

**Public Comment of Andrea James,
Executive Director
The National Council for Incarcerated and
Formerly Incarcerated Women and Girls
to
The Department of Justice
First Step Act Listening Session
April 12, 2019**

The National Council for Incarcerated & Formerly Incarcerated Women and Girls is the only national advocacy organization founded and led by incarcerated and formerly incarcerated women and girls. Organizing began in a federal prison yard with a group of women who were tired of policy makers instituting criminal justice reform without consulting any formerly incarcerated people – those who understand the harm the current system inflicts and have the expertise to create an alternative system that recognizes each person’s humanity.

While still incarcerated, these women founded “Families for Justice as Healing,” which is now doing profound criminal justice reform work in the Boston area. In 2015, Andrea James received a Soros Justice Fellowship and used her 18 months of support to launch the National Council – a platform of connectivity, networking, and support of advocacy organizations led by incarcerated and formerly incarcerated women and girls across the country. In its short history, the National Council has already had a significant impact, including acting as the voice of the incarcerated women who helped draft the Dignity Act, which mandated that women in federal prison receive adequate feminine hygiene supplies and have appropriate and adequate visitation and communication with their children.¹

The National Council is committed to abolishing incarceration for women and girls. As formerly incarcerated women, we believe a prison will never be the place to appropriately address the economic and psychological reasons women end up in prison. Prison most often causes further social and economic harm and does not effectively result in an increase in public safety. The prison experience increases trauma in women and, if they are mothers, to the children they are separated from. It deepens poverty in the individual lives of incarcerated people and the overall economic stability of their communities.

Although our long-term goal is to end the incarceration of women and girls, we are also working to address conditions of confinement for those still living inside prisons. Through our “Reimagining Communities” project,² a national infrastructure for supporting community-based initiatives led by incarcerated, formerly incarcerated, and directly affected women and girls, we support prison reform programs that are designed with the input of incarcerated women and work to keep people out of the legal system.

The National Council opposed the First Step Act because we felt that it did not sufficiently reduce the number of people in federal prisons who need to come home. According to NPR, as of April 1, 500 people have been released under the First Step Act, mainly due to the retroactive sentencing for crack cocaine and compassionate release for the terminally ill. That

¹ <https://justiceroundtable.org/dignity-act-for-incarcerated-women/>

² <https://www.nationalcouncil.us/reimagining-communities/>

amounts to .02% of the federal prison population³ and 18% of those eligible for release under the FSA according to the U.S. Sentencing Commission.⁴ A Justice Department press release issued on April 8 states that the retroactive application of the Fair Sentencing Act of 2010 “has resulted in 826 sentence reductions and 643 early releases.”⁵ We are pleased that the numbers of those being released are increasing and are committed to supporting implementation of the Act so that those who are eligible may reap all the benefits available.

The greatest impact of the FSA will be in providing good time credits for participating in programming – which is supposed to benefit some 150,000 incarcerated people.⁶ The Department’s first public act in implementing that program – naming the Hudson Institute as the “host” for the development of the “recidivism risk assessment tool” – further reinforces our impression that the First Step Act is neither groundbreaking nor bipartisan. We urge the Department to reconsider this decision and create a community oversight board that truly represents the political spectrum and makes a place for formerly incarcerated people to join the conversation.

The National Council also objects to determining appropriate programming for incarcerated people in terms of failure – namely recidivism. The premise of this exercise should not be that people will commit crimes once they are able to return home, i.e. recidivate. Instead, we should attempt to measure how well prepared each incarcerated person is for successful reentry into society.

The FSA requires the development of a “recidivism risk assessment” tool to determine every incarcerated person’s risk of recidivism at the beginning of their sentence and periodically thereafter. The person’s rating (minimum, low, medium, high) will determine what programming they are eligible for and whether they ultimately may be released early. The National Council is skeptical that this system can be implemented in a way that fully respects the individual circumstances and background of each incarcerated person.

At the very least, this risk assessment tool must be developed based on the principles listed below. This list is adapted from principles put together by the Leadership Conference for pre-trial risk assessments and to which 130 non-profit organizations, including the National Council, subscribed.⁷

The criminal justice reform community, especially incarcerated and formerly incarcerated people, must have significant input in designing the recidivism assessment instrument. The

³ Federal Bureau of Prisons, Statistics (Mar. 28, 2019),

https://www.bop.gov/about/statistics/population_statistics.jsp

⁴ Mathew Charles, *I Was Released Under the First Step Act*, Washington Post (Feb. 1, 2019),

https://www.washingtonpost.com/opinions/i-was-released-under-the-first-step-act-heres-what-congress-should-do-next/2019/02/01/1871f1f0-24bb-11e9-ad53-824486280311_story.html?noredirect=on&utm_term=.d696f1cb54df

⁵ Press Release, Dep’t of Justice, *Department of Justice Announces First Step Act Implementation Progress* (Apr. 8, 2019), <https://www.justice.gov/opa/pr/department-justice-announces-first-step-act-implementation-progress>

⁶ *Id.*

⁷ Leadership Council, *The Use of Pre-trial “Risk Assessments”: A Shared Statement of Civil Rights Concerns*, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf>

tool must then be “trained” and revalidated by independent data scientists who will work under meaningful community oversight. Specifically, the instrument should not be considered valid if it has any indication of racial bias.

The National Council therefore expresses concern that two of the three the social scientists in charge of developing this tool have professional backgrounds in the criminal justice system. This group has two men and one woman, none of whom are people of color or appear to have any connection to communities who are impacted by the criminal justice system. In order for their work to be legitimate, this group must be expanded to include social scientists from a wider demographic and political spectrum.

Recidivism instruments must presume that incarcerated people will successfully return to their communities at the end of their sentences and be designed to presume eligibility, i.e. a minimum or low rating, for early release. Under the FSA, incarcerated people who engage in programming are automatically eligible for early release to a halfway house or home incarceration unless they maintain a medium or high recidivism rating. In that case, their release is left up to the discretion of the Warden. In accordance with basic concepts of fairness and due process, a person’s release should not depend on a computer formula and the whim of a single person. Instead, anyone denied the benefits of the FSA should be entitled to a hearing and legal representation.