reform efforts are instructive, with the experiences of jurisdictions varying widely. In some instances, where the instruments have been complemented by a suite of reforms, there have been dramatic reductions in the number of people incarcerated pretrial. One such example is New Jersey, where, in the wake of comprehensive pretrial reforms that included the introduction of a risk assessment instrument and the near-elimination of money bail, the state saw a 20 percent reduction in its pretrial jail population. Yakima County, Washington, similarly introduced a series of reforms to its pretrial system, including improvements to public defense, the establishment of a pretrial services agency, and the introduction of a risk assessment tool. Those changes resulted in greater racial equity in pretrial release rates and a 20 percent increase in the number of people released pretrial.[4]

Other jurisdictions have had less success. Data from Lucas County, Ohio, where a risk assessment instrument was employed in January 2015 as part of a series of reforms to reduce the jail population, showed that pretrial release rates actually declined by about 12 percent, while the number of those detained pretrial increased by 4 percent.[5] Kentucky saw a small decline in pretrial detention following the introduction of risk assessment, but that decline ended as judges regressed to their pre-risk assessment practices. Questions regarding the effectiveness of risk assessments to address racial disparity remain, in light of ongoing efforts to gather and analyze data from jurisdictions that have adopted risk assessments.

Thus, among the most significant lessons to be learned is that the implementation of a risk assessment tool alone does not constitute reform. True pretrial reform that aims to reduce jail populations and address racial disparity must be comprised of expanded procedural due process protections for the accused—including robust adversarial hearings, expanded evidentiary and

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[4] Claire M. B. Brooker, *Yakima County, Washington Pretrial Justice System Improvements: Pre- and Post-Implementation Analysis*, 2-3 (2017) https://justicesystempartners.org/wp-content/uploads/2018/02/2017-Yakima-Pretrial-Pre-Post-Implementation-Study.pdf

[5] Megan T. Stevenson, *Risk Assessment: The Devil's in the Details*, The Crime Report (Aug. 31, 2017), https://thecrimereport.org/2017/08/31/does-risk-assessment-work-theres-no-single-answer/

discovery rules that give counsel for the accused greater access to information so they can adequately challenge a request for detention, and supports for the accused that mitigate concerns about flight and public safety. In some instances, as in New Jersey, advocates were able to push for these due process protections in tandem with the introduction of a risk assessment tool. Some participants stressed that advocates must continue to push for wholesale reform, and feared what they saw as piecemeal tinkering with the pre-trial ecosystem through the introduction of a risk assessment instrument. While risk assessments have sparked discussions about pretrial justice, including a deeper examination of release decision outcomes, they are only one path to reform.

Conversation Four: Applying Knowledge, Looking Forward

Several themes emerged from the convening participants' conversations that help to shape a path forward, which was outlined in the final portion of the convening, with speakers including Jason Schultz with NYU, Spurgeon Kennedy with the National Association of Pretrial Services Agencies, Sakira Cook with the Leadership Conference on Civil and Human Rights, Megan Stevenson with George Mason University, and David Robinson with Upturn.

First, there are a series of considerations that the pretrial justice and risk assessment community must weigh as related to risk assessments alone. The community must be mindful of, and guard against, automation bias, which is the tendency to place faith in the apparent neutrality and objectivity of automated decision-making. One check against that phenomenon is a full and transparent accounting of the factors that may be posited as correlative with risk, but that have not been accounted for (or only accounted for in very poor ways) by the tool—items like arrest history, prior warrant history, or residential stability. Those who use these tools should be provided robust information about their shortcomings—including the data they do or do not rely upon and the inherent flaws in that data. Another measure is to ensure that the procedural due process checks attached to human decision-making are robust and available to those facing criminal charges.

Second, it is worth considering how a risk assessment tool can be used to shape the behavior of systemic actors. Risk assessment tools can be used to: move reform away from money-based bail systems; hold judges accountable and force them to think critically about their decision-making; shed light on the generally very low "risk" posed by the overwhelming majority of people; and drive changes to state bail statutes such that release is presumed. Keeping these and other reforms central in the debate about risk assessments increases the chances that the tools are being used to advance the types of structural changes that much of the pretrial justice community agrees are needed. Such an approach also militates against the type of limited, single-minded focus on risk assessments that can distract from the attention and scrutiny that must be given to wholesale reform of the pretrial justice system.

Third, beyond concerns around eradicating the bias in the data, there is real value in ensuring that the implementation of these tools is done with feedback from communities of color and directly impacted people. Far too often, the voices of those most impacted by the criminal justice system are ignored, undermining the fairness that the system is supposed to provide.

Finally, there is also a need to focus energy on the implementation of the tools. Among the areas of focus are oversight and accountability for judges who use the tools to supplement pretrial decisions;

metrics that provide those actors with feedback about the accuracy of the predictions made; and structures that allow the tools to be updated with data that account for reforms and added supports to mitigate the chance that someone will fail to appear in court if released from custody.

Questions and Conclusions Drawn from Discussion

Are the Tools Necessary for System Change?

In recent years, jurisdictions nationwide have embraced pre-trial risk assessment tools. In large part, the adoption of these tools has come about as advocates, stakeholders, and communities have mounted successful attacks to end, or significantly curtail, the cash bail regimes that have dominated criminal justice systems for generations. The reliance on risk assessments is premised on the notion that data-driven analysis and predictive analytics will better guide judicial evaluation of the risk that a person accused of a crime will return to court or pose a danger to public safety. Better decisions, the thinking goes, will ensure a more accurate sorting of those who should, or should not, be incarcerated during the pendency of their criminal case. The end result, embodied by the efforts to end cash bail, is fewer people in jail.

Without question, these are laudable goals. Research demonstrates that pretrial detention is infected by racism,[6] does not improve public safety,[7] has deleterious effects for communities and families,[8] and leads to worse case outcomes, including an increased likelihood of time spent in prison and further criminal justice involvement upon completion of that sentence for the individual who is detained.[9]

As a political matter, the turn to risk assessments may have some merit. A risk assessment tool can provide the type of cover needed to shield decision-makers from critique. It lends credibility to the notion that a pretrial system can operate efficiently and free from problematic human biases. But as a practical matter, the benefits of introducing risk assessment tools into the pre-trial ecosystem do not always measure up to the political justifications put forward, or the costs that must be paid, for their use. Jurisdictions can reform their pretrial systems without exclusive reliance on risk assessment tools. However, in choosing a course, it is important that stakeholders recognize that

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[6] *See* Cynthia E. Jones, *"Give us Free": Addressing Racial Disparities in Bail Determinations*, 16 Legislation & Pub. Pol'y 919, 938 (2013); Marvin D. Free Jr., *Race and Presentencing Decisions: The Cost of Being African American*, *in* Racial Issues in Criminal Justice: The Case of African Americans 137, 140-41 (Marvin D. Free Jr. Ed., 2003); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 Criminology 873, 899 note 89 (2003).

[7] *See* Michael R. Jones, Pretrial Justice Inst., *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option* at 6 (Oct. 2013); Paul Heaton, et al., *The Downstream Consequences of Misdemeanor Pretrial Detention* (July 2016) at 1.

[8] Christopher T. Lowenkamp, et al., *The Hidden Costs of Pretrial Detention*, 4 (2013), http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf

[9] Megan Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 18–10 (2016), http://www.econ.pitt.edu/sites/default/files/Stevenson.jmp2016.pdf; Arpit Gupta, Christopher Hansman, and Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 19 (2016), http://www.columbia.edu/~cjh2182/GuptaHansmanFrenchman.pdf

there is no such thing as a one-size-fits-all approach to reform. What is useful for one system may be anathema to another.

Against this backdrop, views about the utility and necessity of pretrial risk assessment tools were understandably mixed. On the question of whether the tools should be used in the pretrial justice system at all, participants offered nuanced views that mirror the bail reform debate currently sweeping the nation. Those views generally fell along four lines. One cohort of participants felt that the tools had a role to play, and offered a range of reasons to support that conclusion. Some felt that the tools helped to alleviate the subjective biases of judges, informed judicial decision-making with evidence-based practices, and could help judicial culture evolve in progressive ways by providing norms for judicial decisions. Others were willing to accept the use of the tools in the pretrial justice system, but qualified that decision with the need for unbiased data to feed the tools. Another group of participants opposed the introduction of the tools into pretrial systems, imploring stakeholders to focus on alternative means to decarcerate. Those participants suggested striving for a pretrial regime that infused more robust due process protections for the accused and greater education of directly impacted communities about the inequities of bail to drive reform. A final group of participants viewed the question of their use in pretrial systems as moot, given the widespread adoption of tools in jurisdictions nationwide.

Despite the absence of a consensus about whether the tools should be used at all, there was clear agreement about the aim of the tools when they are introduced into pretrial systems. A substantial portion of participants agreed that the tools should not be used to form a pretrial detention decision. That cohort shared the view that the tools should be consulted only to ensure that individuals are released. Participants raised concerns about racism, bias, inaccuracy, the risks being measured, and the lack of accountability for judges who disregard the tools. Others viewed the tools as a mechanism to provide an initial assessment that would trigger an adversarial hearing or further deliberative process, leaving a judge to ultimately determine whether someone should be released or held in custody. There was also significant fear that tools would lead to some automatic detention decisions, or replace judicial discretion overall. That fear drove healthy skepticism among the convening attendees about the extent to which decision-makers should rely on risk assessment tools.

At bottom, while none of the attendees suggested bail reform was impossible in the absence of pretrial risk assessment tools, those who were not opposed to their use were of the view that they could play a useful role in advancing pre-trial reforms, particularly where they could be used to hold stakeholders and court systems accountable by measuring the decisions made by judges. What was most troubling to those opposed to their use was the chance they would replicate and calcify the biases that already exist in the criminal justice system, stymying efforts to confront racism in the system and reduce jail populations.

What "Risks" Matter?
There was considerable discussion during the day about what risks should be relevant to a pretrial detention determination. As a baseline, most participants agreed that the likelihood of one's appearance in court and the danger one posed to the community were most worthy of consideration, views that track the bail statutes of most states and the Bail Reform Act. Those considerations were tempered by nuanced concerns about how those risks are measured and accounted for by the pretrial

justice system. For example, there was moderate support for a proposal that we should find a way to distinguish general failures to appear as distinct from willful failures to appear or flight. Others emphasized that measuring an individual's risk of re-arrest is simply a measurement of law enforcement behavior, not necessarily individual behavior that jeopardizes community safety.

How to Address Racial Disparities in the Pretrial System

As discussed above, participants were unified in a sense of urgency to remedy the disproportionate burden shouldered by communities of color in our current bail decision-making regimes. However, both with respect to their broader sense of what reform should look like, and with respect to what—if anything—algorithmic designers should do differently to take racial disparities into account, participants felt differently.

With respect to general reform, some participants suggested the presence of PRA tools is essential to changing the culture of pretrial decision-making, including combatting implicit and explicit racial biases. Others felt the opposite way: either that alternative schemes have not been given a real chance in the recent wave of reforms, or that the dangers of a PRA embedding and "tech-washing" racial disparities into pretrial decision-making due to the disparities in underlying criminal justice data outweighed any potential benefit. Others still felt that rejecting pretrial models that use or center on PRA tools based on concerns of racial bias was short-sighted: either because those models will continue to improve, or because the tools might provide a way to track and audit judicial decision-making, or because the status quo is simply so problematic that reforms should embrace this path towards change.

When asked how to combat racial disparities in the pretrial system generally, some participants also discussed focusing on policing practices and arrest rates. Various researchers and computer scientists emphasized that, so long as arrest rates are disparate by race, existing versions of most predictive algorithms will reflect a lopsided forecasting of who presents a "high risk of arrest," arguably supporting this focus on arrest practices.

Within the discussion of what reformers should do to combat racial disparities were reactions to one of the central questions of the convening: whether predictive algorithms need to be designed differently in light of the racial disparities present in the underlying criminal justice data on which they rely.

Should We Endeavor to Redesign these Tools?

The convening included presentations from algorithmic design experts and computer scientists discussing alternative ways that predictive algorithms can be normed, also referred to as "different ways to define 'fairness.'" In reaction to this information, some participants were eager to jump into a discussion about the political feasibility of various alternative algorithmic models that might reduce or eliminate certain forms of racial disparities in tool outputs. There were various general approaches to how PRA tools might evolve or improve, including (1) incorporating a jurisdiction's difference in base rates of arrest into the algorithm itself in order to offset or neutralize a person of color's increased likelihood of arrest, (2) applying another corrective weight to all data prior to running it through an algorithm, (3) applying a corrective weight to the data after running it through an algorithm, (4) norming people by racial group, or (5) centralizing a "definition of fairness" that

evens out the rates of erroneous "high risk" classification (referred to as the "false positive rate") by race. Ultimately, however, there did not appear to be consensus on how the tools could best approach race or fairness differently, which underscores the difficulty in resolving the question.

Takeaways: Points of Consensus

As hoped, the convening and discussion revealed points of consensus among attendees. While convening participants described more disparate views in the follow-up survey, some overarching themes remained relatively common and are worth exploring further as unifying goals. Chief among these points of consensus were the following: (1) any use of PRAs should support our shared goals of decarceration, (2) any PRA scheme should affirmatively have a goal of reducing racial disparities, (3) conversations around the implementation, validation, use, and monitoring of PRAs must include meaningful involvement from people impacted by the criminal justice system and their communities, and (4) PRAs need to be clearly understood by various stakeholders engaging with them.

Goal of Decarceration

A resounding majority of convening participants agreed on the urgent need to dramatically reduce—if not eliminate—the use of pretrial incarceration. Every participant and organization present articulated a clear goal of reducing the population of people incarcerated pretrial, and a sense of the urgency in that mission. When we asked the group gathered if it was fair to say we expressed consensus around a central coal of decarceration, no one objected.

Embedded within this point of consensus was a strong commitment that, if PRA tools are to be used at all, they should be used only in a way that serves this decarceration goal. It was expressed by multiple participants that the tools should be "used for release, not detention." There was even a question and follow-up discussion about what it would mean, functionally, for a tool to be "used for release." Participants had various ideas that were not objected to at the convening, including: (1) using the tools to identify pools or groups of people of varying "risk" levels, if only to facilitate the immediate release of the lower-to-moderate-"risk" groups before providing others with a speedy hearing, (2) using the tools to identify criminogenic factors that may serve to suggest the efficacy of certain conditions of release, and (3) generally, discussing any PRA outputs in terms of an individual's likelihood of success, rather than failure, while out on pretrial release: at multiple points in the day's discussion, it was noted that the vast majority of people present very little pretrial "risk," and, for example, the PSA's "new violent criminal activity flag" is correlated with about a 92 percent chance of avoiding arrest for a violent crime. With respect to the third point about language, many participants felt that even allowing PRA tool outputs to label someone as "high," "medium," or "low" risk was problematic if not unconscionable.

While the notions that we should be reforming our pretrial systems in order to get as many people out of pretrial detention, and that PRA tools should be used only in furtherance of that goal, were points of consensus, some participants expressed a goal of the outright elimination of pretrial detention, but not everyone articulated that belief.

Goal of Reducing Racial Disparities

Another strong point of consensus among convening participants was the need for any pretrial reform to reduce the abhorrent racial disparities present at every stage of the criminal justice system.

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There were varied views as to whether risk assessment tools are more neutral than judicial decision-making, but the general consensus was that this should be the ideal when, and if, they are implemented in a jurisdiction. No participant or organization appeared to question the realities of systemic and institutionalized racism, or the fact that racism is manifested in our criminal legal systems.

Once again, while this overarching goal presented a point of consensus, participants were of different minds about what pretrial reformers should do to remedy racial injustice. These differences were manifested not only in what reformers should do to advance our goals generally, but also specifically in what, if anything, reformers and algorithmic design experts should change in approaching the design, auditing, and use of PRA tools. Concerns were also expressed about the constitutional parameters of efforts to remedy racial bias in the design and implementation of PRA tools. In the follow-up survey, one participant suggested that "[t]he algorithms used for these tools should explicitly account for race, and adjust the risk score/label based on historic over-policing and over-criminalization of black and Latino communities. Unless this happens, the tools should not be utilized in the pretrial context at all." Another participant suggested that "[t]he algorithms must explicitly account for race when producing risk scores or labels," and that "data must be collected and published—including of conditions and, of course, race." More of these differences in approach are discussed below.

Need for Community Oversight, Goal of Impacted Persons
A third, clear point of consensus among participants was the need for community oversight whenever PRA tools are used. At multiple points in the day's discussion, the need for independent review and auditing of PRA tools, both by independent researchers and, especially, by members of the community on which a PRA tool will be used, was mentioned. The reaction to this principle seemed favorable. In other words, before a PRA tool is going to be used in a jurisdiction, convening participants largely agreed that members of that community should be able to ask questions, understand how the tool operates, and demand data around how the tool works prior to and during its implementation and use.

As part of this vision, it was also clear that people who have been personally impacted by the criminal justice system—through their own incarceration, that of a loved one, or other forms of victimization—should affirmatively be given input into how pretrial justice systems are restructured, including how PRA tools are designed and used. In the follow-up survey, one participant suggested that "[o]versight of these tools should be left to the discretion of directly impacted communities and NOT the developers or users of the tool. If the tools do not eliminate racial disparities or reduce pretrial detention rates, these communities must be vested with the authority to repeal the tools and no longer have them be used in pretrial detention decision-making" (emphasis in original). Another participant stated simply that a primary goal for risk assessment development should be to "include community in the design of the tool, design of implementation, and evaluation." While some participants acknowledged that they felt some difficulty knowing how to engage members of the community in the process, all agreed that it was an important area for improvement.

Need for PRAs to be Better Understood by Stakeholders

Finally, the convening discussion underscored a clear consensus that PRA tools and their outputs need to be better understood by all criminal justice stakeholders, including defense counsel, arrestees, and members of the public. To this end, there was large agreement that tools' outputs should not be framed with normative labels such as "high" or "low" risk, but rather state more clearly and technically what is being predicted, for example: "Based on aggregate data, this person presents X percent chance of Y pretrial outcome over a Z period of time." It was also mentioned, and not objected to, that the statistics from risk assessment tools and their outputs should be reported in terms of the likelihood of pretrial success, not the likelihood of failure.

Takeaways: Next Steps Needed

The convening highlighted the importance of continued dialogue across this community, as well as the need for additional research and development. Among some of the proposals for further work were the following:

1. There needs to be some sort of infrastructure for ideologically aligned people that are working to design these tools. There should be no doubt that people "on the other side" are working to keep people incarcerated for as long as possible.
2. Further research and development may be needed to pilot new predictive models that account for some of the concerns discussed, including (1) the ability to distinguish willful from non-willful failures to appear, and/or (2) the need to counter-balance arrest data with disparate arrest rates by race.
3. There is a need to better define how steps to address racial bias in risk assessment tools would be assessed if subjected to legal challenge on an equal protection theory.
4. Further research is needed to determine whether tools developed for risk assessment could take into account factors relating to unequal policing practices: if, for instance, some precincts have known biases in their policing activities—as an example, the Milwaukee Police Department—might that be incorporated into model building?
5. The conversation that was the most promising, in the view of some participants, was a desire to tally the track records of judges and prosecutors. There was a desire to create a YELP (of sorts) rating the track records from the courts (using their data) and sourcing from people impacted by these judges' and prosecutors' data. Instead, we need to train judges to release people. The tool could identify people who need to be released (lowest-risk x percent of people), and schedule them for release hearings. It could require a written statement of reasons, with clear and convincing evidence that no conditions will satisfy objectives of release, and provide a fast-track appeal process. This is done in juvenile courts in a number of jurisdictions. If we do communicate the score to judges, it should be a very small sliver that are "high risk" or get the score that would qualify for detention pretrial.

Appendix A—Overview of the Event: Format, Materials, Attendees

Agenda

Here is an overview of the convening's agenda:

Thursday, November 16

Opening reception and dinner program—Moderated conversation on systemic racism in the United States, especially in the criminal justice system, and reflections from formerly incarcerated racial and social justice leaders on their experiences, including around pretrial justice.

> *Speakers: Vincent Southerland (NYU Law Center on Race, Inequality, and the Law), Bill Cobb (ACLU Campaign for Smart Justice), Teresa Hodge (Mission: Launch)*

Friday, November 17

9:00–10:00 a.m. Welcome and introductions—Brief welcome from Trevor Morrison, Dean, NYU School of Law. Additional welcome, overview, introductions, shared definitions, and level-setting.

> *Speakers: Vincent Southerland (NYU Law Center on Race, Inequality, and the Law), Andrea Woods (ACLU Criminal Law Reform Project)*

10:00–10:40 a.m. Conversation One: Contextualizing Our Discussion—What's the legal landscape around who may be detained prior to a conviction? In assessing that question, what "risks" matter? How should we approach that question? Time for brief Q&A.

> *Speaker: Brandon Buskey (ACLU Criminal Law Reform Project)*

10:40–11:10 a.m. Conversation Two: Grounding Our Discussion—What is the current reality of existing validated pretrial risk assessments? What do they do, what do their outputs mean, how are they built? What are their limitations? Time for Q&A.

> *Speakers: Kristin Bechtel (Arnold Foundation), Hannah Sassaman (Media Mobilizing Project)*

11:20 a.m.–12:00 p.m. Conversation Three: What Does Fairness Look Like?—What are some of the ways an algorithmic tool can be defined as being "fair"? When viewed from the lens of racial inequities in our criminal system, how can such algorithms account for racial disparities, and how can they not? What might the trade-offs of various approaches to these first questions look like? What are some proposed answers to those questions for algorithmic designers and policymakers to keep in mind?

> *Speakers: Jon Kleinberg (Cornell), Suresh Venkatasubramanian (University of Utah)*

12:45–1:30 p.m. Continue Conversation Three

> *Speakers: Marie VanNostrand (Luminosity), Alexandra Chouldechova (Carnegie Mellon), Mark Houldin (Defender Association of Philadelphia)*

1:35–2:20 p.m. Q&A with Conversation Three Panel

Moderator: Anthony Thompson (NYU Law Center on Race, Inequality, and the Law)

Break

2:30–3:15 p.m. Conversation Four: Applying Knowledge, Looking Forward—Given what we know to be true from Conversations One to Three, what is the proper role of algorithmic risk assessment in our pretrial systems? Why might concerned advocates forge ahead with recommending that jurisdictions use these tools, and with what caveats? Why might reformers caution against the use of these tools, or what might need to change about them before they should be used to form a detention recommendation?

> *Speakers: Jason Schultz (NYU Law), Spurgeon Kennedy (National Association of Pretrial Services Agencies), Sakira Cook (Leadership Conference on Civil and Human Rights), Megan Stevenson (George Mason University), David Robinson (Upturn)*

> *Moderator: Vincent Southerland (NYU Law Center on Race, Inequality, and the Law)*

3:15–4:25 p.m. Break-out discussions in smaller groups

4:45–5:00 p.m. Closing—What's missing? Where is there agreement and disagreement? How might we all work together in the future? What further research does this movement need? Who will take it on?

> *Speakers: Vincent Southerland (NYU Law Center on Race, Inequality, and the Law) and Andrea Woods (ACLU Criminal Law Reform Project)*

Materials

Below is a complete list of the materials sent to participants in advance of the convening.

1. ***[What It's Like to be Black in the Criminal Justice System](#)*** Slate (Aug. 9, 2015).

2. ***[U.S. v. Salerno](#)*** 481 U.S. 739 (1987).

3. Julia Angwin, et al., ***[Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks](#)*** ProPublica (May 23, 2016).

4. Jon Kleinberg, et al., ***[Inherent Trade-Offs in the Fair Determination of Risk Scores](#)*** (Nov. 17, 2016).

5. Alexandra Chouldechova, ***[Fair prediction with disparate impact: A study of bias in recidivism prediction instruments](#)*** (Feb. 28, 2017).

6. Anthony W. Flores, Christopher T. Lowenkamp, and Kristin Bechtel, ***[False Positives, False Negatives, and False Analyses: A Rejoinder to "Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks](#)***" Federal Probation, vol. 80, no. 2 (2016) (article begins on page 38).

7. Sam Corbett-Davies, et al., ***A computer program used for bail and sentencing decisions was labeled biased against blacks. It's actually not that clear*** Washington Post (Oct. 17, 2016).

8. Julia Angwin, et al., ***Bias in Criminal Risk Scores Mathematically Inevitable, Researchers Say*** ProPublica (Dec. 30, 2016).

9. Gideon's Promise, NLADA, National Association for Public Defense, NACDL, NLADA, ***Joint Statement in Support of the Use of Pretrial Risk Assessment Instruments*** (May 10, 2017) (attached).

10. Katal Center for Health, Equity, and Justice, and Civil Rights Corps, ***8 Basic Principles for Money Bail Reform*** (attached).

11. "***Human Rights Watch advises against using profile-based risk assessment in bail reform***" (July 17, 2017).

12. Letter from Community & Advocacy Groups to Governor Cuomo—as of 11-8-2017 (attached).

Supplemental materials were added to the above, upon participant request.

1. Sandra Mayson, ***Bias in, Bias Out***, 128 Yale L. J. (2019) (forthcoming).

2. The Sentencing Project, ***Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System*** (2015).

3. David Patton, ***Federal Defender Analysis of Corrections Act S 467*** (which would use risk assessment tools to determine which inmates to give credits to reduce their sentences) (2015) (attached).

4. Megan Stevenson, ***Assessing Risk Assessment in Action,*** Minnesota Law Review Vol. 103 (June 14, 2018) (forthcoming).

5. ***Policy Statement on pretrial "Risk Assessment"*** by Civil Rights Corps (2018)

Attendees

Name	Organization
Matt Alsdorf	Pretrial Advisors
Kristin Bechtel	Arnold Foundation
Jennifer Brown	Federal Defenders of NY
Brandon Buskey	ACLU Criminal Law Reform Project
James Cadogan	NAACP Legal Defense Fund
Robin Campbell	Pretrial Justice Institute
Twyla Carter	ACLU Criminal Law Reform Project
Bill Cobb	ACLU Campaign for Smart Justice
Sakira Cook	Leadership Conference on Civil and Human Rights

Alexandra Chouldechova	Carnegie Mellon University
Kate Crawford	AI Now
Amanda David	Federal Public Defender, EDNY
Danisha Edwards	NYU Law Center on Race, Inequality, and the Law
Cherise Fanno Burdeen	Pretrial Justice Institute
Chris Flood	Federal Defenders of NY
Aubrey Fox	New York Criminal Justice Agency
Erin George	Just Leadership USA
Mirelis Gonzalez	John Jay Center for Policing Equity
Rachel Goodman	ACLU Racial Justice Program
Sean Hill	Katal Center for Health, Equity, and Justice
Teresa Hodge	Mission: Launch
Nia Holston	NYU Law Center on Race, Inequality, and the Law
Mark Houldin	Defender Association of Philadelphia
Crista Johnson	ACLU Campaign for Smart Justice
Alec Karakatsanis	Civil Rights Corps
Spurgeon Kennedy	National Association of Pretrial Services Agencies
Jon Kleinberg	Cornell University
Angela LaScala-Gruenewald	Arnold Foundation
Marc Levin	Right on Crime
Scott Levy	Bronx Defenders
Joshua Norkin	Legal Aid Society of NY Decarceration Project
Udi Ofer	ACLU Campaign for Smart Justice
Cathy O'Neil	ORCAA
Jennifer Perez	NJ Courts
Erica Perry	Law For Black Lives
Terrance Pitts	NYU Law Center on Race, Inequality, and the Law
Manish Raghavan	Cornell University
Scott Roberts	Color of Change
David Robinson	Upturn
Hannah Sassaman	Media Mobilizing Project
Jason Schultz	NYU Law/AI Now
Maneka Sinha	Public Defender Service, DC
Vincent Southerland	NYU Law Center on Race, Inequality, and the Law
Megan Stevenson	Georgia Mason University
Anthony Thompson	NYU Law Center on Race, Inequality, and the Law
Nicole Triplett	New York Civil Liberties Union
Marie VanNostrand	Luminosity Solutions
Suresh Venkatasubramanian	University of Utah
Daniel Weir	NACDL
Tori Wenger	NYU Law Center on Race, Inequality, and the Law

| Meredith Whittaker | AI Now |
| Andrea Woods | ACLU Criminal Law Reform Project |
| Jon Wool | Vera Institute of Justice |

Appendix B: Materials of Interest Generated Since the Convening

Since this event, there has been considerable conversation on the topic of algorithmic pretrial risk assessment, racial equity, and the role of algorithmic tools in pretrial reform efforts. We offer a few additional resources here that may be of interest to those working on these issues.

1. John Logan Koepke and David G. Robinson, ***Danger Ahead: Risk Assessment and the Future of Bail Reform***, Washington L. Rev. (2018) (forthcoming)
2. ***The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns***, Leadership Conference on Civil and Human Rights (July 2018).
3. Brandon Buskey and Andrea Woods, ***Making Sense of Pretrial Risk Assessment***, NACDL *The Champion* (June 2018).

Acknowledgements
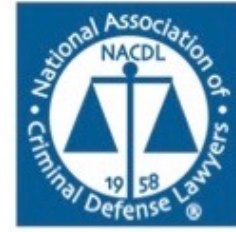
JOINT STATEMENT IN SUPPORT OF THE USE OF
PRETRIAL RISK ASSESSMENT INSTRUMENTS

MAY 10, 2017

The United States and all fifty states prohibit excessive bail; forty-eight states have a constitutional or statutory presumption in favor of releasing all but a specified few people before trial.[1] The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." "There is no discretion to refuse to reduce excessive bail…," *Stack v. Boyle*, 342 U.S. 1, 6 (1951). "In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception." *Salerno v. United States*, 481 U.S. 739, 755 (1987).

Yet, despite the existence of the Excessive Bail, Due Process, and Equal Protection clauses, the current system of pretrial detention and release unfairly and disproportionately affects African-American and Hispanic people:

- Statistically, African-Americans are less likely to be released on recognizance than whites.[2]

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[1] http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx

[2] Estimates based on population statistics from Table 1 in Karen R. Humes, Nicholas A. Jones, and Roberto R. Ramirez, "Overview of Race and Hispanic Origin: 2010," 2010 Census Briefs, March 2011, www.census.gov/prod/cen2010/briefs/c2010br-02.pdf and jail population statistics from Table 6 in Todd Minton, 2012, p. 6.

- Historically, the rate of detention for African-Americans has been five times higher than whites and three times higher than Hispanics.[3]
- African-Americans have money bail imposed at higher amounts than whites.[4]

While there are concerns that the use of pretrial risk assessment instruments fails to address existing racial bias in the criminal justice system, those **concerns should not be used to deter the use of pretrial risk assessment, but should instead be used to guide protocols** for implementation, data collection and analysis; to identify points in the system which may require amelioration; and to act as the basis for ongoing monitoring by advocates and community groups external to the system. Validated pretrial risk assessment instruments have been shown to **increase rates of pretrial release, including people of color**, while maintaining high rates of court appearance and public safety. For example:

- In Washington, DC, where no one accused of a crime is detained due to inability to pay and 80% of arrestees are African-American[5], 90% of arrestees are released pretrial without using a financial bond.[6]
- In New Jersey, the recent introduction of a statewide pretrial risk assessment instrument has resulted in pretrial release in 90% of cases, and detention hearings resulting in only 10% of people being held until trial. While the exact impact on African-Americans and Hispanics is not yet known, these populations made up 71% of the jail population before the use of the pretrial risk assessment instrument.[7]
- In 2012, Colorado introduced a pretrial risk assessment instrument into their existing county pretrial services programs for those arrested and booked into jails. In counties that conducted analyses, participation in the pretrial services programs (utilizing pretrial risk assessment) by African-Americans increased the dismissal rate to 34% (compared to 21% for African-Americans with no pretrial services). African-Americans who received pretrial services were more than 1.6 times as likely to have their cases dismissed compared to African-Americans not receiving those services.[8]

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[3] Ibid.

[4] Ibid.

[5] Washington Lawyers' Committee on Civil Rights and Urban Affairs, Racial Disparities in Arrests in the District of Columbia, 2009-2011 (2013). https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf

[6] Pretrial Services Agency for the District of Columbia, 2016 (FY) Release Rates for DC Pretrial Defendants (March 2017). psa.gov/sites/default/files/2016%20Release%20Rates%20for%20DC%20Pretrial%20Defendants.pdf

[7] Marie VanNostrand, Luminosity in conjunction with the Drug Policy Alliance, New Jersey Jail Population Analysis: Identifying Opportunities to Safely and Responsibly Reduce the Jail Population (March 2013). www.drugpolicy.org/sites/default/files/New_Jersey_Jail_Population_Analysis_March_2013.pdf

[8] Jessica Eaglin and Danyelle Solomon, Brennan Center for Justice, Reducing Racial and Ethnic Disparities In Jails: Recommendations for Local Practice (2015). www.brennancenter.org/sites/default/files/publications/Racial%20Disparities%20Report%2006252015.pdf

- After the introduction of the validated pretrial risk assessment instrument in Multnomah County, Oregon, the new-offense rate for African-American youths dropped from 23 to 13 percent; the African-American release rate at initial screening rose from 44 to 51 percent; and the release rate at preliminary hearings rose from 24 to 33 percent.[9] Before the employment of the pretrial risk assessment instrument, African-American youth were more likely to be detained, and less likely to be diverted than white youths.

The process of validating pretrial risk assessments requires analyzing data and outcomes to ensure that the instrument accurately predicts failure-to-appear rates and new arrests while on pretrial status, with no predictive bias due to race or gender. The pretrial release data studied after implementation of the Laura and John Arnold Foundation's Public Safety Assessment-Court tool used statewide in Kentucky shows that once an arrestee has been classified into one of five categories (low, low-moderate, moderate, moderate-high, and high), the person classified performs at virtually the same percentage, regardless of race, in the areas of making court dates and not committing new criminal activity. The Arnold Foundation reports that "black and white defendants at each risk level fail at virtually indistinguishable rates, which demonstrates that the [pretrial risk assessment tool] is assessing risk equally well for both whites and blacks, and is not discriminating on the basis of race."[10] Likewise, the Virginia Pretrial Risk Assessment Instrument-Revised has also been confirmed as race and gender neutral.

See also Isami Arifuku & Judy Wallen, Public Welfare Found., Racial Disparities at Pretrial and Sentencing and the Effect of Pretrial Services Programs 23, 29, A1 (2012).

[9] The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers (2008).

[10] Laura and John Arnold Foundation, Results from the First Six Months of the Public Safety Assessment – CourtTM in Kentucky, p. 4 (July 2014). www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf.

Therefore, the American Council of Chief Defenders, Gideon's Promise, the National Association for Public Defense, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defenders Association strongly endorse and call for the use of validated pretrial risk assessment in all jurisdictions, as a necessary component of a fair pretrial release system that reduces unnecessary detention and eliminates racial bias, along with the following checks and balances:

- Data used in the development of pretrial risk assessments must be reviewed for accuracy and reliability;
- Data collection must include a transparent and periodic examination of release rates, release conditions, technical violations or revocations and performance outcomes by race to monitor for disparate impact within the system;
- Data collection should avoid interview-dependent factors (such as employment, drug use, residence, family situation, mental health) and consist solely of non-interview dependent factors (such as prior convictions, prior failures to appear) as intensive studies have shown that when sufficient objective, non-interview factors were present, none of the interview-based factors improve the predictive analytics of the pretrial risk assessment, but significantly increase the time it takes to complete the pretrial risk assessment;[11]
- Defense counsel must be included in the process of selecting a pretrial risk assessment tool for their jurisdiction;
- Pretrial risk assessments should be used as part of a deliberative, adversarial hearing that must involve defense counsel and prosecutors before a judicial officer;
- Defense counsel must have the time, training, and resources to learn important information about the client's circumstances that may not be captured in a pretrial risk assessment tool and adequate opportunity to present that information to the court;
- Requests for preventive detention by the state must require an additional hearing where the government proves by clear and convincing evidence that no condition or combination of conditions will reasonably assure the person's appearance in court or protect the safety of the community; and,
- The system must provide expedited appellate review of any detention decision.

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[11] *See,* "Developing a National Model for Pretrial Risk Assessment," *LJAF Research Summary*, Nov. 2013, www.arnoldfoundation.org.

8 Basic Principles for Money Bail Reform

Millions of people are detained in local jails each year; there are nearly 11 million admissions to local jails annually. On any given day, over 730,000 people are being held in local jails; of that population, nearly two-thirds—450,000 people—are presumptively innocent people awaiting trial. The gears of mass incarceration are grinding away in local jails, disproportionately impacting poor people and people of color.

After years of litigation, advocacy, and community pressure, jurisdictions across the country (cities, counties, states) have begun reforming pretrial release practices, and momentum is building for even more reform. These *8 Basic Principles for Money Bail Reform* are drawn from lessons learned through reform and advocacy efforts. These principles are designed to assist organizers, advocates, attorneys, and funders advance pretrial justice reform initiatives that can serve the movement to end mass incarceration.

1 Judicial systems must have only an extremely limited use of pretrial detention.

Because of the harms of pretrial detention and the available empirical research about the ability to safely mitigate any purported risks, virtually all presumptively innocent people should be released from jail pretrial.

The standard must be clear—presumptively innocent arrestees must be released unless: (1) they are charged with one or more of a small set of the most serious offenses and (2) the government proves by clear and convincing evidence that there are no conditions or combination of conditions that can reasonably protect against specifically identified extreme risks to particular people or mitigate a serious risk of willful flight to avoid prosecution.

Any new statute cannot have presumptions in favor of detention and must provide clear language limiting the use of detention. The federal system essentially ended money bail, but it has intolerable and likely unconstitutional detention rates because it has many offense-related presumptions that result in detention. We must be cautious of using this as a model for release and detention in the states.

The system must minimize the time between arrest and release in all cases. Pretrial detention of even two days can increase the likelihood of a new arrest and future failure to appear, and can lead to family instability and the loss of jobs, housing, and medical care.

The system must provide an attorney at any court appearance in which the fundamental right to pretrial liberty is at stake and expedited appellate review of every detention decision to ensure a culture of aggressive advocacy.

Even when detention is based on failure to comply with conditions of release while on pretrial release, the court must conduct a hearing similar to that required for detention in the first instance and, at such hearing, must apply the same standard for pretrial detention concerning extreme risk of danger to particular people and willful flight to avoid prosecution.

2 Pretrial services and supervision functions must be evidence-based and community-oriented.

Requiring pretrial services to follow legal and evidence-based practices will help keep unnecessary supervision at a minimum.

Pretrial services agencies are more effective when they have a public health, social work, and evidence-based culture and employ practices that are supported by the academic literature.

Supervision should be designed to contribute to flourishing communities to support public safety. This means reducing the overall resources expended on mechanisms of surveillance, imprisonment, and other forms of social control that are intrinsically associated with existing law enforcement agencies currently tasked with maintaining the system of mass incarceration.

The location of pretrial services should be considered carefully, including whether they are created as an independent agency or located within an existing law enforcement bureaucracy like a sheriff's department or an existing probation or parole department. The goal of pretrial services is to ensure court appearance while maximizing fundamental liberty and reducing future involvement with the system, therefore pretrial services should direct resources away from policing and jail systems and into community-based practices that provide cost-effective services to improve the lives of presumptively innocent arrestees and their families.

The most successful examples have been separate and independent pretrial services agencies, as in Kentucky or Washington, D.C., that are able to develop their own culture of maximizing pretrial justice.

3 Priority must be given to addressing needs rather than producing constraints or depriving liberty.

The pretrial system must not be reformed into a new iteration of onerous restrictions on liberty through mass surveillance.

Pretrial services should provide cost effective and evidence-based assistance like text and phone reminders and transportation to court as opposed to supervision-based interventions.

Any restriction on liberty of a presumptively innocent person must be no greater than necessary to achieve an important interest. This principle will not only protect liberty and privacy and save money, but will reduce incarceration based on technical violations of unnecessary conditions. It is also consistent with the research on best supervision practices, which cautions against the overuse of conditions like drug testing, GPS monitoring, alcohol bracelets, restrictions on employment, home confinement, or other restrictions on liberty that are not specifically targeted to address and mitigate particular risks.

4 Risk assessment instruments, when they are used, must be open; transparent; actuarial; calibrated for and validated in that jurisdiction; and rigorous about what they tell us empirically and what aspects of the tool are political/values choices.

Risk assessment tools should be empirically based and locally validated to be predictive of the most important considerations: willful failure to appear in court to avoid prosecution or a new arrest for serious or violent crimes.

To the extent the tools identify only risks of general nonappearance or a wide variety of often less serious offenses, they should be used only to assist in determining what conditions of release and supervision are the least restrictive conditions necessary for the person to be successful prior to trial and not to determine detention eligibility.

Any tool must be clear about which assumptions and labels are political choices and which are empirically derived. Risk assessment tools may tell us something about whether an individual presents a risk of flight or risk of harm to a particular person, but no tool can tell us how much risk we are willing to tolerate. Those determinations are political and not empirically derived.

Such tools must be calibrated to take into account that people of color are disproportionately arrested, prosecuted, and convicted. Racial disparities are driven by different factors in different parts of the country, so any tool must be locally validated to reflect the current and past practices of racial discrimination specific to that jurisdiction.

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CONT.

By their very nature, given current and past practice in policing, risk assessment instruments are prone to exacerbate racial disparities. Every effort must be made to minimize the extent to which such tools contribute to further racial disparity. Such tools must actively account for the extent to which existing metrics like prosecutions and convictions themselves reflect discrimination.

It must not re-entrench or mask discriminatory practices and disparities under the guise of "neutrality" or "data" —this includes disparities related to race, class, gender, sexual orientation, mental health, ability, immigration status, geography, etc.

A validated tool must continually be updated with new data from the jurisdiction in which the improved pretrial service system exists to consistently improve the tool.

5 **End all practices that generate profit from pretrial release decisions and eradicate the notion that the system ought to be funded off the backs of the mostly impoverished people who are brought into it.**

We cannot create a new "user funded" alternate system to replace the existing system.

Even when jurisdictions move away from money bail, many now charge defendants to use pretrial services (e.g. fees for every drug test, monthly supervision fees, fees for GPS monitoring, etc.). The bail industry is now shifting to offer GPS monitoring, drug treatment, or supervision and defendants must pay for the "use" of these services. We must be very careful not to create a system substantially similar to the old system that is merely reorganized.

In many places, a product of these "user fees" is that people are being jailed because they can't afford these fees for those services and therefore don't qualify for them. These fees, even when they don't result in jailing, effectively shift people from pretrial detention to post-trial debt. We can't have a replacement system where indigent people are saddled with the bills. There are too many downstream consequences (e.g. lost drivers licenses, employment, credit, etc.).

The economic focus must be on capturing savings from decreasing jail services, rather than generating income through unnecessary supervision of presumptively innocent people.

6 **Jurisdictions must be required to keep standardized data about pretrial practices and outcomes and to make that data publicly available.**

Data collection and reporting must include data related to race and ethnicity.

Data is needed to identify problem areas, make pretrial services more efficient and fair, and identify areas of improvement.

7 **As many people as possible must be filtered out of the criminal legal system entirely.**

This includes police making fewer stops and arrests, decriminalization of certain low-level offenses, and expanded eligibility for diversion to non-confinement alternatives.

Pretrial justice work must be combined with advocacy on policing and decriminalization of poverty generally.

8 **Conditions of confinement must be improved to be humane, evidence based, and oriented around effective reentry.**

Groups endorsing these 8 Principles (*as of 20 June 2017*)
Listed alphabetically – List in formation

- The Bronx Freedom Fund
- Brooklyn Community Bail Fund
- Center for Legal and Evidence-Based Practices
- Civil Rights Corps
- Chicago Appleseed Fund for Justice
- Chicago Community Bond Fund
- Decarcerate Tompkins County
- Just City – Memphis
- Kara Dansky - Founder and Managing Director, One Thousand Arms
- Katal Center for Health, Equity, and Justice
- VOCAL-NY
- Washington Square Legal Services Bail Fund

List information –

Want to sign on? Please send a short note to:
Alexis Wilson Briggs - Director, Research & Development, Katal: Alexis@katalcenter.org.

ABOUT THESE PRINCIPLES:
Alec Karakatsanis at the Civil Rights Corps (CRC) outlined the first draft of these principles. The Katal Center for Health, Equity, and Justice worked with CRC to solicit input, feedback, and recommendations for these principles from advocates, organizers, attorneys, researchers, and funders across the country. The eight principles outlined here are the result of this process. Questions about these principles should be directed to the CRC and Katal.

Civil Rights Corps
Alec Karakatsanis
alec@civilrightscorps.org

Katal Center for Health, Equity, and Justice
Alexis Wilson Briggs
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Letter to Governor Cuomo on Bail Reform
Organizational Sign-On By 5 p.m. on Thursday, November 9, 2017
Send Group Name & Town/City, and Contact for org
(Representatives can also sign on behalf of their organization)

To sign on, or with questions, please email or call
Sean Allan Hill II, Senior Legal Fellow
Katal Center for Health, Equity, and Justice
shill@katalcenter.org | 347.921.0826

November 2017

Dear Governor Cuomo,

We are aware that your administration is exploring bail reform as outlined in your previous State of the State addresses. As advocates for criminal justice reform, we share your desire to reduce New York's pretrial detention population.

While we urge your administration to take decisive action to reduce the State's pretrial detention population, we are deeply concerned about efforts to amend the existing bail statute to require that judges consider a person's risk of future dangerousness. **We, the undersigned organizations, are united in the belief that: we do not have to add dangerousness to New York's bail statute to reduce our pretrial detention population; the use of risk assessment instruments to predict dangerousness will further exacerbate racial bias in our criminal justice system; and the use of these instruments will likely lead to increases in pretrial detention across the state.**

Adding dangerousness is both counterproductive and unnecessary to the aim of decarceration. New York should, instead, build on existing law and implement changes to reduce pretrial detention statewide. New York's bail statute was specifically crafted to accomplish significant reductions in our pretrial detention population. Our statute, however, is not currently used to its full potential. Efforts in New York City to bring down the jail population and increase rates of pretrial release show what is possible within the context of current law. Rather than amend the statute to include dangerousness, your administration should encourage judges to fully implement our existing law. Comprehensive reform must (1) ensure strict limitations on the use of pretrial detention, (2) eliminate race- and wealth-based disparities, and (3) ensure individualized justice and thoughtful detention decisions through robust due process.

"Dangerousness" Risk Assessments Are Ineffective, Exacerbate Racial Disparities, and Will Likely Increase New York's Jail Population

At a time when the public and policymakers have prioritized reducing the State's jail population, we should reject the inclusion of additional reasons to jail presumptively innocent people. We should, instead, seek a comprehensive approach to bail reform that will strengthen due process, ensure careful and thoughtful determinations about the use of pretrial detention, and guarantee reductions in its use.

New York does not currently allow judges to consider the risk of future dangerousness in making bail determinations. This makes our bail statute one of the most progressive in the country. In fact, the Legislature specifically considered and rejected adding dangerousness to New York's bail statute when it was drafted,[i] based largely on concerns that such determinations would be too speculative and would disproportionately impact low-income communities of color.[ii] Those concerns are still valid today.

Adding considerations of dangerousness to the New York bail statute—coupled with the introduction of actuarial risk assessment instruments (RAIs)—might seem to offer a ready-made solution to the problems facing New York. New Jersey, for example, has experienced a reduction in its pretrial detention rates following recent reforms. However, there are important differences in criminal procedure and practice that do not guarantee New York would experience similar reductions. In New Jersey, pretrial detention decisions are reached only after a rigorous evidentiary hearing held within days of a defendant's first appearance. People accused of crimes have a robust right to discovery in advance of these hearings, ensuring that important evidence is turned over early and often, and they also have meaningful speedy trial rights if detention is ordered. In New York, on the other hand, evidence can be withheld from someone accused of a crime until the day of trial, and cases can drag on for months or even years in certain counties. RAIs are ultimately not a panacea or substitute for the hard work of creating more due process, more safeguards, and more alternatives to jail. Too often, these tools are expected to accomplish difficult culture changes inside our courts, but they can easily move culture to a worse, rather than better, position on pretrial release.

Dangerousness RAIs in no way guarantee reductions in the State's jail population, and there is good reason to believe that they would increase reliance on pretrial detention. A soon-to-be-published study by Professor Megan Stevenson of Antonin Scalia Law School at George Mason University finds that Kentucky's adoption of a new RAI "had negligible effects on the overall release rate, [failure to appear] rate, [and] pretrial rearrest rate."[iii] A separate report found that Lucas County, Ohio, actually saw its pretrial detention rates *increase* and the rate at which people plead guilty at first appearance *double* since implementing a dangerousness RAI.[iv] Adding dangerousness to New York's bail statute could very well lead to increases in the State's jail population, particularly on Rikers Island in New York City.

Further, RAIs present a false promise that we can accurately predict the future dangerousness of people charged with crimes. We can't—and attempts to do so will harm low-income communities and communities of color, while likely increasing local jail populations. Studies have shown that, **among people released pretrial, only 1.9% are actually re-arrested for violent felonies**.[v] While sensational cases in the media might suggest otherwise, **instances of re-arrest for violent felonies in New York are equally rare.**[vi] In turn, the ability of RAIs to predict the risk of violent crime accurately is exceedingly limited. Even among people labeled "high risk," rates of re-arrest for violent felonies are exceptionally low—well under 10%.[vii] Even on their own terms, they are of limited utility.

The inability of RAIs to accurately predict dangerousness is particularly troubling given that studies have shown that even facially neutral RAIs will inevitably place more people of color in "high risk" categories, mathematically guaranteeing that there will be a disproportionate number of "false

positives" among people of color.[viii] Racial disparities of this type are hard-wired into RAI algorithms, with some studies finding that "bias in criminal risk scores is mathematically inevitable."[ix] This means that there will be a larger share of people of color who will *not* be re-arrested, but who will nonetheless be categorized as "high risk," leading to disproportionate rates of pretrial incarceration and negative case outcomes. This would present a significant step backward in addressing structural racism in New York's criminal justice system.

RAIs are only as good as the data that goes into them; yet every one of these tools that is currently in use relies on data derived from a broken and discriminatory criminal justice system that disproportionately targets and harms people of color. This data is often outdated and incomplete, and based on arrest information rather than the outcome or facts of individual cases. Where initial inputs are tainted by structural racism, the resulting tools will inevitably reflect and exacerbate those disparities. Laurel Eckhouse, with the Human Rights Data Analysis Group, succinctly states this problem: "Inputs derived from biased policing will inevitably make black and Latino defendants look riskier than white defendants to a computer. As a result, data-driven decision-making risks exacerbating, rather than eliminating, racial bias in criminal justice."[x] For this reason, it is particularly concerning that any dangerousness RAI would necessarily draw on data from the era of Stop and Frisk and Broken Windows policing in New York City—as well as from statewide data that has been shaped by one of the great shames of our state, the Rockefeller Drug Laws. While those laws have been reformed, the legacy of their discriminatory impact carries on.

Finally, dangerousness RAIs are inconsistent with principles of transparency and individualized justice. RAIs, driven by opaque and often proprietary computer algorithms, present a complete "black box" to the public and, more importantly, to people charged with crimes whose futures would be determined by their results. More fundamentally, RAIs, particularly those that try to predict dangerousness, undermine the criminal justice system's commitment to individualized justice. RAIs tell us nothing about the specific person that they score, but instead rely on historical group data—the past conduct of other people—to place individuals into broad risk categories. The categories and labels these instruments produce could tremendously influence and change judicial behavior, and introduce biased data that undermines the presumption of innocence. At best, it is an open question whether risk assessments can exist in harmony with basic constitutional principles. This is particularly troubling in light of both our limited ability to predict future behavior with real accuracy and the potential for exacerbating racial disparities.

The primary goals of any bail reform effort should be reducing and limiting the use of pretrial detention and increasing fairness. Adopting dangerousness and RAIs would be a step in the opposite direction. We firmly believe that the existing bail statute's focus on ensuring people's return to court is appropriate and that there is no pressing or legitimate need to change the underlying considerations driving pretrial detention decisions.

The Current Bail Statute Already Provides Tools to Shrink Jail Populations and Reduce Reliance on Money in Our Pretrial Detention System

New York's bail statute, enshrined in Criminal Procedure Law §§ 500-540, includes a total of nine forms of bail and requires judges to consider a person's ability to pay when setting bail. Despite the menu of options available to judges, and a mandate to set *at least* two forms of bail, judges almost

exclusively rely on the two forms of bail that can be the most difficult for people to afford—cash bail and insurance company bond—and rarely inquire into a person's ability to pay. This contradicts the core objective of the statute, which was specifically intended to reduce pretrial detention rates by creating four new forms of bail that would require little to no money be deposited in order for a person to be released.[xi] One such form, an unsecured bond, requires no upfront cash payment and has been shown to be as effective as secured bonds in ensuring that a person comes to future court dates.[xii] For over thirty years, Madison County judges routinely approved unsecured bonds for bail in a highly successful process with a local community organization. Greater reliance on these bonds could end our two-tiered system, in which the rich go free and the poor do not, and would not require changing our existing statute.

All of these issues can be addressed under the *existing* bail statute by:

- Educating stakeholders, raising awareness of additional forms of bail, and encouraging judges to set alternative forms of bail that are less onerous than insurance company bonds;
- Simplifying the associated paperwork and procedures required for alternative forms of bail;
- Ensuring that courts are conducting the mandatory inquiry into a person's ability to pay before selecting a form of bail;
- Encouraging judges to impose the least onerous conditions necessary to ensure a person returns to court; and
- Holding the bail bond industry accountable through robust regulation and intensive oversight.

New York already has one of the most progressive bail statutes in the country. Your administration should take steps to ensure that it is used to its full capacity.

There Should Be Strict Limitations on the Use of Pretrial Detention and Individualized Justice Should Be Strengthened

We urge your administration to take the best of the existing bail statute and build on it. To fully realize the reduction in the State's jail population we all hope to see, we should: (1) strictly limit the use of pretrial detention, (2) mandate individualized justice and thoughtful detention decisions, and (3) work to eliminate race- and wealth-based disparities. Adoption of dangerousness RAIs will not achieve these goals. A more comprehensive approach to structural bail reform must embrace the following principles:

- New York must eliminate pretrial detention and money bail for all misdemeanors and nonviolent felonies and create a presumption of release for violent felonies.
- Pretrial conditions, including detention, must be determined through individualized evidentiary hearings held immediately after a person's first court appearance. On the record, judges must detail: why bail was set, why the amount and form of bail was selected, and why the individual will be able to gain release with the conditions that have been set. Judges must regularly revisit detention decisions whenever a person remains incarcerated over an extended period of time.
- For-profit bail bonds must be eliminated. Commercial bail bonds are a particularly onerous form of bail, and the only type of bail that requires consumers pay an upfront, non-

refundable fee that families lose no matter the outcome of the case. An estimated $14 to $20 million in legally charged fees were paid to for-profit bail bond companies in New York City in 2016, alone.[xiii] This estimate does not even account for illegal fees that families are often charged or for the collateral that is withheld by bondsmen.

- If money bail is set, courts must set the amount and form at a level the person can afford.
- The state must track and regularly report on racial disparities in pretrial detention decisions in every county.

These are just the starting points for a discussion on true pretrial justice reform. Comprehensive reform will require stronger discovery laws, to ensure the prosecution cannot withhold evidence from the defense until the day of trial. It will also require robust speedy trial laws, to ensure no person is incarcerated for years before the resolution of their case.

Conclusion

There is a growing consensus in New York that we must close jails, eliminate racial disparities and wealth-based detention, and redirect resources to initiatives that support and build communities. Dangerousness and RAIs will not achieve these goals. A more comprehensive approach is needed. **We would welcome the opportunity to work with you on developing a plan of action to safeguard constitutional rights, reduce jail populations, and build communities. Thank you for considering our views.**

Sincerely,
Listed in alphabetical order by org name
Signatories as of 3:20 pm on 11/8/2017

- **American Friends Service Committee**
- **Bernard Harcourt**, Professor of Law & Professor of Political Science, Columbia University
- **Bronx Defenders**
- **Bronx Freedom Fund**
- **Brooklyn Community Bail Fund**
- **Brooklyn Defender Services**
- **Center for Community Alternatives, Inc.**
- **Center for Law and Justice**
- Mark Williams, President, **Chief Defenders Assoc. of NY**
- **Community Service Society of New York**
- **Decarcerate Tompkins County**
- **Drive Change**
- **Harm Reduction Coalition**
- John Raphling, **Human Rights Watch (US Program)**
- **JustLeadershipUSA**
- **Katal Center for Health, Equity, and Justice**
- **The Legal Aid Society**
- Clare Degnan, Executive Director, **Legal Aid Society of Westchester County**
- Marianne Simberg, **Madison County Bail Fund, Inc.**
- **Nassau County Criminal Courts Bar Association**

- **Neighborhood Defender Service of Harlem**
- **New York Harm Reduction Educators**
- John Wallenstein, President, **New York State Association of Criminal Defense Lawyers**
- **New York State Prisoner Justice Network** (Albany)
- **Partnership for the Public Good, Buffalo**
- **Queer Detainee Empowerment Project**
- Keith Cieplicki, **Syracuse Jail Ministry**
- **United Voices of Cortland**
- **VOCAL-NY**
- **VOICE-Buffalo**
- **Washington Heights CORNER Project**
- James Kernan, **Wayne County Public Defender**
- **Working Families Party**
- **Youth Represent**

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i David Burnham, "State Unit Drops Detention Plan," *The New York Times* (Sept. 3, 1969), *available at* http://query.nytimes.com/mem/archive/pdf?res=9405EFDF1031EE3BBC4B53DFBF668382679EDE.

ii Aryeh Neir and Neil Fabricant, "NYCLU Legislative Memorandum #20" (Feb. 6, 1969), *available at* http://www.nycourts.gov/library/nyc_criminal/penal-law-bartlett/099.pdf.

iii Megan Stevenson, "Assessing Risk Assessment," 54, *George Mason University Law and Economics Research Paper Series* (Forthcoming, 2017) (acknowledging the use of risk assessment instruments *before* the state shifted to use of the Arnold Foundation's RAI, the Public Safety Assessment).

iv Human Rights Watch, "Not in it for Justice," 99-100 (April 11, 2017), *available at* https://www.hrw.org/report/2017/04/11/not-it-justice/how-californias-pretrial-detention-and-bail-system-unfairly.

v Baughman, Shima Baradaran and McIntyre, Frank, "Predicting Violence," 527, *Texas Law Review*, Vol. 90 (2012), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1756506.

vi Qudsia Siddiqi, "Predicting the Likelihood of Pretrial Failure to Appear and/or Re-Arrest for a Violent Offense Among New York City Defendants: An Analysis of the 2001 Dataset,"12, *NYC Criminal Justice Agency* (January 2009), *available at* https://goo.gl/WK2813 (finding that, in their 2001 at-risk sample, only 3% of accused people were re-arrested for a violent offense).

vii For example, the Laura and John Arnold Foundation found that only 8.6% of people flagged as "significantly more likely to commit an act of violence if released before trial" by their RAI (the Public Safety Assessment) were actually arrested for a new violent crime. *See* Laura and John Arnold Foundation, "Results from the First Six Months of the Public Safety Assessment-Court in Kentucky" (July 2014), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/PSA-Court-Kentucky-6-Month-Report.pdf.

viii *See* Julia Angwin et al., "Machine Bias," *ProPublica* (May 23, 2016), *available at* https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

ix Julia Angwin & Jeff Larson, "Bias in Criminal Risk Scores Is Mathematically Inevitable, Researchers Say," *ProPublica* (Dec. 30, 2016), *available at* https://www.propublica.org/article/bias-in-criminal-risk-scores-is-mathematically-inevitable-researchers-say.

x Laurel Eckhouse, "Big data may be reinforcing racial bias in the criminal justice system," *The Washington Post* (Feb. 10, 2017), *available at* https://www.washingtonpost.com/opinions/big-data-may-be-reinforcing-

racial-bias-in-the-criminal-justice-system/2017/02/10/d63de518-ee3a-11e6-9973-c5efb7ccfb0d_story.html?utm_term=.e78f54f265d9.

xi "Proposed New York Criminal Procedure Law: 1969 Bill," XVIII, *available at* http://www.nycourts.gov/library/nyc_criminal/penal-law-bartlett/196.pdf.

xii "Brief of Pretrial Justice Institute and the National Association of Pretrial Services Agencies…", 9-12, *Walker v. City of Calhoun,* Docket No. 16-10521 (Aug. 18, 2016).

xiii Brooklyn Community Bail Fund, "License & Registration Please…", 2, *available at* https://static1.squarespace.com/static/5824a5aa579fb35e65295211/t/594c39758419c243fdb27cad/1498167672801/NYCBailBondReport_ExecSummary.pdf.

FEDERAL DEFENDER ANALYSIS OF CORRECTIONS ACT (S. 467)

EXECUTIVE SUMMARY

I.   **The CORRECTIONS Act Would Mandate an Untested Experiment that is Unlikely to Work.**

A.   The Basics of Risk Assessment

When risk assessment tools are used in criminal justice systems, they are typically used to determine the appropriate kind and level of programming or supervision corresponding to an offender's needs. We are unaware of any criminal justice system that uses risk assessment scores to determine the amount of time credits inmates can earn for participating in programming, or to deny them the ability to use such credits.

Broadly speaking, risk assessment tools rely on two categories of information: static and dynamic factors. Static factors are those that do not change over time, including such things as criminal history and age at the time of the offense. Dynamic factors are those susceptible to change, such as work history, educational achievement, and strength of social networks, or the lack thereof.

Even for the limited purpose for which risk assessments are used, they are controversial. These tools do not measure the risk of recidivism of any individual, often classify individuals inaccurately, and tend to mis-classify individuals who are low risk as moderate or high risk. Further, static factors often favor white and well-off defendants. Dynamic factors are slow changing, and highly challenging to address for people with difficult home environments, a background of poverty, lack of education or work opportunities, or cognitive or mental health deficits.

As discussed further below, the problems with risk assessment become insurmountable when applied to the prison setting for the purpose of determining time credits and the ability to use them. None of the states cited by the CORRECTIONS Act sponsors use risk assessment scores or categories for such a purpose – and with good reason.

B.   The CORRECTIONS Act and the Misuse of Risk Assessment

The CORRECTIONS Act ("S. 467") would require the development and implementation of a complex "Post-Sentencing Risk and Needs Assessment System" ("Assessment System") that would require "consideration of dynamic risk factors" such that all prisoners not initially classified as "low risk have a meaningful opportunity to progress to a lower risk classification during the period of the incarceration . . . through changes in dynamic factors." § 3621A(b)(1)(B); *see also* § 3621A(h)(1). It would direct the Bureau of Prisons to assess and periodically reassess every inmate within its custody, § 3621A(a) & (c), and would give maximum incentives for completion of programs to those classified as low risk (10 days per month) and fewer incentives for all others (5 days per month), § 3621(h)(6)(A)(i). Over half the prison population would not be permitted to earn time credits, § 3621(h)(6)(A)(iii), and others

would be deemed ineligible to participate by the BOP, § 3621(h)(8)(A)(ii)(I)-(II). Among those left, only those classified as low risk could use time credits to eventually transfer to community confinement, § 3624(c)(2)-(5); those classified as moderate risk could only transfer to a residential reentry center or home confinement, § 3624(c)(4)-(5)), and only if their risk scores "declined during the period of the prisoner's incarceration," § 3624(c)(2)(B). Those classified as high risk could not use credits at all.

The system described in the bill is novel and untested. State correctional systems, including those cited in press releases announcing the legislation, award time credits for participating in programs based on performance and/or disciplinary record, not risk assessment scores. The system described in the bill is not in use in the states, and there is no evidence from the states that it would work as described (*i.e.*, classifying inmates accurately, and reducing risk levels through changes in dynamic factors), reduce recidivism, or save taxpayer dollars. The lesson from the states is that credits for participating in programs should be awarded on a fair and equitable basis, not risk scores.

The core assumption—that all inmates can progress to a lower risk category through changes in dynamic factors while incarcerated—is untested and likely incorrect. Every extant risk assessment instrument uses static factors and gives them significant weight based on their statistical correlation with recidivism. That weight cannot be overcome by legislative decree while maintaining any semblance of statistical accuracy. There is no question that many programs and activities reduce the overall *rate* of recidivism.[1] However, as discussed below, an individual's risk *category* is unlikely to change as the result of programs and activities in prison. No research supports this assumption.

Further, relying on this unfounded assumption, the bill would give the maximum incentive to those who are classified as low risk when they enter prison. It is well-established that practices aimed at reducing recidivism should focus scarce resources on the highest risk individuals. S. 467 would do the opposite by giving no meaningful incentive to high-risk prisoners who need the most intensive programming, and by expending significant staff time on assessments and release plans for individuals classified as low risk.

The bill also assumes that the Assessment System will predict "the likelihood that a prisoner will commit additional crimes for which the prisoner could be prosecuted," § 3621A(h)(2), and on that basis, would set the number of credits the prisoner could earn, and whether the prisoner could use the credits s/he has earned, § 3621A(h)(6)(A), § 3624(c)(2). Risk

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[1] "Rigorous research has found that inmates who participate in [Federal Prison Industries] are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release." *See* Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, *Rising Costs: Restricting Budgets and Crime Prevention Options* at 3-4 (Aug. 1, 2012), http://www.justice.gov/ola/testimony/112-2/08-01-12-bop-samuels.pdf. The benefit-to-cost ratio for residential drug abuse treatment is as much $2.69 for each dollar invested; $5.65 for adult basic education; $6.23 for correctional industries; and $7.13 for vocational training. *Id.*

assessments cannot predict whether any individual will reoffend. They merely predict the statistical risk of a group with certain characteristics in common, and they often do so inaccurately. A recent meta-analysis showed that only 52% of those assessed as moderate or high risk by risk assessment tools went on to commit any offense, meaning that almost half of all persons were classified as moderate or high risk when they were actually low risk.[2] Current research questions whether risk assessment tools are too inaccurate even for the purpose of identifying criminogenic needs and appropriate programming.[3] It would be wholly unacceptable, and likely unconstitutional, for the length of prison sentences to depend on unreliable and unreviewable risk assessments, as under S. 467.

II. The Development and Implementation of the new "Assessment System" Would Be Costly and Labor-Intensive, and Any Cost Savings Would Not Be Seen for a Decade, If Ever.

S. 467 would require the immediate expenditure of taxpayer dollars on the costly development and implementation of a new "Assessment System." Assessment instruments "are expensive to construct and validate,"[4] and "can take several years to complete."[5] Tools developed for one population or stage of the criminal justice process cannot just be taken off the shelf and used for a different population or stage of the criminal justice process. The tool must be validated for the particular population and specific to the particular stage in the criminal justice process. The bill would require development, validation, training, and implementation within six years.[6] As explained below, we believe that this time frame is overly optimistic, given the need to collect and analyze data on actual recidivism of prisoners released over several years, and the time it would take to train and certify BOP staff to use the tool. Moreover, the bill provides that the tool need only be validated "as soon as is practicable," § 3621A(b)(4), but a tool must be validated *before* it is implemented. Whether a valid tool can be developed for the

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[2] Seena Fazel *et al.*, *Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 British Medical J. 1, 4 (2012), http://www.bmj.com/content/345/bmj.e4692.

[3] *See, e.g.*, *id.* at 4-5; Joselyne L. Chenane *et al.*, *Racial and Ethnic Differences in the Predictive Validity of the Level of Service Inventory-Revised Among Prison Inmates*, 42 Crim. Just. & Behav. 286, 296-300 (2015); James Hess & Susan Turner, Center for Evidence-Based Corrections, Department of Criminology, Law & Society, Univ. of Calif. Irvine, *Risk Assessment Accuracy in Corrections Population Management: Testing the Promise of Tree Based Ensemble Predictions* 15-16 (2013), http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf; Chris Baird *et al.*, *A Comparison of Risk Assessment Instruments in Juvenile Justice* v-vi (2013), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244477.pdf.

[4] Edward Latessa *et al.*, *Creation and Validation of the Ohio Risk Assessment System: Final Report* 8-9 (2009).

[5] Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 Victims & Offenders: Int'l J. Evidence-Based Res., Pol'y, & Prac. 203 (2010).

[6] It would allow 30 months for the new Assessment System to be developed, and another 30 months for BOP to determine the risk level of each prisoner under the new Assessment System, for a total of five years, and six years for BOP to make programming and activities available to all eligible prisoners. *See* § 3621A(a) & (c); § 3621(h)(2).

massive and heterogeneous federal prison system is highly doubtful.

Any savings from transferring individuals from prison to prerelease custody would not be seen for a decade, if ever. After at least six years for development and implementation, it would take a low-risk prisoner three years, and a moderate-risk prisoner six years, to earn one year of credit.[7] As noted above, only a small portion of the prison population would be able to earn and use time credits, and all or some of the prerelease custody they could earn would be spent in a residential reentry center or home confinement, *see* § 3624(c)(2)-(5), which cost more than incarceration in the low and medium security facilities from which they would be transferred. Meanwhile, during the years it would take to implement the proposal, absent front-end sentencing reform, the BOP population would grow from 32% to 55% over rated capacity. Medium and high security facilities will be hit the hardest by future growth, but S. 467 would transfer prisoners from less crowded and less costly minimum and low security facilities.

It would be a significant mistake to require the Bureau of Prisons to spend years developing and implementing a costly and labor-intensive system without solid evidence that it would benefit the taxpayers. There is no such evidence.

III. The Bill Would Have an Unwarranted Adverse Impact on the Poor and Racial Minorities.

The categorical exclusion of over half the prison population is unwarranted, and would have a disparate impact on African American and Native American inmates. Risk factors correlate with socioeconomic class and race, and studies show that African Americans are more likely to be *mis*classified as high risk than White or Hispanic offenders.

The exclusion is also contrary to the goal of increasing public safety. Many of the excluded inmates have the greatest need to participate in programming, but would have no meaningful incentive to do so. With or without time credits, they will serve lengthy sentences and then be released. By failing to encourage them to participate in programs shown to reduce recidivism before releasing them to the community, S. 467 fails to promote the stated goal of enhancing public safety.

IV. The Bill Would Be Unconstitutional.

The bill would violate the Separation of Powers, the Due Process Clause, and the Sixth Amendment by making all determinations and assessments against the inmate unreviewable in any forum; giving the government the right to judicial review of a decision to transfer, with no right to counsel and no clear right to a hearing for the inmate; denying inmates any right to judicial review of decisions to deny transfer; providing for revocation of prelease custody with no procedural mechanism, due process protections, or right to counsel; giving probation officers authority to impose and modify conditions of release and supervise inmates in BOP custody; and

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[7] Only after participating in 30 days of these programs or activities would individuals start to accrue time credits of 5 days or 10 days (only for low risk prisoners) for each 30-day period of successful completion of programming or activity. *See* § 3621(h)(6)(A)(i).

giving BOP, not courts, the authority to revoke prerelease custody and return an inmate to prison. In addition, giving the Sentencing Commission, not the courts, unreviewable authority to decide the legal question whether an inmate's offense of conviction excludes him from earning time credits would lead to error, unfairness, and impracticalities.

V.   There is a Simple, Cost-effective, and Fair Alternative to this Bill.

There is an alternative, straightforward approach that would result in immediate cost savings, promote public safety, and not create unwarranted disparities or violate the Constitution. Congress should expand recidivism-reducing programs in prison and incentivize all inmates to participate on an equitable basis.

Congress should provide support for the expansion of prison programs and jobs demonstrated to reduce recidivism, and incentivize all prisoners to participate by allowing them to earn and use time credits up to a certain percentage of the sentence imposed, so long as they also comply with disciplinary rules. Under this approach, individuals would earn reductions in their prison sentences, taxpayer dollars would be saved, and public safety would be enhanced.

Furthermore, and perhaps most significantly, Congress should reduce unnecessarily severe sentences on the front end. "[A]ny attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options . . . would not be sufficient. . . . [T]he only policy change that would on its own eliminate overcrowding altogether is reducing certain drug mandatory minimums."[8] By all accounts, the Smarter Sentencing Act would result in at least $3 billion in cost savings in the first 10 years.[9]

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[8] Statement of Nancy G. La Vigne, Ph.D., Director, Justice Policy Center, Urban Institute, before the H. Comm on Jud., Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, *Lessons from the States: Responsible Prison Reform* 10, 12 (July 15, 2014).

[9] The Congressional Budget Office estimates that the Smarter Sentencing Act would result in a net savings of $3 billion: $4 billion saved through reduced incarceration less $1 billion in expenditures for items like social security and Medicare benefits for released inmates. DOJ estimates that it would result in $3.426 billion in cost savings and another $3.964 billion in cost aversions. *See* Potential Impact & Cost Savings: The Smarter Sentencing Act, http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf. Urban Institute estimates $3.258 billion in cost savings. Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 3-4 (2014), http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf.

FEDERAL DEFENDER ANALYSIS OF CORRECTIONS ACT (S. 467)

I.   The Assessment System Is an Untested Experiment, and Is Unlikely to Work as Described.

      A.   State correctional systems award time credits for participating in programs based on performance and disciplinary record, not risk assessment scores.

      The press releases announcing S. 467 and similar legislation introduced in the House claim that "similar programs have found success" in Texas, Rhode Island, Oklahoma, Ohio, and North Carolina,[1] thus suggesting that the system described in these bills is already in use, works as described (*i.e.*, the tool classifies prisoners accurately, and risk levels are reduced through changes in dynamic risk factors), reduces recidivism, and saves taxpayer dollars.

      In fact, while some state correctional systems use risk/needs assessments to identify offenders' needs and the appropriate kind and level of programming, no state gives or denies the use of time credits for participating in programs based on risk scores. Rather, the states award time credits based on performance and/or institutional conduct. The real lesson from the states is that credits for participating in programs should be awarded on a fair and equitable basis, not risk scores.

      In <u>Texas</u>, the Department of Criminal Justice conducts a risk and needs assessment at intake only to identify the inmate's needs.[2] Inmates can earn "good conduct" time credits both for "actively engaging" in work and programs[3] and for "diligently participating" in work and programs.[4] The number of days inmates can earn ranges from zero to 45 days per month, and is set by the inmate's "time earning class," which is based on the inmate's "conduct, obedience, and industry."[5] New inmates are placed in the time earning class that earns 35 days per month, and are automatically promoted after six months to the class that earns 40 days per month as long as they have no "major disciplinary cases."[6] Further promotions or demotions to a higher or

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[1] Press Release from Senator John Cornyn (R-TX), Feb. 10, 2015, http://www.cornyn.senate.gov/public/ index.cfm?p=NewsReleases&ContentRecord_id=f6840b81-c2dd-4393-8ff9-f7861e79436d; Press Release of Jason Chaffetz (R-UT), Feb. 5, 2015, http://chaffetz.house.gov/press-release/lawmakers-introduce-bipartisan-bill-reform-federal-prison-system.

[2] *See* Tex. Gov't Code § 508.152(b-1); Texas Dep't of Criminal Justice, *Offender Orientation Handbook* 3 (2015), http://www.tdcj.state.tx.us/documents/Offender_Orientation_Handbook_English.pdf.

[3] Tex. Gov. Code § 498.003(a).

[4] *Id.* § 498.003(d).

[5] *Id.* § 498.002.

[6] *See* Tex. Dep't of Criminal Justice, *Good Conduct Time*, AD-04.80 (rev. 9), at 1, 4 (2010); Tex. Dep't of Criminal Justice, *Review Process for Promotion in Time Earning Class,* AD-04.81 (rev. 8), at 2 (2010); Texas Dep't of Criminal Justice, *Offender Orientation Handbook* 8 (2015); *see also* William T. Habern, David P. O'Neil & Debra Bone, *Going to Prison in Texas in 2014*, at 14 (2014), www.paroletexas.com/articles/GTP2008.pdf.

lower time earning class, or to a non-time earning class, also depend on whether the inmate has a major disciplinary case.[7]

In <u>Rhode Island</u>, the Department of Corrections conducts risk and needs assessments at intake only to assess inmates' needs.[8] The number of days of credit an inmate can earn for participating in programs is not set by the risk assessment score, and varies based only on offense of conviction. Most inmates can earn 2 days per month for working at a prison job, an additional 5 days per month for participating in programs to address the inmate's individual needs,[9] and an additional 30 days whenever they complete a program.[10] Inmates convicted of certain more serious offenses (*e.g.*, sexual assault) can earn the same 2 days per month for working at a prison job, but only 3 additional days per month, with a maximum of 36 days per year for their performance while participating in and completing programs.[11]

In <u>Oklahoma</u>, the department of corrections conducts a risk and needs assessment at intake only to identify an inmate's programming needs.[12] Inmates earn a specific number of days of "achievement" time credit for completing programs,[13] such as 200 days for earning a bachelor's degree, 70 days for successfully completing an alcohol abuse treatment program, or 30 days for completing an anger management program.[14] Inmates can also earn monthly time credits for participating in assigned work, education, or programs.[15] The number of days that an

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[7] *Ibid.*; *see also* Texas Dep't of Criminal Justice, *Disciplinary Rules and Procedures for Offenders* 21 (2012), http://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf. Our understanding of the practice and procedure of earning good conduct time in Texas was confirmed in a telephone conversation with David P. O'Neil, of Habern, O'Neil & Associates, on February 3, 2015. Mr. O'Neil has co-written several articles on the operation of the Texas prison system, and is currently Co-Chairman of the Corrections and Parole Law Committee of the Texas Criminal Defense Lawyers Association.

[8] R.I. Dep't of Corrections, *Policy & Procedure – Classification Process*, Policy No. 15.01-6 DOC, pt. III(H) (2014).

[9] R.I. Gen. Laws § 42-56-24(a), (f), (g). These earned credits are in addition to up to 10 days per month for "good behavior." *See id.* § 42-56-24(c), (g), (f).

[10] *Id.* § 42-56-24(a)-(b), (g).

[11] *Id.* § 42-56-24(f); *id.* § 42-56-26.

[12] Okla. Dep't of Corrections, *Policy & Operations Manual – Male Initial Custody Assessment Procedures*, OP-060102, pt. I.C.6 (2014).

[13] Okla. Stat. tit. 57, § 138; *see* Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060107, at 17-18 (2013). An inmate is not eligible for earning credits if sentenced for "a criminal act which resulted in the death of a police officer, a law enforcement officer, an employee of the Department of Corrections, or an employee of a private prison contractor and the death occurred while the police officer, law enforcement officer, employee of the Department of Corrections, or employee of a private prison contractor as acting within the scope of their employment." *Id.* § 138(A).

[14] *See* Okla. Dep't of Corrections, *Policy & Operations Manual – Programs*, OP-09101 (2014).

[15] Okla. Stat. tit. 57, § 138.

inmate can earn per month ranges from zero to 60 days, and is set by the inmate's assigned "class level," which is based on the inmate's performance in work, education, or programs.[16] Inmates are initially placed in the class that earns 22 days per month.[17] After 3 months, an inmate can be promoted to earn 33 days per month, and after 8 months can be promoted to earn 44 days per month.[18] For inmates in the top two class levels who have never been convicted of certain offenses, the number of days that can be earned is "enhanced" to 45 days and 60 days per month, respectively.[19] Promotions and demotions are based on performance evaluations and institutional conduct.[20]

In <u>Ohio</u>, the department of rehabilitation and correction conducts a risk and needs assessment at intake only to determine an inmate's needs.[21] An inmate can earn either 1 day or 5 days of time credit per month for participating in work and programs, and an additional 1 day or 5 days for completing programs.[22] Whether an inmate earns 1 day or 5 days depends on the offense of conviction and date of conviction, not a risk assessment score.[23]

Ohio also has a procedure for release after service of 80% of the sentence, initiated by the director of rehabilitation and correction by submitting a notice to the sentencing court recommending that the court consider release and including information about the inmate's "participation while confined in a state correctional institution in school, training, work, treatment, and other rehabilitative activities and any disciplinary action."[24] Before granting release, the court must hold a hearing where the offender has an attorney and both prosecutor and offender have a right to be heard.[25] Eligibility depends on the offense of conviction.[26]

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[16] *Id.* There are some exclusions and restrictions based on offense of conviction. For example, inmates convicted of certain offenses must serve a certain percentage of their sentence regardless of earned credits. *See* Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060211, at 10-16 (2014).

[17] Okla. Stat. tit. 57, § 138(D)(1).

[18] *Id.*

[19] *Id.* § 138(D)(1), (D)(2)(b)-(c), (E).

[20] *See* Okla. Dep't of Corrections, *Policy & Operations Manual – Classification & Case Management*, OP-060107, at 2 (2013).

[21] *See* Ohio Dep't of Rehab. & Correction, *Prison Reentry Assessment and Planning*, Policy No. 02-REN-01 (2014).

[22] Ohio Rev. Code Ann. § 2967.193.

[23] *Id.* § 2967.193(C), (D).

[24] *Id.* § 2967.19(B), (C), (D).

[25] *Id.* § 2967.19(F) & (H).

[26] *Id.* § 2967.19(B), (A), (C).

Ohio also has a front-end mechanism for some offenders to reduce the amount of time served by participating in programs, available at sentencing at the discretion of the sentencing judge.[27] Under this mechanism, a risk and needs assessment is used only to identify appropriate programs and treatment. An offender may be sentenced to a "risk-reduction sentence" if he agrees to the assessment and to participate in programming and treatment, and must be released upon successful completion of the prescribed programs and treatment after serving 80% of the non-mandatory prison term.[28] Eligibility for a "risk-reduction sentence" and the amount of time that can be earned is not determined by a risk score. Rather, it depends on the offense of conviction, the discretion of the judge, the sentence imposed, and whether and when the offender completes the prescribed programs.[29]

In <u>North Carolina</u>, the number of days of credit an inmate can earn per month for working and participating in programs ranges from 3 to 9 days and is set by the "level" of the inmate's job or program assignment, which depends on the number of hours per day, skill level, and days per week required by the job or program.[30] An inmate who increases skills through vocational training can be assigned to a higher level job and thus earn more credit.[31] Inmates can earn additional time for achievements in apprenticeship training or for successfully completing job and educational training. The number of days of credit depends on the activity (*e.g.*, 30 days for completing on-the-job training, 20 days for an associate's degree).[32] Earned credit reduces the time that must be served, but cannot reduce it below the minimum sentence imposed by the court.[33]

North Carolina also has a front-end mechanism for some offenders to earn a term of imprisonment less than the minimum term imposed by the court by participating in programs. "Advanced supervised release," or ASR, is available to those convicted of less serious classes of offenses, and may be ordered by the court in its discretion at sentencing.[34] For an inmate sentenced to the ASR track, prison officials conduct a risk and needs assessment, but only to

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[27] *See id.* § 2929.143.

[28] *Id.* §§ 2929.143, 5120.036(A)-(C). A person serving a "risk reduction" sentence is not entitled to earn time credits for participating in risk reduction programming. *Id.* § 2929.143(B).

[29] *See id.* § 2929.143.

[30] N.C. Dep't of Public Safety, *Prison Policy & Procedure Manual – Sentence Credits*, ch. B.0113 (2013); *see* N.C. Gen. Stat. § 148-13(a1). Inmates sentenced for DWI are not eligible for earned time credits.

[31] N.C. Dep't of Public Safety, *Rules & Procedures – Inmate Booklet*, at 17 (2010), https://www.ncdps.gov/div/AC/inmate_rule_book2010.pdf.

[32] *Id.* ch. B.0114.

[33] N.C. Gen. Stat. § 15A-1340.18(d). Under North Carolina's structured sentencing system, the judge imposes a minimum and maximum term of imprisonment within ranges based on class of offense and criminal history. *See* N.C. Gen. Stat. § 15A-1340.17.

[34] N.C. Gen. Stat. § 15A-1340.18(c).

identify and assign appropriate programming.[35]   If the inmate successfully completes the programming, the inmate is released on the specific earlier date determined at the time of sentencing.[36]

In sum, the states do not set the number of time credits prisoners can earn or deny any prisoner the ability to use credits based on actuarial risk assessment scores. Instead, the states award time credits based on individual performance and conduct.

It has been brought to our attention, however, that some states consider an inmate's risk assessment score in connection with parole. But no state uses risk assessment scores to determine when inmates are eligible for parole, and while some state parole agencies consider parole risk assessment scores as one of many factors in exercising their discretion whether to grant parole, those scores are not determinative or even very weighty.

For example, in Pennsylvania, the Parole Board considers an inmate's risk score as one of four weighted and fifteen non-weighted "decisional factors," such as the inmate's motivation for success, his release plan, and acceptance of responsibility.[37] Of the four weighted factors, the inmate's risk score carries the least number of possible points.[38] Thus, an inmate assessed 2 points for being scored as high risk, 3 points for violence, 1 point because he has participated in but not completed risk-reduction programming, and 0 points because he has engaged in no institutional misconduct in the past year will have a total of 6 points, which "suggests" parole. The Parole Board considers this suggestion along with the other decisional factors and retains ultimate discretion whether to grant parole.[39]

In Kentucky, the parole board must review the results of an inmate's risk and needs

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[35] *Id.* § 15A-1340.18(b).   N.C. Dep't of Public Safety, *Prison Policy and Procedures Manual – Advanced Supervised Release (ASR)*, ch. C.2601, C.2606 (2012).

[36] *Id.* § 15A-1340.18(c), (e).

[37] *See* Pa. Parole Decisional Instrument, http://www.pbpp.pa.gov/Understanding%20Parole/Documents/ PDI%20361%2009-2014.pdf.

[38] *Id.* The other three factors are offense violence and/or likelihood of violence, whether a high or medium risk inmate has participated or completed risk-reduction programming, and institutional behavior. Each factor has a maximum score, and the cumulative score either "suggests parole" (1 to 6 points) or "suggests parole refusal" (7 or more points). An inmate's risk assessment score adds 0 to 2 points; the violence indicator adds 1 to 4 points; the institutional programming factor adds 0 to 3 points; and the institutional behavior factor adds 5 points if the inmate has committed a new crime or other institutional misconducts or has a pattern of misconduct.

[39] 61 Pa. Cons. Stat. § 6137(a)(3). For a nonviolent offender sentenced under Pennsylvania's recidivism risk reduction incentive (RRI) program, the inmate is entitled to "rebuttable parole" after she has served 75% or 83% of the sentence imposed (depending on the length of the sentence), if the Parole Board has certified, among other things, that the inmate has successfully completed the treatment program designed to address her needs as determined by a risk and needs assessment. *Id.* §§ 4505, 4506. The Parole Board retains the discretion to deny parole based on the inmate's conduct or for public safety reasons, but the inmate's risk score does not determine when or whether she can be released. *Id.* § 4506. Indeed, 76% of inmates in this program are assessed as medium or high risk. Pa. Dep't of Corrections, *Recidivism Risk Reduction Incentive 2014 Report*, at 4 (2014).

assessment before the parole hearing, but the risk score is not one of the 16 factors, one or more of which the parole board "shall apply to an inmate" in making the parole decision.[40] At the same time, an inmate's institutional conduct and adjustment, "particularly evidence-based program involvement," is such a factor, and whether parole is granted ultimately lies in the discretion of the parole board.[41] The risk and needs assessment is used primarily to determine the terms and intensity of parole supervision and the inmate's need for treatment while on supervision.[42]

In Michigan, the Parole Board considers an inmate's statistical risk of committing assaultive and property crimes.[43] These two risk scores carry differing weights in the parole guidelines depending on the length of the sentence, and their combined score is only one of eight scored categories: (1) offense characteristics and sentence; (2) prior criminal record; (3) institutional conduct; (4) statistical risk; (5) age; (6) program performance; (7) mental health; and (8) institutional housing level.[44] The total preliminary score for all eight categories is subject to adjustment depending on whether the inmate is serving a sentence for criminal sexual conduct and the inmate's criminal record score, institutional conduct, and age, and provides only the inmate's probability of parole.[45] Whether parole will be granted remains in the discretion of the Parole Board.[46]

In Texas, the Parole Division uses a parole-specific risk assessment tool indicating the likelihood of success on parole and combines the parole risk score with a separate measure of offense severity, resulting in a parole guideline score.[47] The parole guideline score is not a "precise recommendation to either deny or grant parole" and is not presumptive.[48] The board

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[40] Ky. Parole Board, *Policies & Procedures – Parole Release Hearings*, KYPB 10-01, at 3-4 (2012). The parole board is directed by statute to consider the results of an inmate's validated risk and needs assessment before granting parole, and is authorized to adopt regulations that "utilize in part objective, performance-based criteria and risk and needs assessment information." Ky. Rev. Stat. § 439.340(3)(b).

[41] Ky. Parole Board, *Policies & Procedures – Parole Release Hearings*, KYPB 10-01, at 4 (2012); Ky. Rev. Stat. § 439.340(1), (2); *see Belcher v. Kentucky Parole Bd.*, 917 S.W.2d 584 (Ky. Ct. App. 1996).

[42] The parole board must "use the results" from the risk and needs assessment "to define the level or intensity of supervision for parole, and to establish any terms or condition of supervision." *Id.* § 439.335(2) ("The terms and intensity of supervision shall be based on an individual's level of risk to public safety, criminal risk factors, and the need for treatment and other interventions.").

[43] Mich. Dep't of Corrections, Policy Directive 06.05.100, *Parole Guidelines* (2008); Mich. Dep't of Corrections, Policy Directive Attachment 06.05.100A, *Parole Guidelines* (2010). The Parole Board "may" but is not required to include in the parole guidelines as a factor "the prisoner's statistical risk screening." Mich. Comp. Laws § 791.233e.

[44] Mich. Dep't of Corrections, Policy Directive Attachment 06.05.100A, *Parole Guidelines* (2010).

[45] *Id.* at 9.

[46] *Id.* at 1; *see In re Parole of Michelle Elias*, 811 N.W.2d 54, 522-23 (Ct. App. Mich. 2011).

[47] Texas Board of Pardon & Paroles, *Parole Guidelines Annual Report – FY 2014*, at 4 (2015).

[48] *Id.*

considers many other factors, such as institutional adjustment and participation in programming, and parole is granted in the Parole Division's discretion to inmates at all guideline levels, and to thousands of inmates classified as highest, high, and moderate risk.[49] For inmates releasing to parole supervision, the Parole Division then uses a different risk and needs assessment tool to determine and address inmates' needs before reentry.[50]

As in Texas, Rhode Island's parole guidelines combine the inmate's parole-specific risk score with a separate score for offense severity, but the guidelines "are not automatic nor is the parole risk score presumptive."[51] In addition to the guidelines, the parole board considers twelve "major criteria," including institutional adjustment and participation in rehabilitative programs.[52]

To summarize, the states do not set the number of time credits prisoners can earn or deny any prisoner the ability to use time credits based on risk assessment scores. Thus, no experience or research shows that prisoners can change risk scores or levels through changes in dynamic factors, or that any such change would reduce recidivism.[53] There is an "absence of evidence" at this point that even the use of risk/needs tools to identify criminogenic needs "add[s] value to risk reduction efforts."[54] Likewise, states do not determine *when* prisoners are eligible for parole based on risk scores, or *whether* to grant parole on the sole or predominant basis of risk assessment scores.

The lesson to be learned from the states is clear: Time credits for participating in programming should be awarded on a fair and equitable basis such as individual performance and conduct, not risk scores.

B.   The idea that a person's "risk classification" can be lowered in prison has not been tested and is most likely incorrect.

S. 467 would direct the Attorney General to ensure that all prisoners other than those classified as low risk have a "meaningful opportunity" to progress to a "lower risk classification" during incarceration "through changes in dynamic factors," § 3621A(b)(1)(B)(i), which it defines

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[49] *Id.* at 8-9.

[50] *See* Texas Dept. of Crim. Just., Parole Div., *Policy & Operating Procedure – Case Assessment*, PD/POP-3.2.5 (2015).

[51] Rhode Island Parole Board, *2014 Guidelines,* at 2-3.

[52] *Id.* at 4-5.

[53] *See* Joselyne L. Chenane *et al.*, *Racial and Ethnic Differences in the Predictive Validity of the Level of Service Inventory-Revised Among Prison Inmates*, 42 Crim. Just. & Behav. 286, 300 (2015).

[54] "There is, at this point, no evidence that instruments focusing on risk reduction produce lower recidivism rates." Chris Baird *et al.*, *A Comparison of Risk Assessment Instruments in Juvenile Justice* 130 (2013), https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244477.pdf; *id.* at 121 (comments by Skeem, Latessa and others acknowledging the "absence of evidence" that risk assessment tools "add value to risk reduction efforts").

as a "characteristic or attribute" that "has been shown to be relevant to assessing risk of recidivism," and that "can be modified based on a prisoner's actions, behaviors, or attitudes, including through appropriate programming or other means, in a prison setting," § 3621A(h)(1).

As an initial matter, even instruments that attempt to incorporate more dynamic factors (in order to identify criminogenic needs) necessarily include and give significant weight to static factors. Static factors are included and given a certain weight based on their statistical correlation with recidivism.[55] That weight cannot be overcome by simply deciding to give overriding weight to dynamic factors. Indeed, "the exchange of dynamic factors for more predictive static factors is ill-advised."[56] Moreover, as discussed below, risk assessment instruments are already too rough a measure for setting the length of prison sentences, and adding too many dynamic factors would make the instrument even less reliable.[57]

Many programs and jobs have been shown to reduce the *rate* of recidivism,[58] but the assumption that risk *categories* can change in the prison setting, through programming or otherwise, is untested and most likely incorrect. For example, the PCRA (which is used to provide guidance on the kind and level of services for people on probation and supervised release) includes static factors and dynamic factors, with a maximum possible score of eighteen.[59] Factors related to criminal history and age at intake to supervision, none of which can change, account for nine of those eighteen points.[60] Marital status, family stressors, and lack of pro-social support, which might be changed in the community but are unlikely to change during incarceration, account for three more points. Another example is Ohio's Prison Intake Tool (which is used only to establish treatment priorities). It includes 30 items with a maximum possible score of 37. Twenty-three points are for factors that could not possibly change in prison because they occurred in the past.[61]

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[55] Christopher T. Lowenkamp *et al.*, *The Federal Post Conviction Risk Assessment (PCRA): A Construction and Validation Study*, 10 Psych. Services 87, 89 (2013).

[56] Baird *et al.*, *supra* note 54, at 105.

[57] *See* Edward Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 Victims & Offenders: Int'l J. Evidence-Based Res., Pol'y, & Prac. 203, 212 (2010) ("Reliability is more of an issue with instruments that include dynamic factors (such as gauging the attitudes or values of the offender).").

[58] *See* Statement for the Record of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the Senate Comm. on the Judiciary, Rising Costs: Restricting Budgets and Crime Prevention Options at 3-4 (Aug. 1, 2012).

[59] The factors on the PCRA are number of prior misdemeanors and felony arrests; violent offense; prior offending pattern (different offense types); revocation of supervision or new crime while on supervision; institutional adjustment in state or federal prison; age at intake to supervision; education; current employment status; work history over 12 months (stability and performance); current alcohol problem; current drug problem; marital status; family stressors; current lack of pro-social support; attitude toward supervision and change. Each has complicated and subjective scoring rules.

[60] Thomas H. Cohen & Scott W. VanBenschoten, *Does the Risk of Recidivism for Supervised Release Offenders Improve Over Time? Examining Changes in the Dynamic Risk Characteristics for Offenders Under Federal Supervision*, 78 Fed. Probation 41, 42 (2014).

[61] Latessa *et al.*, *Creation and Validation of the Ohio Risk Assessment System: Final Report*, Appendix A, 56-59

Moreover, dynamic factors are "slow changing,"[62] and the dynamic factors most prevalent among individuals classified as moderate or high risk would be difficult or impossible to change in prison. A study of the PCRA showed that the most commonly occurring dynamic factors for people on federal probation and supervised release were deficits in education/employment and social networks.[63] Those who were able to lower their risk levels typically did so by becoming employed and having a more stable work history.[64] While vocational training is an important part of correctional programming, the ultimate success of that training and whether it truly reduces the risk of recidivism depends on whether the individual is able to obtain a job that provides a legitimate means of support over a period of time. This cannot be done in a prison setting. There was very little change in education deficits over time, and education had almost no impact on changing risk scores.[65] Under the PCRA, a person with a GED receives the same number of points as a person with any level of education less than a high school diploma. Assuming the same scoring under the "Assessment System," obtaining a GED in prison could not reduce a person's risk classification. There was relatively little change over time in social networks factors (*i.e.*, single, divorced or separated, unstable family situation, lack of prosocial support).[66] If these factors are slow to change in the community, it would be nearly impossible to change them from behind bars.

Even if the raw risk score could change through programming or otherwise in prison, it would be difficult, if not impossible, for inmates to move down a risk category. Unlike some instruments, like the SPIn which has up to six categories of risk "for greater sensitivity in detecting change after reassessment,"[67] or even the PCRA which has four categories, S. 467 directs only three categories. Thus, a greater change in the raw score would be necessary for an inmate to move to a lower risk category.

If prisoners participated in recidivism reduction programs, but did not see their risk categories declining, many—and particularly those in the high risk category who could not use time credits—would come to correctly believe that the incentives were illusory. And when they reached this conclusion, they may opt out of recidivism reduction programming, even though they would have participated in programming if there was no credits system at all (because the program would appear to be a sham). If so, those most in need of recidivism reduction

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(2009).

[62] David Robinson, *The Service Planning Instrument (SPIn); A New Assessment and Case Planning Model for Adult Offenders* 18 (2007), http://www.ohhaonline.ca/SPIN_Overview.pdf.

[63] Cohen & VanBenschoten, *supra* note 60 at 47 fig.3.

[64] *Id.* at 49 tbl.4, 50.

[65] *Id.*

[66] *Id.*

[67] Robinson, *supra* note 62.

programming would return to the streets without the benefit of programming.

In addition, treating inmates differently on the basis of risk classifications that are not easily understood may appear arbitrary and unfair to the inmates and could create significant prison management issues.

       C.   **Actuarial risk assessments are an inappropriate basis for determining the length of prison sentences because they cannot determine any individual's risk of recidivism, and often misclassify individuals as higher risk.**

The bill assumes that the Assessment System will predict the "the likelihood that a prisoner will commit additional crimes for which the prisoner could be prosecuted," § 3621A(h)(2), and on that basis, would set the number of credits the prisoner could earn, and whether the prisoner could use the credits s/he has earned, § 3621A(h)(6)(A), § 3624(c)(2).

This reflects a misunderstanding of the information that actuarial risk assessments are able, and not able, to provide. These tools roughly predict the statistical risk of a group with certain characteristics in common, but they do not and cannot identify whether any individual in a group will reoffend. Actuarial risk assessments tend to over-predict recidivism.[68] An important meta-analysis showed that only 52% of those judged to be at moderate or high risk by generic risk assessment tools went on to commit any offense, meaning that almost half (48%) of all persons who were actually low risk were mis-classified as moderate or high risk.[69] The researchers concluded that "risk assessment tools in their current form can only be used to roughly classify individuals at the group level, and not to safely determine criminal prognosis in an individual case," and that "even after 30 years of development, the view that . . . criminal risk can be predicted in most cases is *not evidence based*."[70]

Researchers have warned that "even for well-validated tools, implementation efforts can fall breathtakingly short" and that more research is needed "to evaluate the extent to which these tools are implemented in 'real world' settings faithfully enough to bridge the usual divide between science and practice."[71] A recent study concluded that the power of risk assessment tools to "accurately classify offenders by risk level may have been overestimated."[72]

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[68] Seena Fazel *et al.*, *Use of Risk Assessment Instruments to Predict Violence and Anti-social Behavior in 73 Samples Involving 24,827 People: Systematic Review and Meta-Analysis*, 345 British Medical J. 1, 4 (2012), http://www.bmj.com/content/345/bmj.e4692.

[69] *Id.*; *see also* BMJ Group, *Concerns Over Accuracy of Tools to Predict Risk of Repeat Offending* (2012), http://group.bmj.com/group/media/latest-news/concerns-over-accuracy-of-tools-to-predict-risk-of-repeat-offending.

[70] Fazel *et al.*, *supra* note 68, at 5 (emphasis added).

[71] Jennifer Skeem*, Risk Technology in Sentencing: Testing the Promises and Perils (Commentary on Hannah-Moffat, 2011)*, 30 Justice Q. 297, Abstract & 302 (2013), http://www.albany.edu/scj/documents/RiskAssessment Skeem.pdf.

[72] Baird *et al.*, *supra* note 54, at v. While this study focuses on risk assessment instruments used in juvenile justice, the general theory and actuarial science behind the instruments are the same, so the concerns about juvenile

Significantly, a group of experts funded by the Department of Justice concluded that "simple, actuarial approaches to risk assessment can produce the strongest results. Adding factors with relatively weak statistical relationships to recidivism – including dynamic factors and criminogenic needs – can result in reduced capacity to accurately identify high-, moderate-, and low-risk offenders."[73] The more "dynamic" factors that require subjective judgment are included in the assessment, "the greater the potential for classification error."[74]

Other researchers are even more "wary of over-promising unattainable results" with risk assessments.[75] Researchers at the Center for Evidence-Based Corrections, Department of Criminology, Law & Society, University of California Irvine, found that the "overall predictive ability" of risk assessment instruments for criminal justice systems "is relatively modest" and "often falls short of the levels found in other domains."[76] Explanations for this "comparative weakness" include: (1) "tools employed in risk assessment [that] fail to cope with complex relationships between risk factors and outcomes," (2) "unmeasured heterogeneity across offenders and jurisdictions," (3) inadequate assessment of "the impact of communities and the criminal justice system" on recidivism, and (4) the impact on risk assessment of factors such as neighborhood inequality, segregation, social disorder, and access to service providers.[77] Aside from those factors, "the complexity of human agency may present a challenge of irreducible heterogeneity," which cannot be captured by a risk assessment instrument.[78]

It is bad enough that inaccuracies in risk/needs assessments may misidentify appropriate services.[79] It is wholly unacceptable, and likely unconstitutional, for the length of prison sentences to depend on unreviewable and unreliable BOP-determined risk assessments, as under S. 467.

D. There is no evidence that risk assessment tools that rely on dynamic factors actually reduce recidivism.

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assessments hold true for adult assessments.

[73] *Id.* at vi.

[74] Christopher Baird, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System* 7 (2009), http://nccdglobal.org/sites/default/files/publication_pdf/special-report-evidence.pdf.

[75] James Hess & Susan Turner, Center for Evidence-Based Corrections, Department of Criminology, Law & Society, Univ. of Calif. Irvine, *Risk Assessment Accuracy in Corrections Population Management: Testing the Promise of Tree Based Ensemble Predictions* 16 (2013), http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf.

[76] *Id.* at 15.

[77] *Id.* at 15-16.

[78] *Id.* at 16.

[79] Chenane *et al.*, *supra* note 53, at 287.

There is no evidence that targeting "dynamic factors" statistically correlated with recidivism (known as "criminogenic needs") can actually reduce recidivism. The term "'criminogenic' implies causation, yet needs that are considered criminogenic are simply those with a statistical relationship with recidivism."[80] "While correlation is an adequate requirement for inclusion in risk assessment, the simple fact that a particular need exhibits a general relationship to recidivism does not mean it contributed to an individual's offending behavior."[81] For example, a person with an alcohol disorder may have committed a fraud because he wanted to buy an expensive car to improve his status among colleagues. Treating the alcohol disorder would remove a risk factor for recidivism and lower his risk score, but would do nothing to treat the underlying cause of the criminal behavior, i.e., a need for status driven by psychological factors apart from the alcohol disorder.[82]

Until researchers can affirmatively show that a variable is not just correlated with recidivism but that the "variable reduces [] risk when successfully changed by treatment (i.e., is a *causal* risk factor)," public policy should not be made "on the promise" that actuarial tools can "inform[] risk reduction."[83] "There is, at this point, no evidence that instruments focusing on risk reduction produce lower recidivism rates."[84]

E. **The Assessment System is contrary to evidence-based practices aimed at reducing recidivism.**

It is well established that practices aimed at reducing recidivism should focus scarce resources on individuals classified as the highest risk.[85] S. 467 would do the opposite by giving no meaningful incentive to high-risk prisoners who need the most programming, and by expending significant staff time on assessments and release plans for individuals classified as low risk when those resources should be focused on inmates with the greatest needs. And by requiring individuals classified as low risk and without a need for programming to participate in activities including prison jobs, § 3621(h)(4)(B), it would appear to require BOP to give the

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[80] Winnie Ore & Chris Baird, National Council on Crime & Delinquency, *Beyond Risk and Needs Assessments* 2 (2014), http://nccdglobal.org/sites/default/files/publication_pdf/beyond-risk-needs-assessments.pdf.

[81] *Id.* That correlation does not equate with cause is not a controversial proposition. Other researchers acknowledge that a risk factor is nothing more than a "correlate that precedes the outcome in time, with no implication that the risk factor and outcome are causally related." Jennifer Skeem & John Monahan, *Current Directions in Violence Risk Assessment* 4 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793193.

[82] *See generally* Muel Kaptein, *Why Do Good People Sometimes Do Bad Things?: 52 Reflections on Ethics at Work* (2012).

[83] Skeem & Monahan, *supra* note 81, at 11.

[84] Baird *et al.*, *supra* note 54, at 130.

[85] *See*, *e.g.*, The Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* 4 (2011), http://www.ovsom.texas.gov/docs/Risk-Needs-Assessment-101-New-Tools-to-Manage-Offenders-2011.pdf; Chenane *et al.*, *supra* note 53, at 287; Latessa *et al.*, *supra* note 61, at 6-7.

limited number of Federal Prison Industries (FPI) (also known by its trade name, UNICOR) jobs,[86] to individuals classified as low risk even though FPI has been proven to reduce recidivism more than any other program (inmates involved in FPI work programs are 24% less likely to recidivate for as long as 12 years following release), by giving them marketable job skills (they are 14% more likely to be employed 12 months after release), particularly for "young minorities who are at the greatest risk for recidivism."[87]

By not ensuring that individuals classified as high risk get the fullest attention and have maximum opportunity and incentive to participate in meaningful programs aimed at the true causative factors of their criminal behavior (as opposed to factors that bear nothing more than a statistical correlation with recidivism), S. 467 does not promote recidivism reduction.[88] This approach is particularly unwise since prisoners classified as high risk are housed in the most crowded and expensive federal institutions.[89]

II.   The Development and Implementation of the Complex "Assessment System" Would Be Costly and Labor-Intensive, and May Not Be Possible.

The development of a scientifically valid risk tool is not a simple undertaking. "[A]ssessment instruments are expensive to construct and validate,"[90] and "can take several years to complete."[91] Tools developed for one population or stage of the criminal justice process cannot just be taken off the shelf and put to use for a different population or stage of the criminal justice process.[92] The tool must be validated for the particular population and specific to the

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[86] "[P]rimarily [as a] result of efforts to compensate for declining revenues and earnings," the program has had a drop in the number of inmates it has been able to employ in recent years. U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates* ii (2013), http://www.justice.gov/oig/reports/2013/
a1335.pdf. "[A]s of June 2012, FPI employed 12,394 inmates, or 7 percent of the eligible inmate population, its lowest inmate employment in over 25 years and far below its historical target of 25 percent of the eligible BOP inmate population." *Id*. at 1.

[87] FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf; *see also* Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp.

[88] The Pew Center on the States, *Risk/Needs Assessment 101*, *supra* note 85, at 4.

[89] U.S. Dep't of Justice, *FY 2015 Performance Budget, Congressional Submission Federal Prison System: Buildings and Facilities* 1 (2014) (high security institutions are 51 percent overcrowded; medium security facilities are 41 percent overcrowded), http://www.justice.gov/sites/default/files/jmd/legacy/2014/05/21/
bop-bf-justification.pdf.

[90] Latessa *et al.*, *supra* note 61, at 8-9.

[91] Latessa & Lovins, *supra* note 57, at 217.

[92] Unfortunately, "increasingly complex and poorly validated risk assessment tools are being sold to criminal justice agencies." Skeem, *supra* note 71, at 302.

particular stage in the criminal justice process.[93] A new tool had to be developed and validated with data specific to the federal probation and supervised release population,[94] and a new tool would have to be developed and validated with data specific to the federal prison population.[95]

To construct, validate, and implement an instrument that could identify dynamic factors for the federal prison population would require extensive data collection and statistical analyses over a period of years, including collecting data on outcomes after release from prison for three to five years, then a lengthy period to train BOP staff to use the tool.[96] For example, the PCRA was developed and validated based on data collected on offenders who started a term of probation or supervised release between October 1, 2005 and August 13, 2009.[97] It was then implemented in stages beginning in 2010 while probation officers were trained to use it, and was finally being implemented on 95% of offenders placed on probation or supervised release by September 2014.[98]

Perhaps reflecting how difficult and time-consuming this undertaking would be, S. 467 delivers an ambiguous message: The Attorney General "may use existing risk and needs assessment tools, as appropriate," § 3621A(b)(3), but "must statistically validate" the tool "on the Federal prison population," but if this "validation cannot be completed" within the 30 months

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[93] While criminal justice agencies "often use empirically derived tools developed on samples from a different population" because of resource constraints, this "assumes that the instrument is a valid predictor of recidivism for each agency's specific population," but because "it is unlikely for a single instrument to have universal applicability across various offending populations, validating risk assessment instruments on specific target populations is important. . . . For example, the population of defendants on pretrial supervision is likely different from the population of individuals who are released from prison." Edward Latessa *et al.*, *The Creation and Validation of the Ohio Risk Assessment System (ORAS)*, 74 Fed. Probation 16, 17 (2010); *see also* National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing*, at 31 (to have predictive validity, a risk assessment tool must have been developed and tested for use at the same decision point in the criminal justice system), http://www.ncsc.org/~/media/Microsites/Files/CSI/RNA%20Guide%20Final.ashx.

[94] James L. Johnson *et al.*, *The Construction and Validation of the Post Conviction Risk Assessment (PCRA)*, 75 Fed. Probation 16, 18 (2011).

[95] The PCRA could not be used for the federal prison population. The distribution of risk categories for the PCRA is heavily skewed toward lower risk offenders due in part to the fact that it includes people sentenced to probation. *See* Cohen & VanBenschoten, *supra* note 60, at 44.

[96] *See* Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416918; Latessa *et al.*, *supra* note 61, at 10-17.

[97] Johnson *et al.*, *supra* note 94, at 17. The PCRA was constructed and validated based primarily on archival data on people already on probation or supervised release to whom the PCRA was not administered when they were first placed on supervision, which allowed a follow-up period of up to 60 months, and a small prospective study (of 356 people) that tracked people from the time they were placed on supervision for over one year. Lowenkamp *et al.*, *supra* note 55, at 92-93. The only outcome tracked was whether the subjects were arrested. The authors identified their use of archival data as a limitation, and recommended "future (larger) validation in a prospective fashion," and that "future prospective validation research should use varied measures of outcome," including reconviction, reincarceration, and severity of offense. *Id*. at 94.

[98] Cohen & VanBenschoten, *supra* note 60, at 41.

allowed for development of the tool, it need only be completed "as soon as is practicable." *See* §
3621A(b)(4). But a tool must be "well-validated <u>before</u> it is disseminated."[99] Otherwise, use of
the instrument is highly suspect.[100]

Whether a valid tool can even be developed for the massive and heterogeneous federal
prison system is doubtful. The districts to which federal inmates return vary widely in their
availability of services and supervision practices, but "[v]ariables that predict recidivism in a
jurisdiction with ample services for offenders may not predict recidivism in a resource-poor
jurisdiction."[101] The racial composition and types and severity of crimes also vary widely among
districts, but to have predictive validity, a tool must have been tested on a population with a
"representative gender [and] racial composition," and with "the same types [and] severity of
offenses."[102] The higher the at-risk environment into which a person is released (as one
researcher puts it, Dangertown versus Peacetown), the more likely the person will recidivate and
vice versa.[103] Indeed, there is a "statistically significant variation in arrest and revocation rates
across the 90 federal districts, after taking risk and protective factors into account."[104] An
actuarial risk assessment instrument that did not take into account these variations among
districts would be inaccurate.

Even assuming that a scientifically valid instrument could be developed for the federal
prison system, implementing a new assessment system for a prison population larger than any
state prison population[105] is a "significant challenge," which "requires the development of new

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[99] Baird *et al.*, *supra* note 54, at 111 (emphasis in original).

[100] *See* Mike Eisenberg *et al.*, Justice Center, The Council of State Governments, *Validation of the Wisconsin
Department of Corrections Risk Assessment Instruments* 2 (2009) ("Validity of risk assessment instruments is the
most important supportive principle behind the proper utilization of these instruments."),
http://csgjusticecenter.org/wp-content/uploads/2012/12/WIRiskValidationFinalJuly2009.pdf.

[101] John Monahan & Jennifer Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sentencing* 14
(2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2332165.

[102] National Center for State Courts, *Using Offender Risk and Needs Assessment Information at Sentencing*, *supra*
note 93, at 30-31.

[103] National Institute of Justice, Office of Justice Programs, *Measuring Recidivism* (2008). *See also* Jay P. Singh *et
al.*, *Rates of violence in patients classified as high risk by structured risk assessment instruments*, 204 British J. of
Psych. 180, 184 (2014) (finding substantial variation in actual rates of violence among individuals judged to be high
risk and that different rates depended on local factors).

[104] For example, districts with large populations had lower arrest and revocation rates; districts with a larger
proportion of Native Americans had higher revocation rates. William Rhodes *et al.*, *Recidivism of Offenders on
Federal Community Supervision* 3, 16 (2013). Household income also had an effect on revocation rates such that
persons with higher average family income had fewer revocations than those with lower income. "Offenders who
return to neighborhoods that are seen as impoverished and transient have higher failure rates." *Id*. at 18.

[105] Bureau of Justice Statistics, *Corrections Statistical l Analysis Tool (CSAT) – Prisoners* (in 2013, 214,989 inmates
were in the custody of federal correctional facilities, including private prison facilities; Texas and California
followed with 155,377 and 134,330), available at http://www.bjs.gov/index.cfm?ty=nps.

staff skills, (re)certification and quality assurance policies, performance metrics, and the establishment of a system for providing coaching and feedback for assessors in the field."[106] The training that would be necessary would be extensive. Each staff using the Assessment System would have to be certified via standardized training, and retrained (along with testing and recertification) every two years "to guard against rater drift and knowledge decay."[107] To train one person would require three to four days, and recertification every two years in a one-to-two day workshop.[108] In addition, a "[q]uality assessment generally requires an hour with the individual being assessed."[109] As the National Institute of Corrections observes, "[t]he staff time necessary to do this may be the scarcest resource in a jurisdiction."[110]

To expect BOP staff to undertake the training necessary to reliably implement a risk assessment and to administer the assessments to every inmate, multiple times, is unrealistic. As of April 2014, BOP was operating at 32 percent over its rated capacity.[111] The inmate-to-staff ratio is so high that staff cannot "effectively supervise prisoners and provide inmate programs."[112] Instead of working with inmates and formulating programs, unit staff is often called upon to perform the function of correctional officers in maintaining security.[113]

III.   Any Savings from Reduced Incarceration Would Not Be Seen for a Decade, if Ever.

S. 467 would require the immediate expenditure of taxpayer dollars on the costly development and implementation of the "Assessment System," but it would be at least a decade before anyone was released. The bill directs that the "Assessment System" be developed within 30 months (which is likely not enough), that BOP train staff to use it and determine each prisoner's risk level within another 30 months (also likely not enough), and that BOP make programming and activities available to all eligible prisoners within six years. *See* § 3621A(a), (c)(1) & (e); § 3621(h)(2). Thereafter, it would take three years for a low-risk prisoner, and six

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[106] Justice Research and Statistics Association*, Ensuring the Fidelity of Offender Risk-Assessment in Large-Scale Correctional Settings: The Quality Assurance-Treatment Intervention Programs and Supervision Initiative (QA-TIPS)*, http://jrsa.org/webinars/index.html#qa.

[107] Lowenkamp *et al.*, *supra* note 55, at 95.

[108] *See* Justice Research and Statistics Association, *supra* note 106.

[109] National Institute of Corrections and Urban Institute, *The Role of Screening and Assessment in Jail* Reentry 6 (2012).

[110] *Id*.; *see also* Hess & Turner, *supra* note 75, at 9 (noting that assessment places demands on staff time), http://ucicorrections.seweb.uci.edu/files/2013/08/Risk-Assessment-Accuracy-in-Corrections-Population-Management-Testing-the-Promise-of-Tree-Based-Ensemble-Predictions.pdf.

[111] Statement of Charles E. Samuels, Jr., Director, Federal Bureau of Prisons, Before the H. Comm. on Appropriations, Subcomm. on Commerce, Justice, Science and Related Agencies, Federal Bureau of Prisons FY 2015 Budget Request 2 (April 10, 2014).

[112] *Id.* at 3.

[113] *Id.*

years for a moderate-risk prisoner, to earn one year of credit. *See* § 3621(h)(6)(A)(i). And because prisoners could not receive time credits for successfully completing recidivism reduction programs before the date of enactment or during official detention before the sentence commenced, § 3621(h)(6)(A)(ii), they would have to repeat programs they had already completed.[114]

The savings, if any, would be small. <u>First</u>, well over half the prison population would be unable to earn time credits. The proposal would categorically exclude inmates convicted of "a second or subsequent conviction for a Federal offense"; anyone in criminal history category VI at the time of sentencing; and anyone serving a sentence for specified offenses. *See* § 3621(h)(6)(A)(iii). The percentage of inmates in the categories for which data is available is 52.9%: 23.3% who were in Criminal History Category VI at the time of sentencing[115] (there should be very little overlap between this and other excluded categories because most in Criminal History Category VI are drug offenders[116]), 22.6% who were convicted of federal crimes of violence (which may be less or more depending on how the term is defined[117]), 6.8% who were convicted of sex offenses,[118] and .2% who were convicted of violating 21 U.S.C. § 848 (CCE).[119] No data are available on the percentage who have a second or subsequent federal offense, or were convicted of a federal crime of terrorism, of violating 18 U.S.C. § 1962 (RICO), or of a federal fraud offense who were sentenced to more than 15 years, in part because the numbers are so small, but they may add up to one or two percentage points.

Inmates serving life without parole, another 2.5%,[120] would be unable to use time credits

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[114] Further, apparently referring to the residential drug treatment program (RDAP), "a prisoner shall not be eligible for the time credits described in [§ 3621(h)(6)(A)] if the prisoner has accrued time credits under another provision of law based solely upon participation in, or successful completion of, such program," § 3621(h)(6)(D). Yet, confusingly, BOP "may, in the Director's discretion, reduce the credit awarded under subsection (h)(6)(A) to a prisoner who receives a reduction under" § 3621(e)(2)(B) for participating in RDAP, "not [to] exceed one-half the amount of the reduction awarded to the prisoner under [§3621(e)(2)(B)]." *See* Section 7(b).

[115] U.S. Sent'g Comm'n, Quick Facts – Federal Offenders in Prison – January 2015.

[116] In 2013, 1,685 people sentenced for drug offenses were in criminal history category VI, compared to 464 violent or firearms offenders, 6 sex offenders, 2 fraud offenders, and 72 RICO offenders. *See* U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.14.

[117] Bureau of Prisons, Statistics, Offenses, last updated December 27, 2014. This includes homicide, aggravated assault, kidnapping, weapons, explosives, arson, and robbery. It does not include burglary, though burglary of a dwelling is considered a crime of violence. *See* USSG § 4B1.2(a)(2). It includes unlawful possession of a firearm (as distinct from use); this offense is not a crime of violence under the guidelines, USSG § 4B1.2, comment. (n.1), but is treated as violent by BOP, 74 Fed. Reg. 1892, 1895 (2009). All robbery and arson offenses are included, but do not necessarily have to be included. *See* 18 U.S.C. § 3559(c)(3)(excluding unarmed robbery and arson that did not pose a threat to human life from the definition of "serious violent felony").

[118] Bureau of Prisons, Statistics, Offenses, last updated December 27, 2014.

[119] *Id.*

[120] U.S. Sent'g Comm'n, Quick Facts – Federal Offenders in Prison – January 2015.

by operation of existing statutes and the act.[121] Each life sentence costs over $1.1 million today.[122]

Those classified as high risk, § 3624(c)(2)(A), and those classified as moderate risk unless their "risk of recidivism has declined" during incarceration, § 3624(c)(2)(B), could not use their time credits. Those deemed by BOP to be ineligible to participate in programs, § 3621(h)(8)(A)(ii)(I)-(II), could not earn or use time credits.

Second, for those who could use time credits, moderate risk prisoners would spend all of their prerelease custody, and low risk prisoners would spend part of it, in a residential reentry center (RRC), which costs more or the same as imprisonment in the minimum, low, or medium security facilities from which they would be transferred,[123] or home confinement, which costs more under current contract arrangements than the marginal average cost of imprisonment.[124] *See* § 3624(c)(3)-(5). Only low risk prisoners would spend even part of prerelease custody in community supervision. *See* § 3624(c)(5).

Third, during the years it would take to develop and implement the system, absent sentencing reform or construction of new facilities, the BOP population would grow from 32% to 55% over rated capacity by 2023.[125] Medium and high security facilities will be most hard hit

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[121] Prisoners serving life sentences could not be transferred to prerelease custody because they have no "release date." A prisoner "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624." 18 U.S.C. § 3621(a).   Under § 3624(a), which would not be changed, a prisoner "shall be released" by BOP "on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b)." Subsection (b), which also would not be changed, governs "[c]redit toward service of sentence for satisfactory behavior." Prisoners serving a "term of imprisonment for the duration of the prisoner's life" are expressly excluded from earning credit for satisfactory behavior. *Id*. § 3634(b). They have no "release date" based on "expiration of the term imposed," or earlier "for satisfactory behavior." Earning time credits does not affect the prisoner's "release date," but only the "portion of the final months" s/he can spend in some form of "pre-release custody" under § 3624(c)(2)-(5). For persons serving life, there is no "release date," and thus no "final months."

[122] The annual cost of incarceration in fiscal year 2013 was $29,291.25. *See* Bureau of Prisons, *Annual Determination of Average Cost of Incarceration*, 79 Fed. Reg. 26,996 (May 12, 2014). The Sentencing Commission reports life sentences as 470 months (39.16 years) "consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders." U.S. Sent'g. Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, Appendix A.

[123] "Annual costs per inmate are $21,694 for minimum security, $27,166 for low security, $26,686 for medium security, and $34,046 for high security. . . . Average annual cost per inmate housed in a [RRC] for the BOP is $27,003." Urban Institute, *Stemming the Tide: Strategies to Reduce the Growth and Cut the Cost of the Federal Prison System* 313 (2014), http://www.urban.org/uploadedpdf/412932-stemming-the-tide.pdf.

[124] Because "much of the average costs of housing an inmate are fixed . . . the average marginal cost of increasing or decreasing the population by one inmate is $10,363." BOP reimburses contractors for each inmate in home confinement at a rate of "over $13,500 annually." *Id.* The rate BOP pays its contractors for home confinement is not necessarily the actual cost of home confinement. *Id.* at 13-14 & n.45 (estimating that "traditional probation with electronic monitoring to verify home confinement would cost a total of $5,890 annually").

[125] *See* U.S. Dep't of Justice, *FY 2015 Performance Budget*, *supra* note 89, at 1, 5 (system-wide crowding in FY

by future population growth,[126] but S. 467 would transfer prisoners from less crowded and less costly minimum and low security facilities.[127]

We recognize that the bill allows the Bureau of Prisons to "use the existing Inmate Classification System," which is not an actuarial risk assessment tool, "[b]efore the development of the Assessment System." *See* § 3621A(b)(5). Thus, inmates with a low security classification at intake could be released immediately, and others could be released if and when their security classifications declined to low. But the facts remain that during this interim period, over half the prison population could not earn time credits, and those who could earn and use credits would be transferring from less expensive and less crowded BOP facilities to as or more expensive RRCs or home confinement. Meanwhile, the Attorney General and BOP would still be required to develop and eventually implement an expensive actuarial risk assessment tool, which is highly unlikely to work as described in the bill.

IV.   S. 467 Would Have an Unwarranted Adverse Impact on the Poor and Racial Minorities.

A.   Risk assessments have an adverse impact on the poor and racial minorities.

Risk factors correlate with socioeconomic class and race.[128] The factors with the heaviest weight – arrests and convictions – are more prevalent for African Americans than for any other race.[129] Other factors, such as negative attitudes toward law enforcement, are more prevalent in the lower socioeconomic population, as are lack of steady employment and lower educational levels.[130]

2014 was at 32 percent over rated capacity, projecting net increase of 2,500 inmates in FY 2015 and more for years to come); Urban Institute, *Stemming the Tide*, *supra* note 123, at 1 (absent sentencing reforms or construction of new facilities, overcrowding is expected to rise to 55 percent by 2023).

[126] U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, GAO-12-743, Appendix II (Sept. 2012), http://www.gao.gov/assets/650/648123.pdf.

[127] *See* Urban Institute, *Stemming the Tide*, *supra* note 123, at 13; U.S. Dep't of Justice, *FY 2015 Performance Budget, supra* note 89, at 1 (system-wide crowding in FY 2014 was at 32 percent over rated capacity with 51 percent and 41 percent at high and medium security institutions respectively).

[128] *See generally* Glenn D. Walters, *Relationships Among Race, Education, Criminal Thinking, and Recidivism: Moderator and Mediator Effects*, Assessment (2012) (online version) (discussing relationships among three variables commonly associated with recidivism and the difficulty of measuring their effects).

[129] *See* ACLU, *School to Prison Pipeline: Talking Points* (2008) (discussing how people of color are disproportionately represented at every stage of the school to prison pipeline).

[130] *See* NACCP, Legal Defense Fund, *Bad Times in Tulia, Texas* (2000) (discussing an African-American community in Texas that was victimized by the "war on drugs" and how that "war" disproportionately targets minorities), http://www.naacpldf.org/case-issue/bad-times-tulia-texas; Testimony of Chief Judge Patti B. Saris, Chair, U.S. Sent'g Comm'n, for the Public Meeting of the Charles Colson Task Force on Federal Corrections (Jan. 27, 2015) ("Risk assessment tools may use factors that some believe are inappropriate such as education, marital status, and even geographical area of residence.").

Further, as discussed above, risk assessments often classify people incorrectly.[131] Studies show that there are "more classification errors for African Americans,"[132] and that Black offenders are more likely to be misclassified as high risk than White or Hispanic offenders.[133] This is particularly problematic if such classifications are used to determine the length of incarceration.

B.   The exclusions would have a disparate impact on racial minorities, and are contrary to the stated goal of promoting public safety.

Many of the excluded inmates have the greatest need to participate in programming, but would have no meaningful incentive to do so. Thus, S. 467 would not promote the stated goal of increasing public safety. At the same time, the exclusions that would apply to any significant number of inmates would have a disparate impact on racial minorities.[134] "[I]f a rule has a significant adverse impact, and there is insufficient evidence that the rule is needed to achieve a [legitimate goal], then the rule [is] considered unfair toward the affected group."[135]

Criminal History Category VI. Forty-six percent of defendants sentenced from 2006 to 2013 who were in criminal history category VI were Black; 26% Hispanic; 26% White; and 2% other race.[136] Thirty-two percent of defendants in criminal history category VI were in that category not based on their number of criminal history points, but by operation of the "career offender" guideline,"[137] which artificially places a defendant who is in a lower criminal history category into category VI if s/he has two prior convictions for either a "controlled substance

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[131] *See* Latessa & Lovins*, supra* note 57, at 212 ("actuarial risk assessment . . . is not a perfect science").

[132] Kevin Whiteacre, *Testing the Level of Service Inventory-Revised (LSI-R) for Racial/Ethnic Bias*, 17 Crim. Just. Pol'y Rev. 330 (2006); *see also* Matthew Fennessy & Matthew T. Huss, *Predicting Success in a Large Sample of Federal Pretrial Offenders: The Influence of Ethnicity*, 40 Crim. Just. & Behav. 40, 53 (Jan. 2013) ("It is arguable that indiscriminate screening of all ethnic groups as opposed to each ethnic group as unique from one another can lead to misrepresentation and inaccurate decision making" as "bolster[ed]" by "[t]he fact that certain variables were pertinent for Black defendants but not Whites and vice versa.").

[133] Tracy L. Fass *et al.*, *The LSI-R and the COMPAS Validation Data on Two Risk-Needs Tools*, 35 Crim. Just. & Behav. 1095 (2008); *see also* Chenane *et al.*, *supra* note 53, at 299 ("Consistent with previous research, our findings generally indicate that the LSI-R and its subcomponents do a better job at predicting institutional misconduct for White inmates than for non-Whites.").

[134] While 66.9% of defendants convicted of fraud and sentenced to more than fifteen years from 1999 through 2013 were white, there were only 301 such defendants and they comprised only .03% of all 941,794 defendants sentenced in those fourteen years. USSC, Monitoring Datafiles FY 1999-2013.

[135] U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 113-14 (2004).

[136] USSC, Monitoring Datafiles FY 2006-2013.

[137] USSC, Monitoring Datafiles FY 2006-2013.

offense" or a "crime of violence."

Although Black offenders comprised only 20.4% of all federal offenders in 2012, they were 61.9% of those subject to the career offender guideline.[138] Most offenders are subject to the career offender guideline," not because of crimes of violence, but "because of … drug trafficking crimes."[139] African Americans "have a higher risk of conviction for a drug trafficking crime than do similar White drug traffickers" because of the "relative ease of detecting and prosecuting offenses that take place" on the streets "in impoverished minority neighborhoods."[140] The recidivism rate of offenders who are subject to the career offender guideline based on drug convictions is *half* that of offenders in criminal history category VI under the normal criminal history rules.[141] Thus, the career offender guideline has an "unwarranted adverse impact" on Black offenders.[142] Likewise, denying career offenders the opportunity to earn time credits would have an unwarranted adverse impact on Black offenders.

Moreover, prisoners in Criminal History Category VI are serving sentences double or triple the sentences of others because their guideline ranges were increased based on criminal history points or the career offender guideline.[143] With or without time credits, they will serve lengthy sentences and will then be released. It does not promote public safety to refuse to incentivize them for participating in programs shown to reduce recidivism before releasing them to the community.

Federal Crime of Violence. Because of federal jurisdiction over tribal territories, Native Americans are prosecuted in federal court for ordinary crimes of violence, while people of other races are prosecuted for such crimes in state court.[144] Thus, Native Americans comprised only 4.1% of federal defendants sentenced in 2013, but were 36.8% of those sentenced for murder; 85.7% of those sentenced for manslaughter; 34.5% of those sentenced for sexual abuse; 46.3% of those sentenced for assault; and 64.9% of those sentenced for burglary.[145]

If all kinds of robbery and firearms offenses are considered crimes of violence, this exclusion would also have an adverse impact on Black offenders. Black offenders comprised

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[138] *See* U.S. Sent'g Comm'n, *2012 Sourcebook of Federal Sentencing Statistics*, tbl. 4; U.S. Sent'g Comm'n, Quick Facts, Career Offenders.

[139] U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing*, *supra* note 135, at 133.

[140] *Id*. at 134.

[141] *Id*.

[142] *Id*.

[143] U.S. Sent'g. Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.14.

[144] *See* 18 U.S.C. § 1153.

[145] U.S. Sent'g Comm'n, *2013 Sourcebook of Federal Sentencing Statistics*, tbl.4. The "other" race category includes Native Americans, Alaskan natives, Asians and Pacific Islanders, but the vast majority are Native Americans.

only 20.6% of federal defendants in 2013, but 35.5% of robbery offenders and 47.3% of firearms offenders.[146] Notably, repeated analyses have shown that prosecutors' choices to charge a § 924(c) firearm count in addition to a drug trafficking count rather than rely on a two-level increase in the guideline range for a firearm has a racially disparate impact on Black offenders.[147] Again, it is difficult to see how it promotes public safety not to incentivize these offenders to participate in programs shown to reduce recidivism before releasing them to the community.

Second or Subsequent Conviction for a Federal Offense. This exclusion would have an adverse impact on Native Americans. While there is no available data on who has prior federal convictions, in our experience, few federal defendants have prior federal convictions, *except* for Native Americans, because they are prosecuted in federal court for crimes for which people of other races are prosecuted in state court, as noted above.

Continuing Criminal Enterprise. A person who violated the drug laws as part of a series of such violations undertaken in concert with five or more others with respect to whom the defendant was an organizer, supervisor or manager, and from which s/he obtained substantial income or resources, can be charged under 21 U.S.C. § 848, or s/he can be charged under 21 U.S.C. § 841 and receive an enhancement under the guidelines for a leadership role and any other applicable guideline enhancements. Seventy-seven percent of the 239 defendants charged and convicted of violating 21 U.S.C. § 848 from 2006 to 2013 were Black or Hispanic.[148]

Inmates Serving Life Without Parole. Over 73% of federal prisoners serving life are African American.[149] Studies show that lifers are half as likely to commit disciplinary violations as other inmates, and that when they are released early, and indeed when any inmate is released at age 50 or older, they have recidivism rates as low as 0 to 1%.[150]

V. Giving BOP Unreviewable Discretion to Decide that Certain Inmates Are Ineligible to Participate in Programming is Likely to Result in Unintended Exclusions.

The proposal would give BOP broad discretion, with no right to any kind of review, to exclude inmates from participating in programs if BOP decides they are "medically unable to

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[146] *Id.*

[147] *See* U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing*, *supra* note 135, at 90; Paul J. Hofer, *Review of the U.S. Sentencing Commission's Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 Fed. Sent. Rep. 193, 198 (2012).
[148] USSC, Monitoring Datafiles FY 2006-2013.

[149] Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 Fed. Sent'g. Rep. 27, 28 (2010).

[150] *Id.* at 28-29 (discussing studies showing that individuals released from a life sentence were less than one third as likely to be rearrested as all released individuals; that 21 people released at age 50 or older and had served 25 or more years committed no new crimes three years after release; that 1.4% of offenders released at 50 or older were convicted of new crimes in the first 22 months; and that 1% of 285 offenders whose life sentences were commuted were convicted of a new crime).

successful complete recidivism reduction programming or productive activities" or "would present a security risk if permitted to participate in recidivism reduction programming." § 3621(h)(8)(A)(I)-(II); § 3621A(g).

This is likely to exclude more inmates than intended, given BOP's historical tendency to construe its early release authority more narrowly than required. For example, though Congress authorized sentence reductions for persons convicted of "nonviolent offenses" who participate in the Residential Drug Abuse Program, 18 U.S.C. § 3621(e)(2)(B), and unlawful possession of a firearm is not a "crime of violence,"[151] BOP categorically denies early release to those convicted of that offense, and those who did not themselves possess, carry, or use a firearm but were convicted for the conduct of others on a conspiracy or aiding and abetting theory. [152] Accordingly, it is reasonable to expect that BOP would exercise its discretion to deny programming to inmates who do not actually present a "security risk." Similarly, BOP may rely on its authority to deny programming to those who are "medically unable to successfully complete recidivism reduction programming" to exclude individuals with mental illness that may interfere with their ability to participate in programs. People with serious mental illness "may have difficulties with activities of daily living, including maintaining their hygiene, complying and rules and adhering to routines, and concentrating and learning."[153] It would be counter-productive, illogical, and contrary to evidence-based practices to deem them ineligible to participate in recidivism reduction programming,[154] yet that is the likely result of S. 467.

VI.   S. 467 Would Be Unconstitutional.

A.   Making all determinations and assessments "while implementing or administering" the Assessment System unreviewable in any forum, § 3621A(g), would be unconstitutional.

Subsection (g) of § 3621A would state that "[s]ubject to any constitutional limitations, there shall be no right of review, right of appeal, cognizable property interest, or cause of action, either administrative or judicial, arising from any determination or classification made by any Federal agency or employee while implementing or administering the Assessment System, or any rules or regulations promulgated under this section."

"[I]mplementing or administering the Assessment System" under § 3621A would include the initial assessment and assignment of the risk level for an inmate, as well as reassessments and

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[151] *See* USSG § 4B1.2. comment. (n.1).

[152] While BOP originally failed to provide any rationale for this decision, *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), it later asserted without statistical support that such persons present a significant potential for violence. 74 Fed. Reg. 1892, 1895 (2009).

[153] Fred Osher *et al.*, Council of States Governments Justice Center, *Adults with Behavioral Health Needs Under Correctional Supervision: A Shared Framework for Reducing Recidivism and Promoting Recovery* 15 (2012), https://www.bja.gov/Publications/CSG_Behavioral_Framework.pdf.

[154] *Id.* at 16 (individuals with the highest impairment should be given priority in treatment).

any changes in risk level. *See* § 3621A(a)(1), (a)(3), (a)(4). The assigned risk level, in turn, would determine whether the inmate is eligible for time credits under § 3621(h)(6), how many days of time credit he may receive, and whether and when an inmate may be transferred to prerelease custody under § 3624(c)(2). Yet, § 3621A(g) would explicitly deny administrative and judicial review of these determinations and deny judicial review of any rules or regulations governing them.

Subsection (g) would also appear to deny any administrative or judicial review of determinations made under other sections "while implementing or administering the Assessment System," including, *inter alia*, a determination that an inmate is excluded from earning time credits, § 3621(h)(6)(A)(iii), that an inmate is ineligible to participate in programs, § 3621(h)(8)(A)(ii)(I)-(II), to reduce time credits for a disciplinary violation, § 3621(h)(6)(C), to deny an inmate transfer to prerelease custody or place him in a more restrictive type of prerelease custody, § 3624(c)(2), and that an inmate has violated a condition of community supervision such that he will be returned to prison, § 3624(c)(6).

Because these decisions directly affect an inmate's liberty interests, they must be subject to administrative and judicial review under rules already in place, which are based on the Due Process Clause and the historic purpose of the writ of habeas corpus (which may not be suspended, U.S. Const. art. I, § 9, cl. 2). [155] Under the BOP's "Administrative Remedy Program," inmates may "seek formal review" of grievances relating to "any aspect" of their confinement. [156] Inmates may seek review of their grievances at the institutional, regional, and national levels. [157] Inmates are afforded a hearing when charged with misconduct that could lead to sanctions, including disallowance of good time credit, [158] and may appeal the determination and sanction imposed within the agency through its administrative review process. [159] They may seek review of the final administrative decision in the district court by filing a writ of habeas

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[155] *See Superintendent, Mass. Corr. Inst. v. Hill*, 472 U.S. 445, 454 (1985) (due process requires, where a prison disciplinary hearing may result in the loss of good time credits, that the inmate receive notice, an opportunity to be heard, call witnesses, and present evidence, a written statement of evidence relied on and reasons for the action, and the findings must be supported by some evidence); *id.* at 450 (suggesting that the Constitution precludes granting "an administrative body the unreviewable authority to make determinations implicating fundamental rights"); *see also Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (in order to avoid "serious constitutional concerns," construing statute regarding detention of alien to contain an "implicit 'reasonable time' limitation, the application of which is subject to federal court review"); *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011) ("When [] a State creates a liberty interest, the Due Process Clause requires fair procedures for its vindication – and federal courts will review the application of those constitutionally required procedures."); *cf. INS v. St. Cyr*, 533 U.S. 289, 304-05 (2001) ("[A] serious Suspension Clause issue would be presented if we were to accept [that statutes limiting judicial review of removal orders] have withdrawn [the power to issue a writ of habeas corpus under § 2241] from federal judges and provided no adequate substitute for its exercise.").

[156] 28 C.F.R. § 542.10(a).

[157] 28 C.F.R. § 542.14-15.

[158] *See* 28 C.F.R. §§ 541.7, 541.8.

[159] *See* 28 C.F.R. §§ 541.7(i), 541.8(i).

corpus under 28 U.S.C. § 2241.[160] And inmates may challenge BOP's rulemaking to ensure that it is not arbitrary or capricious, or otherwise unlawful.[161]

The serious problems with subsection (g) are not solved because it is "subject to any constitutional limitations." Indeed, this phrase suggests that it would be unconstitutional to deny any and all "right of review, right of appeal, cognizable property interest, or cause of action, either administrative or judicial, arising from any determination or classification made by any Federal agency or employee while implementing the Assessment System, or any rules or regulations promulgated under [section 3]." With a statute that expressly states that "there shall be no right" to administrative or judicial remedy of any sort, it is most unlikely that inmates would attempt to test the constitutional limits of the denial of review. Even if some attempted to test the limits by filing a habeas corpus action under 28 U.S.C. § 2241, there would be no record below for the district court to act upon. Presumably, the Judicial Conference would object to a procedure that would so obviously hinder judicial review.[162] And it would be entirely unnecessary. The already constitutional approach would be to permit ordinary administrative review of decisions made "while implementing or administering the Assessment System" under BOP's established administrative and disciplinary review systems, subject to judicial review under 28 US.C. § 2241,[163] or if the decision involves rulemaking, review under the APA.[164]

B.   Providing the government the right to judicial review of a decision to transfer—with no right to counsel and no clear right to a hearing for the inmate—while denying inmates any right to judicial review of decisions to deny transfers, § 3624(c)(14)(D), would be unconstitutional.

Under § 3624(c)(14)(A), BOP would be required to provide prior notice of a decision to transfer a prisoner to prelease custody to the U.S. Attorney's Office for the district in which the prisoner was sentenced. Under § 3624(c)(14)(D), the government would have a right to file a motion "seeking a hearing" to "request that the prisoner's transfer be denied or modified," which

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[160] *See*, *e.g.*, *Howard v. Bureau of Prisons*, 487 F.3d 808, 811 (10th Cir. 2007); *see also Setser v. United States*, 132 S. Ct. 1463, 1473 (2012).

[161] *See, e.g.*, *Lopez v. Davis*, 531 U.S. 230, 240 (2001); *Barber v. Thomas*, 560 U.S. 474 (2010).

[162] *See McKart v. United States*, 395 U.S. 185, 194 (1969) ("[J]udicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise."); *see also Woodford v. Ngo*, 548 U.S. 81, 89 (2006) ("[Administrative] [e]xhaustion gives an agency 'an opportunity to correct its own mistakes with respect to the programs it administers before it is haled into federal court'" and "promotes efficiency" because administrative claims "generally can be resolved much more quickly and economically in proceedings before an agency than in litigation in federal court"); *Andrade v. Lauer*, 729 F.2d 1475, 1484 (D.C. Cir. 1984) (administrative remedies "aid[] judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding [and] promote[] judicial economy by avoiding needless repetition of administrative and judicial factfinding").

[163] *Setser*, 132 S. Ct. at 1473.

[164] *See, e.g.*, *Gatewood v. Outlaw*, 560 F.3d 843, 846-47 & n.2 (8th Cir. 2009) (conducting APA review of BOP rulemaking).

"shall not require the Court to conduct a hearing," and makes no mention of any right to counsel, or any notice to the prisoner's counsel. The inmate would have no right to any form of review of a BOP decision to deny a transfer.

This would be unconstitutional for two reasons. First, if the government has the right to judicial review of a decision by BOP to transfer an inmate to prerelease custody, inmates must have the right to judicial review of decisions by BOP officials not to transfer inmates to prerelease custody. Once an appeal right is established by Congress, it "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[165] There is no conceivable reason the government would have an immediate right to review of a decision to transfer, while the inmate would never have the right to review of a decision not to transfer.

Second, inmates are entitled to the fundamentals of due process in proceedings involving review of a decision about whether they should be released or remain in prison.[166] It is entirely unclear whether or not a hearing is required when the government seeks denial or modification of a transfer. While subparagraph E states that the court may deny the transfer "if, after conducting a hearing . . . pursuant to subparagraph D," subparagraph D states that the government's motion "shall not require the Court to conduct a hearing." These provisions are in conflict. Moreover, prosecutors cannot be permitted to argue and provide information in support of requests that inmates' transfers be denied or modified without inmates having "the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the [inmate] to present his case."[167] Other statutes clearly state that counsel must be provided at hearings where liberty is at stake.[168]

C. Providing no procedural mechanism or due process protections for the revocation of prerelease custody, § 3624(c)(6), would be unconstitutional.

Under § 3624(c)(4) and (c)(5)(C), an inmate released to home confinement or community supervision based on earned time credits would be subject to such "conditions as the Director of the Bureau of Prisons deems appropriate." Under § 3624(c)(5)(C)(ii), an inmate may remain on community supervision only if he "remains current on any financial obligations imposed as part

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[165] *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); s*ee also Johnson v. Avery*, 393 U.S. 483 (1969). *Cf. Halbert v. Michigan*, 545 U.S. 605, 610 (2005) ("[A] State may not 'bolt the door to equal justice' to indigent defendants.").

[166] *See Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974).

[167] *Mempa v. Rhay*, 389 U.S. 128, 135 (1967).

[168] *See* 18 U.S. C. § 3565(a) (hearing must be conducted "pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure," under which the person is "entitled to" "to request that counsel be appointed if the person cannot obtain counsel"); *id.* § 3583(e) (hearing must be conducted "pursuant to" Rule 32.1); 18 U.S.C. § 3006A(a)(1)(C), (E) ("Representation shall be provided for any financially eligible person who . . . is charged with a violation of probation" or "a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release").

of the prisoner's sentence," such as fines and restitution. Under § 3624(c)(6), the Director of BOP "may revoke the inmate's prerelease custody and require the inmate to serve the remainder of the prisoner's term of incarceration, or any portion thereof, in prison, or impose additional conditions" on the inmate's prerelease custody. If the violation is "non-technical," the Director of BOP "shall revoke the prisoner's prerelease custody." *Id.*

Taken together, these provisions mean that the Director of BOP "may revoke" an inmate's prerelease custody (halfway house, home confinement, or community supervision) if he violates any condition of prerelease custody and "shall revoke" an inmate's prerelease custody if the violation is "non-technical." Thus, for example, for an inmate on community supervision, prerelease custody could automatically be revoked, and the inmate returned to prison, if he was not "current" on payments toward a fine or restitution ordered as part of the sentence. Yet, there is no mechanism for notifying the inmate of the alleged violation, for a hearing to establish the violation, or for providing counsel to the inmate. And it requires automatic revocation if the inmate fails to "remain[] current" on court-ordered financial obligations, regardless of the inmate's efforts or ability to pay. As such, § 3624(c)(6) fails to provide the fundamental due process protections required by the Constitution.

The loss of liberty associated with revocation of prerelease custody, just like the revocation of parole, probation, or supervised release, is a "serious deprivation requiring that the [person] be accorded due process."[169] The Supreme Court long ago established minimum due process standards for the revocation of parole, including:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[170]

An indigent person on parole, supervised release, or probation also has a due process right to counsel when she has a legitimate claim that she did not commit the violation or the violation can be justified or mitigated.[171] And because federal parolees, just like those on supervised release and probation, have a statutory right to counsel when facing a loss of their liberty for a violation of release conditions,[172] it would be a violation of equal protection to

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[169] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

[170] *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

[171] *Scarpelli*, 411 U.S. at 790.

[172] *See* 18 U.S.C. § 3565(a) (probation); *id.* § 3583(e) (supervised release); *id.* § 3006A(a)(1)(C), (E) ("Representation shall be provided for any financially eligible person who . . . is charged with a violation of probation" or "a violation of supervised release or faces modification, reduction, or enlargement of a condition, or

deprive a person in prerelease custody of the same protections. Finally, a decision to modify or revoke probation or supervised release is subject to appellate review on both procedural and substantive grounds.[173]

Because a person may not be constitutionally imprisoned solely because of a lack of financial resources, special procedures must be followed before a person may be incarcerated for failing to pay financial obligations.[174] "[A] sentencing court must inquire into the reasons for the failure to pay."[175] If a person "willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment."[176] If, however, the "probationer could not pay despite sufficient bona fide efforts . . . the court must consider alternate measures of punishment other than imprisonment," and if those alternatives are not adequate, only then may the court imprison a probationer for non-payment.[177]

Revoking prerelease custody under § 3624(c)(6) would be constitutionally indistinguishable from revoking parole, probation or supervised release. Each results in the "immediate disaster" that the inmate will not be free but in prison, requiring all of the due process protections described above.[178]

BOP recognizes these constitutional requirements for inmates released to home confinement who have allegedly violated program rules. *See* BOP Program Statement 7320.01(9) (requiring providers of home detention services to use a system for handling program violations that meets the requirements of due process).

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extension or revocation of a term of supervised release"); Fed. R. Crim. P. 32.1; *see also* 18 U.S.C. § 3006A (1986) (providing for right to counsel at parole proceedings; provision remains in effect under the saving clause of the U.S. Parole Commission Extension Act of 2008) (Pub. L. No. 110-312, 122 Stat. 3013 (Aug. 12, 2008)). *See generally* Guide to Judiciary Policy, Vol. 7A 4 (2015).

[173] *See* 18 U.S.C. § 3742(a)(4); *United States v. Clark*, 726 F.3d 496 (3d Cir. 2013).

[174] *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983).

[175] *Id.* at 672.

[176] *Id.*

[177] *Id.*; *see, e.g.*, *United States v. Holt*, 664 F.3d 1147 (8th Cir. 2011) (applying these principles); *see also* 18 U.S.C. § 3613A (a defendant found to be in default on a payment of fine or restitution may not be revoked and returned to prison without the due process protections set forth in Fed. Rule Crim. P. 32.1); *id.* § 3614 ("In no event shall a defendant be incarcerated under this section solely on the basis of inability to make payment because the defendant is indigent.").

[178] *Cf. Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974).

D. **Giving probation officers authority to impose and modify conditions of release and supervise inmates in BOP custody, § 3624(c)(4)(B)-(C), (5)(C), (8), (12), would be unconstitutional.**

Section 3624(c)(8) provides that the BOP "shall, to the extent practicable, enter into agreements with" probation "to supervise prisoners placed in home confinement or community supervision." These agreements "may authorize" probation "to exercise the authority granted" to BOP to determine the "appropriate" conditions of home confinement and community supervision, § 3624(c)(4)(A)(iii), (c)(5)(C), to "modify" the conditions of home confinement for "compelling reasons," § 3624(c)(4)(C), and to decide when an inmate's prerelease custody will be subject to "less restrictive conditions" due to "demonstrate[d] continued compliance with the requirements" of prerelease custody, § 3624(c)(12).

Probation officers, thus, would be responsible for imposing conditions of home confinement and community supervision, for supervising inmates, and for making decisions about when an inmate may be transferred from home confinement to community supervision. They also would be responsible for reporting violations to the BOP for purposes of revocation. This means that probation officers would be making executive decisions while inmates are in custody, and that probation officers would be deciding that an inmate in custody will remain subject to more onerous conditions, all without administrative or judicial review.

This would be unconstitutional. Probation officers cannot make executive branch decisions. Probation officers are administrative units of Article III courts, appointed by the court and removable by the court.[179] Congress may not enlist an administrative arm of the Judicial Branch, subject to removal by the Judicial Branch, to do the work of the Executive.[180]

E. **The constitutionality of giving BOP, not courts, the authority to revoke prerelease custody and return an inmate to prison, § 3624(c)(6), is questionable.**

If BOP were to revoke an inmate's prerelease custody under § 3624(c)(6) and return him to prison, it would be deciding how long an inmate actually spends in prison. In this context, and in light of the legislative history of the Sentencing Reform Act and Supreme Court law, putting such power in the hands of the Executive may violate the separation of powers.

It is "indisputable" that the "right to impose the punishment provided by law is judicial"

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[179] *See* 18 U.S.C. § 3602; *United States v. Bernardine*, 237 F.3d 1279, 1282-83 (11th Cir. 2001) (the probation officer "is appointed by the district court and acts. . . under the discretion of the appointing court," is an "arm of the court," is "a liaison between the [district] court . . . and the defendant," and though "statutorily mandated to perform any other duty that the court may designate," that authority is limited by Article III of the Constitution which prohibits the delegation of judicial functions).

[180] *Cf. Bowsher v. Synar*, 478 U.S. 714 (1986) (separation of powers violated by placing responsibility for the performance of an executive function in the hands of the Comptroller General, an officer controlled by Congress through its power of removal).

and that "the right to relieve from the punishment" imposed belongs to the Executive Branch.[181] *Ex Parte United States*, 242 U.S. 27, 41-42 (1916). While granting earned time credits and releasing an inmate to the community would "relieve [an inmate] from the punishment" imposed, sending him *back* to prison after he has been released to the community (regardless of whether he remains in the "custody" of the BOP), based on the BOP's determination that the inmate has violated a condition of release, would not be any sort of relief from punishment. It would be the "immediate disaster" of no longer being free, but in prison.[182] And it would be based on the BOP's unreviewable determination that the inmate violated release conditions imposed and supervised by a probation officer, *see* § 3624(c)(4), (5), whose function is entirely judicial. Such power is properly exercised by a court.

When Congress enacted the Sentencing Reform Act of 1984, it recognized that by putting in the hands of the Executive the determination of how long an inmate actually spends in prison, the federal parole system "arguably usurped a function of the judiciary," and that "the better view is that sentencing should be within the province of the judiciary."[183] In *United States v. Setser*, the Supreme Court considered whether the court has the authority to decide whether, under 18 U.S.C. § 3584(a), a federal sentence is to run concurrently with, or consecutively to, a state sentence that has not yet been imposed, or whether that authority is exclusively committed to the BOP.[184] Relying on "our tradition of judicial sentencing" and the requirement "that sentencing not be left to employees of the same Department of Justice that conducts the prosecution,"[185] the Court held that the decision belongs with the court. This was true even though a decision by BOP to run the federal sentence consecutive to a state sentence does not alter the term of imprisonment imposed by the federal court for the federal offense, because it increases the amount of time the federal prisoner physically remains in prison. Noting that one of the principle purposes of the Sentencing Reform Act of 1984 was to eliminate the Executive's power, through parole, to decide the actual length of a term of imprisonment, the Court declined to interpret the statute in a manner that would "giv[e] to the Bureau of Prisons what amounts to sentencing authority."[186]

Because § 3624(c)(6) would permit BOP to send an inmate back to prison, it would give BOP what amounts to sentencing power. This is a matter for a court to decide.

F.   **Giving the Sentencing Commission, not the courts, unreviewable authority to decide the legal question whether an inmate's offense of conviction**

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[181] *Ex Parte United States*, 242 U.S. 27, 41-42 (1916).

[182] *McDonnell*, 418 U.S. at 561 (internal quotation marks omitted).

[183] S. Rep. No. 98-225, at 54 (1983).

[184] 132 S. Ct. 1463, 1467 (2012).

[185] *Id.* at 1472.

[186] *Id.* at 1471 & n.5.

excludes him from earning time credits, § 3621(h)(6)(A), would lead to error, unfairness, and impracticalities.

Section 3621(h)(6)(A)(iii) would exclude an inmate from earning time credits if he was convicted of a "crime of violence, as defined under section 16." Section 16 defines "crime of violence" as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16.

The determination whether an offense is a "crime of violence" under § 16 requires application of the elements-based "categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), and recently clarified in *Descamps v. United States*, 133 S. Ct. 2276 (2013). If the statute of conviction is "divisible," i.e., sets forth elements in the alternative, some of which describe a "crime of violence" and some of which do not, application of the "modified categorical approach" may be required to determine which was the offense of conviction. This may require consideration of a limited set of case-specific documentation—i.e., the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial,[187] or the plea agreement and plea colloquy transcript (or "some comparable judicial record of this information") if the defendant pled guilty[188]—to determine the elements of the offense of which the defendant was convicted.[189] If the elements of the offense of conviction cannot be determined from these documents, it must be assumed that the conviction was for the least culpable crime, i.e., the non-qualifying offense.[190] The Supreme Court adopted the categorical approach to avoid practical difficulties, unfairness to defendants, and Sixth Amendment violations.[191]

The categorical approach may require extensive legal analysis of issues without clear precedent. Further complicating matters, the "force" clause under § 16(a) and the "residual clause" under § 16(b) each require additional analysis implicating yet another line of Supreme Court cases.[192] Even that law is uncertain and may be changed, which will trigger yet another

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[187] *Taylor*, 495 U. S. at 602.

[188] *Shepard*, 544 U. S. at 25-26.

[189] *Descamps*, 133 S. Ct. at 2283-84.

[190] *Johnson v. United States*, 559 U.S. 133, 137 (2010).

[191] *See Descamps,* 133 S. Ct. at 2287-89.

[192] *See Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Begay v. United States*, 553 U.S. 137 (2008); *Chambers v. United States*, 555 U.S. 122 (2009); *Johnson*, 559 U.S. at 140.

wave of interpretive caselaw, as the Supreme Court is now considering whether the "residual clause" is unconstitutionally vague.[193]

In any event, the categorical approach must be applied at sentencing as well as in administrative settings, such as when deciding whether a conviction is an "aggravated felony" for purposes of deportation, where it is subject to both administrative and judicial review.[194] Yet, under § 3621(h)(6)(A)(iv), the U.S. Sentencing Commission, not a court, would identify all "Federal crime[s] of violence" (as well as other offenses not specified by statute, such as "Federal fraud offenses"), and its decisions are not subject to any review. It is unclear what would happen if the inmate was convicted under a "divisible" statute, which requires examination of case-specific documents.

It is up to courts "to say what the law is,"[195] and the Sentencing Commission is not a court.[196] It has no experience applying the categorical approach. Moreover, its decisions would not even be subject to judicial review. By delegating these decisions to the Commission, § 3621(h)(6)(A) would invite legally erroneous exclusions that could unfairly affect entire classes of inmates with no recourse. Practical difficulties would also arise in cases requiring examination of case-specific documents. This is a determination for a court.

VII.   There Is a Simple, Cost-Effective, Practical and Fair Approach.

The approach that would result in immediate cost savings, promote public safety, and not create unwarranted disparity or violate the Constitution would be to expand recidivism-reducing programs in prison and incentivize all inmates to participate on an equal basis.

Congress should support the expansion of prison programs and jobs demonstrated to reduce recidivism, and incentivize all prisoners to participate by allowing them to earn time credits up to a certain percentage of the sentence imposed, so long as they comply with disciplinary regulations.[197] Under this approach, individuals would earn reductions in their

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[193] *See* Order, *United States v. Johnson*, No. 13-7120 (Jan. 9, 2015).

[194] *See, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013).

[195] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[196] *Mistretta v. United States*, 488 U.S. 361, 393 (1989).

[197] The proposal advanced by DOJ and reported out of the Senate Judiciary Committee in the 112th Congress, would award the same number of credits and percentage of the sentence imposed to all prisoners (except those with more than one conviction for an offense involving rape or who have been convicted of a sex offense against a minor) who successfully participate in programs demonstrated to reduce recidivism, and comply with disciplinary regulations. *See* S. 1231, § 4(g)(1). We agree with this general approach. However, particularly if mandatory minimums are not reduced, we do not agree with the limit on the amount of credit in the DOJ bill. It would limit the maximum total reduction to 33% of the sentence imposed, including credits for program participation, good time credits for compliance with disciplinary regulations, and any reduction for participation in the residential substance abuse treatment program (RDAP). Since good time credit would be 15% under Section (f) of the DOJ bill, this would mean that a prisoner would earn only 18% off the sentence imposed for participating in programs, and less (or in

prison sentences, taxpayer dollars would be saved, and public safety would be enhanced.

BOP currently provides programming that has been proven to reduce recidivism.[198] These programs do not require the costly and time-consuming development and implementation of a complex Assessment System, and have been proven to be cost-effective.[199] But many of these programs have long waiting lists and cannot accommodate all who need them. For example, even after BOP added new slots from 2009 to 2011, the residential drug abuse treatment program (RDAP) still has long waiting lists, thus constraining BOP's ability to admit participants early enough to allow a full year reduction for completing the program.[200] Likewise, there are long waiting lists for non-residential drug treatment, drug education, literacy programs, the Life Connections and Threshold programs, and perhaps most important, meaningful work.[201] As noted above, FPI jobs are proven to reduce recidivism more than any other program, particularly for young minority inmates who are at the greatest risk of recidivism, by giving them marketable job skills.[202] But because FPI must generate operating revenue to remain a self-sustaining program, and has had to compensate for declining revenues and earnings in recent years, as of June 2012, it employed "7 percent of the eligible inmate population, its lowest inmate employment in over 25 years and far below its historical target of 25 percent of the eligible BOP inmate population."[203] Support for the development of meaningful work opportunities, as well as other recidivism-reducing programs, is clearly needed.

Lastly, and perhaps most significantly, to truly address the historically unprecedented

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some cases nothing) if he also participated in RDAP.

[198] "Rigorous research has found that inmates who participate in [Federal Prison Industries] are 24 percent less likely to recidivate; inmates who participate in vocational or occupational training are 33 percent less likely to recidivate; inmates who participate in education programs are 16 percent less likely to recidivate; and inmates who complete the residential drug abuse treatment program are 16 percent less likely to recidivate and 15 percent less likely to relapse to drug use within 3 years after release." *See* Statement for the Record of Charles E. Samuels, Jr., *supra* note 58, at 3-4.

[199] The benefit-to-cost ratio for residential drug abuse treatment is as much $2.69 for each dollar invested; $5.65 for adult basic education; $6.23 for correctional industries; and $7.13 for vocational training. *Id.*

[200] U.S. Government Accountability Office, *Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure*, *supra* note 126, at 69-73.

[201] *Id*. at 73-75.

[202] Federal Bureau of Prisons, *UNICOR: Preparing Inmates for Successful Reentry through Job Training*, http://www.bop.gov/inmates/custody_and_care/unicor.jsp. Inmates involved in FPI work programs are 24% less likely to recidivate for as long as 12 years following release compared to similarly situated inmates who did not participate, and are 14% more likely than non-participants to be employed 12 months following release from prison. "Work programs especially benefit young minorities who are at the greatest risk for recidivism." *See* FPI and Vocational Training Works: Post-Release Employment Project (PREP) at http://www.bop.gov/resources/pdfs/prep_summary_05012012.pdf.

[203] U.S. Dep't of Justice, Office of the Inspector General, *Audit of the Management of Federal Prison Industries and Efforts to Create Work Opportunities for Federal Inmates*, *supra* note 86, at ii, 1.

high levels of incarceration, Congress should reduce unnecessarily severe sentences on the front end. "[A]ny attempt to address prison overcrowding and population growth that relies exclusively on back-end policy options … would not be sufficient. . . . [T]he only policy change that would on its own eliminate overcrowding altogether is reducing certain drug mandatory minimums."[204] By all accounts, the savings under the Smarter Sentencing Act would be large, direct, and swift. The Congressional Budget Office estimates that it would result in a net savings of $3 billion in the first ten years: $4 billion saved through reduced incarceration less $1 billion in expenditures for items like social security and Medicare benefits for released inmates. DOJ estimates that it would result in $3.426 billion in cost savings and another $3.964 billion in cost aversions in the first 10 years.[205] The Urban Institute estimates that it would result in $3.258 billion in cost savings in the first 10 years.[206]

The need for reform in the federal corrections system is real and urgent. Congress should pass legislation that would meaningfully and equitably achieve significant reductions in the prison population. Unfortunately, in its present form, the Corrections Act does not do so.

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[204] Statement of Nancy G. La Vigne, Ph.D., Director, Justice Policy Center, Urban Institute, before the H. Comm on Jud., Subcomm. on Crime, Terrorism, Homeland Security, and Investigations, *Lessons from the States: Responsible Prison Reform* 10, 12 (July 15, 2014).

[205] Potential Impact & Cost Savings: The Smarter Sentencing Act, http://famm.org/wp-content/uploads/2014/02/SSA-Impact-DOJ-Cost-Savings-Estimate.pdf.

[206] Urban Institute, *Stemming the Tide, supra* note 123, at 3-4.