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Risk and Needs Assessment in the Criminal Justice System

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Summary

The number of people incarcerated in the United States has increased significantly over the past three decades from approximately 419,000 inmates in 1983 to approximately 1.5 million inmates in 2013. Concerns about both the economic and social consequences of the country's growing reliance on incarceration have led to calls for reforms to the nation's criminal justice system.

There have been legislative proposals to implement a risk and needs assessment system in federal prisons. The system would be used to place inmates in rehabilitative programs. Under the proposed system some inmates would be eligible to earn additional time credits for participating in rehabilitative programs that reduce their risk of recidivism. Such credits would allow inmates to be placed on prerelease custody earlier. The proposed system would exclude inmates convicted of certain offenses from being eligible to earn additional time credits.

Risk and needs assessment instruments typically consist of a series of items used to collect data on behaviors and attitudes that research indicates are related to the risk of recidivism. Generally, inmates are classified as being high, moderate, or low risk. Assessment instruments are comprised of static and dynamic risk factors. Static risk factors do not change, while dynamic risk factors can either change on their own or be changed through an intervention. In general, research suggests that the most commonly used assessment instruments can, with a moderate level of accuracy, predict who is at risk for violent recidivism. It also suggests that no single instrument is superior to any other when it comes to predictive validity.

The Risk-Needs-Responsivity (RNR) model has become the dominant paradigm in risk and needs assessment. The risk principle states that high-risk offenders need to be placed in programs that provide more intensive treatment and services while low-risk offenders should receive minimal or even no intervention. The need principle states that effective treatment should focus on addressing needs that contribute to criminal behavior. The responsivity principle states that rehabilitative programming should be delivered in a style and mode that is consistent with the ability and learning style of the offender.

However, the wide-scale adoption of risk and needs assessment in the criminal justice system is not without controversy. Several critiques have been raised against the use of risk and needs assessment, including that it could have discriminatory effects because some risk factors are correlated with race; that it uses group base rates for recidivism to make determinations about an individual's propensity for re-offending; and that risk and needs assessment are two distinct procedures and should be conducted separately.

There are several issues policymakers might contemplate should Congress choose to consider legislation to implement a risk and needs assessment system in federal prisons, including the following:

- Should risk and needs assessment be used in federal prisons?
- Should certain inmates be excluded from earning additional time credits?
- Should risk assessment be incorporated into sentencing?
- Should there be a decreased focus on punishing offenders?

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The number of people incarcerated in the United States has increased dramatically over the past three decades. In 1983, there were approximately 419,000 inmates under the jurisdiction of state and federal correctional authorities.¹ By the end of 2013, this figure reached approximately 1.5 million inmates.² The incarceration rate increased from 179 per 100,000 people in 1983 to 478 per 100,000 in 2013. While research indicates that the expanded use of incarceration during the 1980s and 1990s did contribute to the declining crime rate, the effect was likely small,³ and incarceration has probably reached the point of diminishing returns.⁴ Concerns about both the economic and social consequences of the country's burgeoning prison population have resulted in organizations such as Right on Crime and the Coalition for Public Safety calling for reforms to the nation's criminal justice system. Congress also formed the Charles Colson Task Force on Federal Corrections to examine the growth of the federal prison population and provide recommendations for reforms.⁵

There are two, not mutually exclusive, methods to reduce the number of incarcerated individuals in the United States: send fewer people to prison (e.g., placing offenders on probation or in a diversion program like a drug court) and/or release more inmates (e.g., placing inmates on parole or granting them early release by allowing them to earn more good time credits). While the ideas of diverting "low-level drug offenders" from prison or granting non-violent offenders early release so they can serve a greater proportion of their sentence in the community have been popular proposals to reduce the prison population, the crime someone is convicted of is not always the best proxy for the risk that person might pose to the community. For example, people who might not be violent individuals and who pose a low risk for future violence might be convicted of, what are legally defined as, violent crimes (e.g., illegal gun possession or driving the get-away car for someone who committed an armed robbery).⁶ On the other hand, violent people might be sentenced to prison for non-violent crimes as a result of a plea deal.⁷

Because courts and correctional officials make decisions about who can safely be diverted from incarceration or granted early release, they may benefit from tools that can help in this process. Actuarial risk assessment tools may serve this purpose. Needs assessments could also help correctional officials make determinations about which offenders need higher levels of supervision and/or rehabilitative programming. Assessment instruments might help increase the efficiency of the criminal justice system by identifying low-risk offenders who could be effectively managed on probation rather than incarcerated, and they might help identify high-risk offenders who would gain the most by being placed in rehabilitative programs.

¹ University at Albany, School of Criminal Justice, Hindelang Criminal Justice Research Center, *Sourcebook of Criminal Justice Statistics (online)*, Table 6.28.2012.

² E. Ann Carson, *Prisoners in 2013*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, NCJ 247282, Washington, DC, September 2014, p. 2.

³ Research by the Brennan Center for Justice and the New York University School of Law estimates that 0%-7% of the decline in crime in the 1990s can be attributed to increased incarceration, while 0%-1% of the decrease in crime since 2000 can be attributed to increased incarceration. Oliver Roeder, Lauren-Brooke Eisen, and Julia Bowling, *What Caused the Crime Decline?*, Brennan Center for Justice, New York, NY, February 12, 2015, p. 6.

⁴ Anne Morrison Piehl and Bert Useem, "Prisons," in *Crime and Public Policy*, ed. Joan Petersilia and James Q. Wilson, 2nd ed. (New York: Oxford University Press, 2011), p. 542.

⁵ See P.L. 113-76 and the joint explanatory statement to accompany P.L. 113-76, printed in the January 15, 2014, *Congressional Record*, p. H514.

⁶ Leon Neyfakh, "OK, So Who Gets to Go Free?," *Slate*, March 4, 2015, http://www.slate.com/articles/news_and_politics/crime/2015/03/prison_reform_releasing_only_nonviolent_offenders_won_t_get_you_very_far.html.

⁷ *Ibid.*

The use of risk and needs assessment in the criminal justice system is not without controversy, however. Proponents of assessment assert that the tools used to assess the risk and needs of inmates are better than the independent judgment of clinicians and that the tools have demonstrated the ability to make distinctions between high- and low-risk offenders.⁸ Nonetheless, risk and needs assessment is not 100% accurate. Two experts in the field note that “[a]lthough statistical risk assessment reduces uncertainty about an offender’s probable future conduct, it is subject to errors and should be regarded as advisory rather than peremptory. Even with large data sets and advanced analytical techniques, the best models are usually able to predict recidivism with about 70% accuracy—provided it is completed by trained staff.”⁹

There have been legislative proposals introduced in the current Congress that would require the Bureau of Prisons (BOP) to implement a risk and needs assessment system.¹⁰ The system would evaluate inmates and place inmates in rehabilitative programs and productive activities. Under the proposed system some inmates would be allowed to earn additional time credits for participating in rehabilitative programs that reduce their risk of recidivism. Such credits would allow inmates to be placed in prerelease custody earlier.

This report provides information on the use of risk and needs assessment in the criminal justice system. It starts with an overview of risk and needs assessment and a discussion of some of the critiques of it. The report concludes with a discussion of the issues policymakers might consider if they debate legislation to expand the use of risk and needs assessment in the federal prison system.

An Overview of Risk and Needs Assessment

A risk and needs assessment instrument measures offenders’ criminal risk factors and specific needs that if addressed will reduce the likelihood of future criminal activity.¹¹ Assessment instruments typically consist of a series of questions that help guide an interview with an offender in order to collect data on behaviors and attitudes that research indicates are related to the risk of recidivism.¹² Data collected during the interview is typically supplemented with information from an official records check, such as a criminal history records check.¹³ A total score is calculated using the risk and needs assessment instrument, and that score places the offender into a risk category (typically “low,” “moderate,” or “high”).

⁸ Eileen Sullivan and Ronnie Green, “States Predict Inmates’ Future Crimes with Secretive Surveys,” *Associated Press*, February 24, 2015, <http://bigstory.ap.org/article/027a00d70782476eb7cd07fbcca40fc2/states-predict-inmates-future-crimes-secretive-surveys>.

⁹ Edward J. Latessa and Brian Lovins, “The Role of Offender Risk Assessment: a Policy Maker Guide,” *Victims and Offenders*, vol. 5, 2010, p. 212 (hereinafter “The Role of Offender Risk Assessment”).

¹⁰ See for example, S. 467 and H.R. 759. A more detailed comparison of S. 467 and H.R. 759 can be found in the **Appendix**.

¹¹ Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders*, issue brief, September 2011, http://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2011/PewRiskAssessmentbriefpdf.pdf, p. 2 (hereinafter, “*Risk/Needs Assessment 101*”).

¹² *Ibid.*

¹³ *Ibid.*

Risk and Needs Factors

Generally speaking, risk and needs assessment instruments typically consist of both static and dynamic risk factors. Static risk factors do not change over time. Examples include age at first arrest, gender, past problems with substance or alcohol abuse, prior mental health problems, or a past history of violating terms of supervision (e.g., parole or probation).¹⁴

Dynamic risk factors, also called “criminogenic¹⁵ needs,” change and/or can be addressed through interventions. Examples include current age, education level, or marital status; being currently employed or in substance or alcohol abuse treatment; and having a stable residence.¹⁶

Can Risk and Needs Assessment Instruments Accurately Predict Risk?

In general, research indicates that most commonly used risk and needs assessment instruments can, with a moderate level of accuracy, predict who is at risk for recidivism. It also indicates that no one instrument is superior to any other when it comes to predictive validity.¹⁷ One group of researchers concluded that “[o]verall, our results showed that all of the nine tools predicted violence at above-chance levels, with medium effect sizes, and no one tool predicting violence significantly better than any other. In sum, all did well, but none came first.”¹⁸

The relative interchangeability of risk and needs assessment instruments was demonstrated by an experiment whereby items from four instruments were written on pieces of paper and placed in a coffee can, and researchers drew 13 of the items from the coffee can at random to create four new instruments. The researchers found that the four “coffee can” instruments predicted violent recidivism as well as the four original needs and risk assessment instruments.¹⁹

Two scholars have posited that there might be two explanations for why well-validated risk and needs assessment instruments have similar levels of performance. First, some evidence suggests that there is a “natural limit” to the predictive utility of instruments.²⁰ Simply stated, there is a limit to how accurately recidivism can be predicted given society’s current level of knowledge about criminal behavior. Second, well-validated instruments may show similar levels of

¹⁴ James Austin, “The Proper and Improper Use of Risk Assessment in Corrections,” *Federal Sentencing Reporter*, vol. 16, no. 3, February 2004, p. 5 (hereinafter “The Proper and Improper Use of Risk Assessment in Corrections”).

¹⁵ “Criminogenic” is commonly understood to mean factors that can contribute to criminal behavior.

¹⁶ “The Proper and Improper Use of Risk Assessment in Corrections,” p. 5.

¹⁷ Public Safety Canada, *Predicting Violent Recidivism*, Research Summary, vol. 12, no. 3, May 2007, <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/prdng-rcvds/index-eng.aspx>; Mary Ann Campbell, Sheila French, and Paul Gendreau, “The Prediction of Violence in Adult Offenders; A Meta-Analytic Comparison of Instruments and Methods of Assessment,” *Criminal Justice and Behavior*, vol. 36, no. 6, June 2009, pp. 567-590; Min Yang, Stephen C.P. Wong, and Jeremy Coid, “The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools,” *Psychological Bulletin*, vol. 136, no. 5, 2010, pp. 740-767.

¹⁸ Min Yang, Stephen C.P. Wong, and Jeremy Coid, “The Efficacy of Violence Prediction: A Meta-Analytic Comparison of Nine Risk Assessment Tools,” *Psychological Bulletin*, vol. 136, no. 5, 2010, p. 757.

¹⁹ Daryl G. Kroner, Jeremy F. Mills, and John R. Reddon, “A Coffee Can, Factor Analysis, and Prediction of Antisocial Behavior: The Structure of Criminal Risk,” *International Journal of Law and Psychology*, vol. 28, 2005, pp. 360-374.

²⁰ John Monahan and Jennifer L. Skeem, “Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning,” *Federal Sentencing Reporter*, vol. 26, no. 3, February 2014, p. 162 (hereinafter “Risk Redux”).

performance because they are tapping “common factors” or shared dimensions of risk, even though the instruments utilize different items or have different approaches.²¹ For example, the researchers who conducted the “coffee can” experiment found that assessment instruments gauge four overlapping dimensions: criminal history, persistent antisocial lifestyle, psychopathic personality, and alcohol/mental health issues.

How Risk and Needs Assessment is Used in the Criminal Justice System

Risk and needs assessment can be used at nearly all points of the criminal justice system, as highlighted by a Vera Institute of Justice memorandum.²²

- **Pretrial detention:** Courts use risk assessment instruments to help them make decisions about which defendants can be safely released pending trial. The assessment typically measures the likelihood the defendant will appear if released and whether the defendant is likely to commit another offense while on release.
- **Sentencing:** Risk and needs assessment can be used to help a sentencing judge decide whether an offender should be incarcerated or placed on community supervision. The result of the assessment can also help the judge decide whether any conditions should be placed on the offender.
- **Probation/Post-Release Supervision:** Probation and parole agents use risk and needs assessment instruments to predict the likelihood that offenders will recidivate and to identify offenders’ criminogenic needs. The results of the assessment help probation and parole agents make decisions about (1) the level of supervision offenders will receive, (2) developing an individualized case management plan that focuses on placing offenders in programs that help reduce their risk of recidivism; and (3) sanctions for violations of the conditions of release.
- **Prison:** Correctional authorities use risk assessment to make decisions about the security level to which inmates will be assigned (e.g., a high, medium, low, or minimum security facility). Prison classification systems traditionally try to identify inmates who are at a high risk for escaping or who might be management problems.
- **Parole Boards and Releasing Authorities:** Risk assessment can be used by parole boards and releasing authorities to make decisions about which inmates can be safely released from incarceration.

Two experts on the use of risk and needs assessment note that while there is evidence that risk and needs assessment is widely used in corrections, there is a great deal of variation in how it is implemented and employed.²³ Some states have adopted and implemented standardized

²¹ Ibid.

²² Vera Institute of Justice’s Center of Sentencing and Corrections, *Risk and Needs Assessment*, memorandum to the Delaware Justice Reinvestment Task Force, October 12, 2011, pp. 9-12, https://ltgov.delaware.gov/taskforces/djrtf/DJRTF_Risk_Assessment_Memo.pdf (hereinafter “Vera Institute of Justice’s memorandum re: risk and needs assessment”).

²³ The Role of Offender Risk Assessment, p. 205.

assessment instruments that are used throughout the state and across a wide variety of settings.²⁴ Other states use risk and needs assessment in a less systematic manner. Ohio is highlighted as a noteworthy example because the state developed a statewide risk and needs assessment system that is used across all levels of its correctional system.

An Example of Risk and Needs Assessment from Ohio

The Ohio Risk Assessment System (ORAS) provides an example of how risk and needs assessment can be integrated into the criminal justice system. Ohio passed a law that required the Ohio Department of Rehabilitation and Corrections to develop a risk assessment tool to evaluate the likelihood of recidivism for adult offenders.²⁵ The law required the risk assessment tool to be used by

- each municipal, county, and common pleas court, when it orders an assessment for sentencing or other purposes,
- the probation department serving those courts,
- state and local correctional institutions,
- private correctional institutions,
- community-based correctional facilities, and
- the Adult Parole Authority and the Ohio Parole Board.

ORAS was “developed as a statewide system to assess the risk and needs of Ohio offenders in order to improve consistency and facilitate communication across criminal justice agencies.”²⁶ The goal was to develop assessment tools that were predictive of recidivism at different stages in the criminal justice system; specifically, pretrial release, community supervision, prison intake, and community reentry. The ORAS consists of seven different tools that are used at various points in the criminal justice system:

- the Pre-Trial Tool (PAT),
- the Community Supervision Screening Tool (CSST),
- the Community Supervision Tool (CST),
- the Prison Screening Tool (PST),
- the Prison Intake Tool (PIT),
- the Reentry Tool (RT), and
- the Supplemental Reentry Tool (SRT)

Risk-Needs-Responsivity (RNR) Principles

The Risk-Needs-Responsivity (RNR) model of risk and needs assessment and offender treatment incorporates many of the evidence-based practices for reducing recidivism.²⁷ As the name

²⁴ Ibid.

²⁵ Ohio Department of Rehabilitation and Corrections, *Ohio Risk Assessment System*, <http://www.drc.ohio.gov/web/oras.htm>.

²⁶ Edward J. Latessa, Richard Lemke, and Matthew Makarios, et al., “The Creation and Validation of the Ohio Risk Assessment System (ORAS),” *Federal Probation*, vol. 74, no. 1 (June 2010).

²⁷ Pamela M Casey, Roger K. Warren, and Jennifer K. Elek, *Using Offender Risk and Needs Assessment Information at Sentencing: Guidance for Courts from a National Working Group*, National Center for State Courts, Williamsburg, VA, 2011, p. 5.

implies, the model has three main principles: assessing risk, addressing criminogenic needs, and providing treatment that is responsive to the offender’s abilities and learning style.²⁸

The RNR model is based on the social psychology of offending, which posits that individuals and social/situational factors intersect to create values, cognitions, and personality orientations that are conducive to criminal conduct.²⁹ These ways of thinking and responding are learned and become reinforced through feedback, and they eventually result in individual differences in the propensity for criminal behavior.³⁰ The RNR model has become a dominant paradigm in the assessment literature because it is one of the few comprehensive theories of how to provide effective intervention to offenders. Experts in the field of risk and needs assessment assert that assessment systems should adhere to the RNR model. As the Vera Institute of Justice notes, “[u]nderlying the development of evidence-based practices in the criminal justice system are the *risk, need, and responsivity* principles” [emphasis original].³¹

Many other theories of criminal behavior focus on the social causes of criminal behavior, factors that cannot be addressed through treatment. On the other hand, the RNR model focuses on the proximate causes of criminal behavior, which can be the focus of effective correctional treatment.

Risk Principle

The risk principle has two aspects: (1) criminal behavior can be predicted, and (2) the level of treatment should be matched to the risk level of the offender.³² The risk principle states that high-risk offenders need to be placed in programs that provide more intensive treatment and services while low-risk offenders should receive minimal or even no intervention.

Needs Principle

The needs principle states that effective treatment should focus on addressing criminogenic needs, that is, dynamic risk factors that are highly correlated with criminal conduct.³³ Also, according to the needs principle, effective treatment should not focus on addressing

²⁸ There are several principles other than risk, needs, and responsivity that are a part of the RNR model. These include three overarching principles: delivering services with respect for people, basing programs on psychological theory, and reducing criminal victimization. In addition to the risk, needs, and responsivity principles, there are several other core principles, including introducing human services in order to reduce recidivism, targeting more criminogenic needs relative to noncriminogenic needs, assessing offenders’ strengths to enhance prediction and specific responsivity effects, using structured assessments, and only using professional discretion for very specific reasons. There are also three organizational principles: a preference for community-based services, services are enhanced when delivered by therapists and staff with high-quality relationships skills in combination with high-quality structuring skills, and management should closely oversee the provision of services. For a more detailed overview of all of the principles of the RNR model, see Chapter 2 of D.A. Andrews and James Bonta, *The Psychology of Criminal Conduct*, 5th ed. (New Providence, NJ: Anderson Publishing, 2010) (hereinafter “*The Psychology of Criminal Conduct*”).

²⁹ Francis T. Cullen and Cheryl Lero Jonson, “Rehabilitation and Treatment Programs,” in *Crime and Public Policy*, ed. James Q. Wilson and Joan Petersilia, 2nd ed. (New York: Oxford University Press, 2011), p. 319.

³⁰ Ibid.

³¹ Vera Institute of Justice’s memorandum re: risk and needs assessment, p. 2.

³² *The Psychology of Criminal Conduct*, p. 47.

³³ The Role of Offender Risk Assessment, p. 209.

noncriminogenic needs, because changes in noncriminogenic needs are not associated with reduced recidivism.³⁴

Responsivity Principle

The responsivity principle states that rehabilitative programming should be delivered in a style and mode that is consistent with the ability and learning style of the offender.³⁵ The responsivity principle is further divided into two elements. The general responsivity principle states that cognitive-behavioral and social learning therapies are the most effective form of intervention.³⁶ The specific responsivity principle states that treatment should consider the relevant characteristics of the offender (e.g., the offender’s motivations, preferences, personality, age, gender, ethnicity, and cultural identification, along with other factors).

“Central Eight” Risk and Needs Factors

The developers of the RNR principles identified what they deem the “central eight” risk and needs factors. These risk and needs factors include the “big four,” which they believe to be the “major predictor variables and indeed the major causal variable in the analysis of criminal behavior in individuals.”³⁷ The remaining four risk and needs factors are referred to as the “moderate four.” The “central eight” risk and needs factors are presented in **Table 1**.

Even though antisocial behavior is the most prominent of the “central eight” risk and needs factors, a common mistake in risk assessment is conflating past antisocial behavior with current antisocial behavior. The seriousness of the current offense is *not* a risk factor.³⁸ A past history of antisocial behavior is what indicates a risk of future offending.

Table 1. Major Risk and Needs Factors: The “Central Eight”

Risk/Need Factor	Indicator	Target for Intervention
The Big Four		
History of Antisocial Behavior	This includes early involvement in any number of a variety of antisocial activities. Major indicators include being arrested at a young age, a large number of prior offenses, and rule violations while on conditional release.	History cannot be changed, but targets for change include developing new noncriminal behaviors in high-risk situations and building self-efficacy beliefs supportive of reform.
Antisocial Personality Pattern	People with this factor are impulsive, adventurous, pleasure-seeking, involved in generalized trouble, restlessly aggressive, and show a callous disregard for others.	Building skills to address weak self-control, anger management, and poor problem-solving.

³⁴ *The Psychology of Criminal Conduct*, p. 49.

³⁵ *The Psychology of Criminal Conduct*, p. 49.

³⁶ *Ibid.*, pp. 49-50.

³⁷ *Ibid.*, p. 55.

³⁸ *Ibid.*, p. 60.

Risk/Need Factor	Indicator	Target for Intervention
Antisocial Cognition	People with this factor hold attitudes, beliefs, values, rationalizations, and personal identity that is favorable to crime. Specific indicators include identifying with criminals, negative attitudes towards the law and justice system, beliefs that crime will yield rewards, and rationalizations that justify criminal behavior (e.g., the “victim deserved it”).	Reducing antisocial thinking and feelings through building and practicing less risky thoughts and feelings.
Antisocial Associates	This factor includes both association with procriminal others and isolations from anticriminal others.	Reduce association with procriminal others and increase association with anticriminal others.
The Moderate Four		
Family/Marital Circumstances	Poor-quality relationships between either the child and the parent (in the case of juvenile offenders) or spouses (in the case of adult offenders) in combination with either neutral expectations with regards to crime or procriminal expectations.	Reduce conflict, build positive relationships, and enhance monitoring and supervision.
School/Work	Low levels of performance and involvement and low levels of rewards and satisfaction.	Enhance performance, involvement, rewards, and satisfaction.
Leisure/Recreation	Low levels of involvement in and satisfaction from noncriminal leisure pursuits.	Enhance involvement in and satisfaction from noncriminal leisure activities.
Substance Abuse	Problems with abusing alcohol and/or other drugs (excluding tobacco). Current problems with substance abuse indicate a higher risk than past substance abuse problems.	Reduce substance abuse, reduce the personal and interpersonal supports for substance-oriented behavior, and enhance alternatives to substance abuse.

Source: Adapted from Table 2.5 in D.A. Andrews and James Bonta, *The Psychology of Criminal Conduct*, 5th ed. (New Providence, NJ: Anderson Publishing, 2010).

Empirical Basis for the RNR Principles

Research on the risk principle suggests that recidivism is only reduced when high-risk offenders are placed in programs where they receive intensive levels of services.³⁹ In some instances, research also found that low-risk offenders who were placed in intensive treatment programs actually had an increased likelihood of recidivism.⁴⁰ This could be because placing low-risk offenders in intensive programming interrupts support structures or self-correcting behaviors that already exist, or because it exposes low-risk offenders to high-risk offenders who may have a negative influence on low-risk offenders’ thoughts or behaviors.⁴¹

³⁹ Ibid., p. 48.

⁴⁰ Ibid.

⁴¹ Vera Institute of Justice’s memorandum re: risk and needs assessment, p. 2.

Research suggests that programs that adhere to the RNR principles are more effective at reducing recidivism.⁴² Specifically, the more of the RNR principles a treatment program adheres to, the greater the reduction in recidivism. Research also indicates that treatment can be more effective when provided in a community setting, though treatment that adheres to the RNR principles can still be effective when provided in a custodial setting (i.e., prison or jail).

The developers of the RNR principles argue that research results indicate that the “central eight” risk and needs factors are the best predictors of future criminal behavior. A review of eight meta-analyses on the relationship between certain risk and needs factors and criminal behavior found moderate effect sizes for both the “big four” and the “moderate four” risk factors. In comparison, the mean effect size for four minor risk factors was not statistically significant.

Critiques of Risk and Needs Assessment

Proponents assert that risk and needs assessment instruments are effective enough that they can help officials make decisions about who needs to be incarcerated and who can be safely treated and supervised in the community. However, while risk and needs assessment instruments have demonstrated the ability to predict the risk of recidivism with some degree of accuracy, there are people who are concerned about how these instruments are used in the criminal justice system. One expert notes that risk and needs assessment involves judgments about uncertainty.⁴³ Risk and needs assessment can limit the range of plausible speculation about a potential outcome, but it will never be certain. This expert notes that there are so many determinants of human behavior that it is impossible to reason through all of the possible outcomes. This section of the report provides an overview of some of the critiques of risk and needs assessment.

Making Judgments about Individuals Based on Group Tendencies

One of the key critiques of risk and needs assessment is that while there is evidence of some predictability in group behavior, it is difficult, if not impossible, to make a determination about how individual members of a group will behave.⁴⁴

Two scholars argue that “[o]n the basis of empirical finding, statistical theory, and logic, we conclude that predictions of future offending [using risk and needs assessment] cannot be achieved in the individual case with any degree of confidence.”⁴⁵ They note that it is a logical fallacy to make a causal inference about a member of a group based on the group’s characteristics.⁴⁶

⁴² James Bonta and D.A. Andrews, *Risk–Need–Responsivity Model for Offender Assessment and Rehabilitation*, Public Safety Canada, June 2007, pp. 9-12, <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/rsk-nd-rspnsvty/index-eng.aspx>, hereinafter, “*RNR Model for Offender Assessment and Rehabilitation*.”

⁴³ R. Karl Hanson, “The Psychological Assessment of Risk for Crime and Violence,” *Canadian Psychology*, vol. 50, no. 3 (2009), p. 172.

⁴⁴ James Austin, “The Proper and Improper Use of Risk Assessment in Corrections,” *Federal Sentencing Reporter*, vol. 16, no. 3, February 2004, p. 3 (hereinafter, “The Proper and Improper Use of Risk Assessment in Corrections”).

⁴⁵ David J. Cook and Christine Michie, “Limitations of Diagnostic Precision and Predictive Utility in the Individual Case: A Challenge for Forensic Practice,” *Law and Human Behavior*, vol. 34, 2010, p. 259 (hereinafter, “Limitations of Diagnostic Precision and Predictive Utility in the Individual Case”).

⁴⁶ *Ibid.*, p. 271.

However, the supposition that risk and needs assessment provides no useful information for criminal justice decision making has been vigorously contested. Two scholars assert that while the probabilities associated with assessment clearly will never be certain, group data can help criminal justice professionals make decisions about who is at risk of recidivating.⁴⁷ Proponents of the use of assessment note that the insurance industry makes decisions about risk based on actuarial methods.⁴⁸ Insurance companies set the price for insurance on a purchaser's membership in a group. Without relying on such probabilities it would be impossible for insurance companies to set prices.

However, researchers who question the use of risk and needs assessment to predict individual risk assert that this analogy is false because insurance companies are interested in predicting what proportion of insured individuals will, for example, die within a certain time frame; they are not interested in predicting the deaths of certain individuals.⁴⁹

Should Risk Assessment Be Separate from Needs Assessment?

Research suggests that including dynamic risk factors in risk and needs assessment can increase its accuracy.⁵⁰ However, some experts in the field have also advocated for shorter risk assessment instruments that focus on a relatively short list of static risk factors.

One scholar of risk and needs assessment argues that risk and needs should not be measured together. He notes that many early assessment instruments were simple and consisted of fewer than a dozen factors.⁵¹ More recently the focus of risk assessment has changed from solely predicting risk to "risk reduction." The focus on risk reduction means that instruments added dynamic risk factors that can change with time and/or are amenable to treatment and, therefore, reduce the offender's risk level.⁵² However, some research has shown that *some* dynamic risk factors are not related to any measure of recidivism.⁵³ Also, dynamic risk factors might be more difficult to measure accurately.⁵⁴

It is argued that the inclusion of a bevy of dynamic risk factors has diluted the ability of risk and needs assessment instruments to classify cases accurately.⁵⁵ Most assessment instruments, even though they contain risk factors that might be extraneous to predicting risk, contain enough valid risk factors that they are able to predict with modest accuracy which groups of offenders are the most likely to recidivate. However, "[t]here is substantial evidence available to suggest that

⁴⁷ Jennifer L. Skeem and John Monahan, *Current Directions in Violence Risk Assessment*, University of Virginia Law School, Public Law and Legal Theory Research Paper Series, no. 2011-13, March 2011, pp. 8-9.

⁴⁸ Ibid.

⁴⁹ Limitations of Diagnostic Precision and Predictive Utility in the Individual Case, p. 271.

⁵⁰ Stephen D. Gottfredson and Laura J. Moriarty, "Statistical Risk Assessment: Old Problems and New Applications," *Crime and Delinquency*, vol. 52, no. 1, January 2006, p. 191 (hereinafter "Statistical Risk Assessment: Old Problems and New Applications").

⁵¹ Christopher Baird, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System*, National Council of Crime and Delinquency, February 2009, p. 3 (hereinafter "*A Question of Evidence*").

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Statistical Risk Assessment: Old Problems and New Applications, p. 191.

⁵⁵ *A Question of Evidence*, p. 3.

relatively brief risk indices outperform longer, more complex models.”⁵⁶ For example, one study in Pennsylvania found that risk assessment accuracy was improved by using only 8 of the 54 factors in one commonly used instrument.

Two scholars have argued that risk assessment should be conducted separately from needs assessment.⁵⁷ Combining risk and needs assessment has the potential to introduce variables that might be useful when trying to assess what interventions would be effective to *reduce* an offender’s risk, but it might reduce the ability of the instrument to predict risk accurately in situations where *only* predicting risk is all that is warranted (e.g., should someone be granted pretrial release or should an inmate be released on parole).

Potential for Discriminatory Effects

There is a concern that the wide-scale use of risk and needs assessment might exacerbate racial disparities in the nation’s prison systems. One scholar contends that research on assessment instruments has not adequately vetted the tools for use on racial minorities.⁵⁸ This scholar notes that social context, such as gender, race, and economic and socio-structural factors, plays a role in crime, and assessment does not account for these factors.⁵⁹

It is also possible that minorities might score higher on risk and needs assessments because “of their elevated exposure to risk, racial discrimination, and social inequality—not necessarily because of their criminal propensities or the crimes perpetrated.”⁶⁰ One expert noted that most instruments use socioeconomic factors that correlate with race and ethnicity, and include factors that punish people for choices that people are allowed to make in a free society (e.g., whether to get married, live in a stable residence, or have a regular job).⁶¹

Another researcher has warned of the need to thoroughly evaluate risk and needs assessment instruments to ensure that the classifications of risk are not biased against African-Americans and Hispanics.⁶² Cutoff points developed using reoffending rates for white offenders might lead to over- or under-classification for some minorities.

A review of the research on the relationship between race/ethnicity and predictive validity of risk and needs assessment found contradictory and mixed results.⁶³ The researchers found a total of eight meta-analyses that evaluated the role that race/ethnicity played in mediating the ability of instruments to predict recidivism. Three studies found that the higher the percentage of white offenders in the sample, the higher the predictive validity of the instrument—suggesting that

⁵⁶ Ibid., p. 5.

⁵⁷ Statistical Risk Assessment: Old Problems and New Applications, p. 192.

⁵⁸ Kelly Hannah-Moffat, *Actuarial Sentencing: An “Unsettled” Proposition*, paper presented at University at Albany Symposium on Sentencing, September 2010, p. 16 (hereinafter “*Actuarial Sentencing: An ‘Unsettled’ Proposition*”).

⁵⁹ Ibid., p. 14.

⁶⁰ Ibid., p. 17.

⁶¹ Michael Tonry, “Legal and Ethical Issues in the Prediction of Recidivism,” *Federal Sentencing Reporter*, vol. 26, no. 3, February 2014, p. 171.

⁶² *The Psychology of Criminal Conduct*, p. 333.

⁶³ Jay P. Singh and Seena Fazel, “Forensic Risk Assessment: a Metareview,” *Criminal Justice and Behavior*, vol. 37, no. 9, September 2010, p.978.

instruments can better predict risk for white offenders. The other five studies found no evidence that predictive validity varied based on the race/ethnicity of the participants.

Select Issues for Congress

There are two pieces of legislation before Congress that would establish a risk and needs assessment system in the BOP. The above discussion about the strengths and weaknesses of assessment might raise a question among some policymakers about whether the BOP should use a risk and needs assessment system. Even if policymakers decide that the BOP should use assessment, there might be additional questions about how to implement an effective assessment system. The two legislative proposals might also raise questions about whether other measures should be taken in order to reduce the number of inmates in federal prisons. This section of the report discusses some of the issues that might arise if Congress considers either piece of legislation.

Should Risk and Needs Assessment Be Used in Federal Prisons?

An overarching issue policymakers might consider is whether the BOP should use risk and needs assessment. Research suggests that assessment instruments can make distinctions between high- and low-risk offenders with some degree of accuracy. Furthermore, assessment systems that adhere to the RNR principle appear to be effective at reducing recidivism. Implementing an assessment system in federal prisons would appear, based on the current research, to be an evidence-based way to improve the effectiveness of rehabilitative programming, and when combined with additional time credits for some inmates who participate in rehabilitative programs and productive activities, it might provide a means for reducing the federal prison population without increasing the risk to public safety.

However, risk and needs assessment systems are not flawless. There will always be false positives (e.g., inmates who are determined to be high risk but are actually a low risk for recidivism) even though the predictive accuracy of instruments has improved over the years with more research into the correlates of crime and the development of a theory of criminal behavior and effective rehabilitation (i.e., the RNR model).

There are also concerns that the use of risk and needs assessment will have a discriminatory effect on minorities. As discussed previously, the research on the applicability of currently used instruments for minorities is mixed. Some policymakers might be concerned that instruments might find minorities to be at a higher risk for recidivism than whites because of the use of static risk factors, such as criminal history, that might be more prevalent in minority communities because they are more at risk of coming into contact with the criminal justice system. While this is a valid concern, it should also be noted that many commonly used instruments consider a wide variety of dynamic risk factors that could allow all inmates to reduce their assessed risk level. Also, actuarial assessment is the norm, which makes the process of assessing each offender's risk level more objective. Before the use of actuarial assessment, decisions about who was to be assigned to which treatment program and who was to be released on parole were left to criminal justice professionals who made assessments based on their own sets of standards, which might have been influenced by overt or subconscious biases.

Should Certain Inmates Be Excluded from Earning Additional Time Credits?

One issue policymakers might consider is whether certain inmates should be excluded from earning extra time credits for participating in rehabilitative programs and productive activities. Some legislative proposals would exclude inmates who were convicted of certain offenses, such as violent and sex offenses, from earning additional time credits for participating in rehabilitative programming.⁶⁴ Research suggests that inmates should be assessed for risk and decisions about programming and supervision should be made based on those assessments regardless of the inmate's current offense. However, it might be argued that inmates who are convicted of serious offenses, such as violent or sex offenses, should not be eligible to be released from prison early, regardless of what they do to reduce their risk of recidivism.

Should Priority Be Given to High-Risk Offenders?

Policymakers might consider whether the proposed risk and needs assessment system should focus on high-risk inmates. The RNR principles state that high-risk individuals should be the focus of interventional programming.

Research on the risk principle suggests that recidivism is only reduced when high-risk offenders are placed in programs where they receive intensive levels of services.⁶⁵ In some instances, research also found that low-risk offenders who were placed in intensive treatment programs actually had an increased likelihood of recidivism.⁶⁶ This could be because placing low-risk offenders in intensive programming interrupts support structures or self-correcting behaviors that already exist, or because it exposes low-risk offenders to high-risk offenders who may have a negative influence on low-risk offenders' thoughts or behaviors.⁶⁷

Some legislative proposals would require the BOP to phase-in the risk and needs assessment system.⁶⁸ During the phase-in period, low-risk prisoners would be given priority for programs and activities over moderate- and high-risk prisoners. In addition, higher-risk inmates would be required to participate in more rehabilitative programming, but inmates with low or no risk of recidivating would also be required to participate in rehabilitative programming. Other legislative proposals would require inmates who are deemed to be low risk and without need of recidivism reduction programming to continue to participate in productive activities.⁶⁹ Policymakers might consider whether inmates who are deemed to be low risk should immediately be placed in prerelease custody in order to open spots for moderate- and high-risk inmates who are in need of rehabilitative programming.

⁶⁴ See, for example, S. 467 and H.R. 759.

⁶⁵ *The Psychology of Criminal Conduct*, p. 48.

⁶⁶ *Ibid.*

⁶⁷ Vera Institute of Justice's memorandum re: risk and needs assessment, p. 2.

⁶⁸ See, for example, H.R. 759.

⁶⁹ See, for example, S. 467.

Should Risk and Needs Assessment Be Used in Sentencing?

Another issue policymakers might consider is whether risk and needs assessment should be used in sentencing to help identify low-risk offenders who could be diverted to community supervision rather than incarcerated. As discussed previously, research suggests that low-risk offenders should not be subjected to intensive treatment (and some research indicates that it might be criminogenic) and they might be able to be effectively supervised in the community. Some legislation would require the BOP, to the extent practicable, to house low-risk inmates together, which might help reduce the criminogenic effects of placing low-risk offenders in prison.⁷⁰ Legislative proposals would also seek ways to try to place some inmates in prerelease custody earlier.⁷¹ However, if the purpose of the legislation is to reduce the federal prison population and save money, it is significantly cheaper to place offenders on probation compared to incarcerating them.⁷²

While some scholars have argued for integrating risk assessment into sentencing guidelines to help judges determine the appropriate sentences for offenders,⁷³ research suggests that if such assessment were to be integrated into sentencing, it might be best to use it as a way to screen-out low-risk offenders. Three researchers who conducted a meta-analysis of the research on risk assessment instruments concluded that instruments could be used to make informed decisions about treatment or management of offenders.⁷⁴ However, the high number of false positives limits their effectiveness as a tool to make decisions about who should be sent to prison for longer periods of incarceration because they pose the greatest threat of reoffending. Simply stated, if assessment were to be used to make decisions about who should be incarcerated for long periods of time because certain offenders were at a high risk for committing more offenses, there is the potential to incarcerate a significant number of people who would not commit any more offenses. The researchers concluded that the results of their analysis “suggest that these tools can effectively screen out individuals at low risk of future offending.”⁷⁵

However, the idea of using risk and needs assessment in sentencing is not without controversy. DOJ, while acknowledging the important role the use of evidence-based practices plays in effective rehabilitation programs and reentry practices, has raised concerns about making risk assessment a part of determining sentences for federal offenders.⁷⁶ DOJ echoes previously mentioned concerns that risk assessment bases decisions on group dynamics and that determining someone’s risk of reoffending on static risk factors might place certain groups of offenders at a disadvantage. DOJ also argues that using risk assessment in determining sentences would erode

⁷⁰ See, for example, S. 467.

⁷¹ See, for example, S. 467 and H.R. 759.

⁷² The Administrative Office of the U.S. Courts reports that in 2012 the average annual cost of probation supervision was \$3,347 per probationer, compared to \$28,948 to house an inmate in a federal prison. Administrative Office of the U.S. Courts, “Supervision Costs Significantly Less than Incarceration in Federal System,” July 18, 2013, <http://news.uscourts.gov/supervision-costs-significantly-less-incarceration-federal-system>.

⁷³ Jordan M. Hyatt, Mark H. Bergstrom, and Steven L. Chanenson, “Follow the Evidence: Integrate Risk Assessment into Sentencing,” *Federal Sentencing Reporter*, vol. 23, no. 4, April 2011, pp. 266-268.

⁷⁴ Seena Fazel, Jay P. Singh, and Helen Doll, “Use of Risk Assessment Instruments to Predict Violence and Antisocial Behaviour in 73 Samples Involving 24,827 People: Systematic Review and Meta-analysis,” *BMJ: British Medical Journal*, vol. 345, July 24, 2012, <http://www.bmj.com/content/bmj/345/bmj.e4692.full.pdf>.

⁷⁵ *Ibid.*, p. 4.

⁷⁶ Letter from Jonathan J. Wroblewski, Director, Office of Policy and Legislation, Criminal Division, U.S. Department of Justice, to The Honorable Patti B. Saris, Chair, U.S. Sentencing Commission, July 29, 2014.

the certainty in sentencing, something Congress attempted to address when it passed the Sentencing Reform Act (P.L. 98-473), which eliminated parole for federal inmates and established a determinate sentencing structure under the federal sentencing guidelines. Certainty in sentencing, argues DOJ, is a key factor in deterring crime. DOJ also argues that sentencing should primarily be about holding offenders accountable for past criminal behavior.

Should There Be a Decreased Emphasis on Punishment?

If Congress were to consider legislation to implement risk and needs assessment in the federal prison system, policymakers might consider whether implementing a policy of making decisions based on an offender's risk level is compatible with a perceived desire to continue to incarcerate certain offenders for as long as possible. Some legislation would exempt inmates convicted of certain crimes from being eligible from earning extra time credits.⁷⁷ This would mean that offenders convicted of certain offenses would be required to serve a greater proportion of their sentences in prison even if they are deemed to be at a low risk for recidivism. As discussed previously, it is an offender's past history of antisocial behavior, and not the offender's current offense, that is indicative of a risk for recidivism. Therefore, the policy of requiring certain offenders to serve most of their sentences in prison might, in some capacity, undermine the potential effectiveness of a risk and needs assessment system.

Research has questioned the effectiveness of incarceration as a way to reduce crime. It suggests that while incarceration did contribute to lower violent crime rates in the 1990s, there are declining marginal returns associated with ever-increasing levels of incarceration.⁷⁸ The diminishing level of return resulting from higher levels of incarceration might be explained by the fact that higher levels of incarceration are likely to include more offenders who are either at the end of their criminal careers or who were at a low risk of committing crimes at a high rate (so-called "career criminals").⁷⁹ Another possible reason for diminishing marginal returns might be that more of the individuals incarcerated over the past three decades have been incarcerated for crimes where there is a high level of replacement (i.e., incarcerating one offender "opens the market" for a new offender to take that person's place).⁸⁰ For example, if a drug dealer is incarcerated and there is no decrease in demand for drugs in the drug market, it is possible that someone will step in to take that person's role; therefore, no further crimes may be averted by incarcerating the individual. It is also possible that being imprisoned with other offenders is actually criminogenic, especially for low-risk offenders.⁸¹

Research on the psychology of punishment also provides insight into why incarceration might provide a limited deterrent effect. For punishment to be successful at suppressing behavior it requires

⁷⁷ See, for example, S. 467 and H.R. 759.

⁷⁸ Anne Morrison Piehl and Bert Useem, "Prisons," in *Crime and Public Policy*, ed. Joan Petersilia and James Q. Wilson, 2nd ed. (New York: Oxford University Press, 2011), p. 542.

⁷⁹ Doris Layton MacKenzie, "Reducing the Criminal Activities of Known Offenders and Delinquents: Crime Prevention in the Courts and Corrections," in *Evidence-based Crime Prevention*, ed. Lawrence W. Sherman, David P. Farrington, Brandon C. Welsh, and Doris Layton MacKenzie (New York: Routledge, 2002), p. 337.

⁸⁰ Bert Useem and Anne Morrison Piehl, *Prison State: The Challenge of Mass Incarceration* (New York: Cambridge University Press, 2008), p. 74.

⁸¹ *The Psychology of Criminal Conduct*, p. 433.

- the immediate delivery of an intense level of punishment,
- catching and punishing criminals for every offense,
- not allowing the offender to be able to escape from the consequences of the behavior,
- making the density of the punishment associated with the behavior greater than the density of the rewards, and
- the punishment be consistent with the characteristics of the offender.⁸²

However, “the necessary conditions for effective punishment are virtually impossible to meet for the criminal justice system. Police cannot be everywhere to ensure the certainty of detection, the courts cannot pass sentence quickly enough, and correctional officials have difficulties ensuring adequate supervision and monitoring.”⁸³

There is also an argument to be made about the purpose of incarceration. While there might be a minimal general deterrent effect associated with incarceration, it does provide for incapacitation, which can reduce the number of crimes an incarcerated offender can commit. Also, long prison terms might provide for society’s sense of justice. Sentencing someone to prison for several years, or even decades, could be viewed as a way for society to say that there are certain behaviors that will not be tolerated, and those who commit such transgressions deserve to receive severe punishment for them.

⁸² Ibid., pp. 443-447.

⁸³ Ibid., p. 451.

Appendix. Comparison of S. 467 and H.R. 759

This appendix provides a comparison of the provisions in S. 467 and H.R. 759 that would establish a risk and needs assessment system in the Bureau of Prisons (BOP).

Establishment of an Assessment System

S. 467 would require the Department of Justice (DOJ) to establish, within 30 months of the enactment of the bill, a Post-Sentencing Risk and Needs Assessment System (Assessment System) for use in the BOP that would

- assess and determine the recidivism risk level of all inmates and classify each inmate as being at low, moderate, or high risk for recidivism;
- to the extent practicable, determine the risk of violence for all inmates;
- ensure that, to the extent practicable, low-risk inmates are housed and assigned to programs together;
- assign inmates to rehabilitative programs and productive activities based on their risk level and criminogenic needs;
- periodically reassess and update an inmate’s risk level and programmatic needs; and
- provide information on best practices concerning the tailoring of rehabilitative programs to the criminogenic needs of each inmate.

H.R. 759 would also require DOJ to develop and release an Assessment System for use by the BOP, but it would require DOJ to establish the system within 180 days of the bill becoming law. The requirements for the Assessment System under H.R. 759 are similar to those of S. 467, but H.R. 759 would *not* require the Assessment System to determine the risk of violence for all inmates, nor require that low-risk inmates be housed together and assigned to the same programs.

Both S. 467 and H.R. 759 would require DOJ, when developing the Assessment System, to use the best available research and best practices in the field of risk and needs assessment. Both bills would allow DOJ to develop its own instrument or use an existing instrument. In addition, both bills would require DOJ either to validate the instrument on the federal prison population or to ensure that the instrument has been validated using federal inmates.

Expanding Rehabilitative Programs

S. 467 would require the BOP, subject to the availability of appropriations, to make recidivism-reducing programs and activities, including prison jobs, available to all eligible inmates⁸⁴ within six years of enactment of the legislation. The bill would also require the National Institute of

⁸⁴ “Eligible inmates” would include inmates who have been sentenced to a period of incarceration for a federal offense and would not include an inmates who (1) are medically unable to successfully complete a recidivism reduction program or productive activity, (2) would present a security risk if they participated, or (3) are serving a sentence of less than one month.

Corrections to evaluate all programs and activities to ensure that they are evidence based and effective at reducing recidivism.

H.R. 759 would also require the BOP to expand, subject to appropriations, recidivism-reducing programs and activities for inmates. However, H.R. 759 would phase in expansion of programs and activities. The BOP would be required to provide rehabilitative programming and productive programs to 20% of inmates within one year of the date when risk and needs assessments are completed for all inmates. The BOP would be required to provide rehabilitative programming and productive activities to an additional 20% of inmates each year until they are serving all inmates. During the phase-in period, low-risk inmates would be given first priority for participation in rehabilitative programs and productive activities. Moderate- and high-risk inmates would be given second and third priority, respectively. Also, within risk levels, priority would be given to inmates who are closer to finishing their sentences.

Both bills would allow the BOP to enter into partnerships with nonprofit organizations, educational institutions, and private entities in order to provide rehabilitative programs and activities for inmates.

Assessing the Risk and Needs of Inmates

S. 467 would require the BOP to conduct an initial risk and needs assessment for all inmates within 30 months of the bill becoming law. The bill would also require the BOP to reassess each inmate at least once a year for inmates within three years of release; at least once every other year for inmates who are within 10 years of release; and at least once every three years for every other inmate. H.R. 759 would require the BOP to periodically reassess inmates who successfully participate in rehabilitative programs and productive activities (with high- and moderate-risk inmates receiving more frequent evaluations) and assign inmates to the proper programs and activities if their risk levels change.

Training for Staff on Using the Assessment System

Both S. 467 and H.R. 759 would require the BOP to provide training for any staff members who are responsible for administering the Assessment System, which includes a requirement that staff demonstrate competence in administering the instrument. Both bills would require DOJ to monitor and assess the use of the Assessment System and to periodically audit the use of the system in BOP facilities.

Additional Time Credits and Other Incentives

S. 467 would grant additional time credit for inmates who successfully complete 30 days of rehabilitative programming and productive activities. Every inmate would be eligible to earn five additional days of credit upon completion. Inmates who are deemed low risk would be eligible to receive an additional five days. However, the following inmates would be exempted from earning additional time credits:

- inmates serving a sentence for a second federal offense;
- inmates who were in the highest criminal history category under the U.S. Sentencing Guidelines at the time of sentencing; and

- any inmate sentenced for a terrorism offense,⁸⁵ a crime of violence,⁸⁶ a sex offense,⁸⁷ racketeering,⁸⁸ engaging in a continuing corrupt criminal enterprise,⁸⁹ a federal fraud offense for which the inmate was sentenced to more than 15 years imprisonment, or a crime involving child exploitation.⁹⁰

H.R. 759 would also allow inmates to earn additional time credits for successfully participating in rehabilitative programs or productive activities, but the credit structure would be different. Under H.R. 759, low-risk inmates would be eligible to receive 30 days of time credits for each month they successfully participate in a rehabilitative program or productive activity; moderate-risk inmates would be eligible to receive 15 days, and high-risk inmates would be eligible to receive 8 days. H.R. 759 lists 47 offenses that would make federal inmates ineligible to receive additional time credits for participating in rehabilitative programs or productive activities. The enumerated offenses could generally be classified as violent, terrorism, espionage, human trafficking, sex and sexual exploitation, and high-level drug offenses. The bill would also exclude inmates with three or more convictions for crimes of violence or drug trafficking offenses.

S. 467 would require the BOP to develop other incentives, such as additional telephone or visitation privileges, for inmates who are exempt from earning additional time credits. H.R. 759 would allow any prisoner who successfully participates in a rehabilitative program or productive activity to receive, for use with family, close friends, mentors, and religious leaders, up to 30 minutes per day and up to 900 minutes per month in phone privileges and, as determined by the facility's warden, additional visitation time.

Under S. 467, inmates would not be allowed to accrue the proposed additional time credits if the inmate has accrued other time credits for participation in another program under another provision of law. Under H.R. 759, the time credits earned for participating in rehabilitative programs and productive activities would be in addition to any other rewards or incentives for which inmates might be eligible.

Placement in Prerelease Custody

The extra time credit inmates could earn under S. 467 and H.R. 759 would allow them to be placed on prerelease custody earlier. Under S. 467 inmates who are deemed to be at a low risk for recidivism within one year of being eligible to be placed in prerelease custody, or inmates who are deemed at a moderate risk for recidivism but their most recent risk and needs assessment shows that their risk of recidivism has decreased, would be eligible to be placed in a residential reentry center (RRC, i.e., a halfway house) or home confinement. Inmates who are deemed to be low risk for recidivism can be placed on community supervision. Inmates who have earned less than 36 months of additional good time credit would only be eligible to spend one-half of that time on community supervision, while inmates who have earned 36 months or more of additional

⁸⁵ As defined at 18 U.S.C. §2332b(g)(5).

⁸⁶ As defined at 18 U.S.C. §16.

⁸⁷ As described in 42 U.S.C. §16911.

⁸⁸ As defined at 18 U.S.C. §1962.

⁸⁹ As defined at 21 U.S.C. §848.

⁹⁰ As defined at 42 U.S.C. §17601.

good time credit would be eligible to serve the amount of such credit exceeding 18 months on community supervision.

H.R. 759 would allow the BOP to place inmates who are deemed to be low risk, who have earned time credits equal to the amount of time remaining on their sentences, and who are otherwise deemed qualified, in prerelease custody. All inmates transferred to prerelease custody would be placed on home confinement. Inmates would be required to remain on home confinement until they served at least 85% of their imposed sentence.

Under S. 467, any period of supervised release imposed on an inmate would be reduced by the amount of time the prisoner spent in prerelease custody. Inmates would not be eligible to be transferred to community supervision unless the amount of time the inmate could spend on community supervision is equal to or greater than the amount of time remaining on the inmate's period of prerelease custody.

Judicial Review of Prerelease Custody Placement

S. 467 would not allow the BOP to transfer any inmate sentenced to more than three years of incarceration to prerelease custody unless the BOP provides notice to the U.S. Attorney's office in the district where the inmate was convicted. The federal government would be allowed to challenge an inmate's prerelease custody. A court would be allowed to deny an inmate's transfer to prerelease custody or modify the terms of such transfer if, after conducting a hearing, the court finds by a preponderance of the evidence that placing the inmate on prerelease custody is inconsistent with the factors specified in paragraphs (2), (6), and (7) of 18 U.S.C. §3553(a).

H.R. 759 would require the BOP to notify the court in the district in which the inmate was convicted of its intention to place the inmate in prerelease custody. A judge would be required to approve or deny the recommendation within 30 days. However, the judge would only be able to deny the recommendation if he or she finds through clear and convincing evidence that the inmate's actions after conviction warrant denial of the transfer to prerelease custody. Failure of the judge to approve or deny the recommendation within 30 days would be treated as an approval.

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