



NINA J. GINSBERG
President

September 10, 2019

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

Dear Mr. Attorney General:

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

Criminal History

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



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

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

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

Disproportionate Emphasis on Youth at Time of First Conviction

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



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

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

Inadequate Recognition of Evidence of Rehabilitation

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

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



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

Undue Weight to Infractions

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

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

Transparency

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

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



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

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

Sincerely,

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