

MANAGING PRISONS BY THE NUMBERS: USING THE GOOD-TIME LAWS AND RISK-NEEDS ASSESSMENTS TO MANAGE THE FEDERAL PRISON POPULATION

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Any effort to evaluate modern-day correctional policy should address at least four subjects.¹ The first involves sentencing policy and asks how should we treat convicted offenders. We could incarcerate them in institutions varying in their degree of control from a low-security, incarceration-and-work-release program, to confinement in one of the so-called “super-max” facilities. In the alternative, we could place an offender on probation, which comes in varying degrees of intensity, or into a drug treatment program.² Subject number two deals with how we should treat those offenders that we choose to confine. The question is

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1. There are additional issues not discussed below that society also should address, such as how we should help at-risk people avoid committing crimes and getting caught up in the criminal justice system in the first place. Those issues, while important, are beyond the scope of this article.

2. For a creative probationary approach for offenders with substance abuse problems, see, for example, Hon. Steven S. Alm, *A New Continuum for Court Supervision*, 91 OR. L. REV. 1181 (2013); David A. Boyum & Mark A. R. Kleiman, *Substance Abuse Policy from a Crime-Control Perspective*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 331 (James Q. Wilson & Joan Petersilia eds., 2002); ANGELA HAWKEN & MARK A. R. KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE (2009), available at <http://nicic.gov/Library/024156>; Mark A. R. Kleiman & Kelsey R. Hollander, *Reducing Crime by Shrinking the Prison Headcount*, 9 OHIO ST. J. CRIM. L. 89 (2011); Mark A. R. Kleiman, *Controlling Drug Use and Crime with Testing, Sanctions, and Treatment*, in DRUG ADDICTION AND DRUG POLICY: THE STRUGGLE TO CONTROL DEPENDENCE 168, 171–75 (Philip B. Heymann & William N. Brownsberger eds., 2001). See generally Paul J. Larkin, Jr., *The Hawaii Opportunity Probation with Enforcement Project: A Potentially Worthwhile Correctional Reform*, THE HERITAGE FOUND. (Feb. 26, 2014), available at http://thf_media.s3.amazonaws.com/2014/pdf/LM116.pdf (analyzing the HOPE program and collecting authorities discussing it).

whether we should simply warehouse prisoners until they have served their sentences or provide them with educational, substance abuse, anger management, job-training programs and the like in the hope that those offerings may reduce, if not eliminate, the risk that they will recidivate.³ The third subject focuses on the question of whether, and if so when, we should release prisoners before they have completed their sentences. The three traditional mechanisms of early release are executive clemency, parole, and good-time laws. Each mechanism offers prisoners the reward of an early release if they can prove that they are rehabilitated or that they should be rewarded for good in-prison behavior.⁴ The last subject asks what, if any, assistance we should offer prisoners after their release in order to help them restart their lives and keep out of trouble.⁵

Recently, members of Congress in each chamber have displayed an interest in addressing those issues.⁶ At the front end of the process, the Smarter Sentencing Act of 2014⁷ would ex-

3. The Eighth Amendment's Cruel and Unusual Punishments Clause guarantees prisoners certain minimum conditions of confinement. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (ruling that overcrowding in California prison system violated the Cruel and Unusual Punishments Clause); *Hudson v. McMillan*, 503 U.S. 1, 4 (1992) (ruling that the state's use of excessive force against a prisoner can violate the Cruel and Unusual Punishments Clause); *Hutto v. Finney*, 437 U.S. 678, 680 (1978) (ruling that a state's use of punitive isolation violated the Cruel and Unusual Punishments Clause). The rehabilitation programs mentioned in the text are not constitutionally required, but may be valuable from a correctional perspective.

4. For a discussion of the options at the release stage of the process, see Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303 (2013); Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1 (2013) [hereinafter Larkin, *Reconsidering Early Release*].

5. *See* Larkin, *Reconsidering Early Release*, *supra* note 4, at 32–33 (discussing recent interest in prisoner "re-entry" programs).

6. For a summary of the various proposed reforms, see JULIE SAMUELS ET AL., URBAN INSTITUTE, *STEMMING THE TIDE: STRATEGIES TO REDUCE THE GROWTH AND CUT THE COST OF THE FEDERAL PRISON SYSTEM* (2013), available at <http://www.urban.org/UploadedPDF/412932-stemming-the-tide.pdf>.

7. S. 1410, 113th Cong. There are other bills under consideration too. Senators Patrick Leahy (D-VT) and Rand Paul (R-KY) have introduced the Justice Safety Valve Act of 2013, S. 619, 113th Cong., which would grant district courts discretion to depart below any mandatory minimum sentence, unlike the Smarter Sentencing Act 2013, which would apply principally to federal mandatory minimums for drug offenses. On January 30, 2014, the Senate Judiciary Committee considered S. 619 and S. 1410. The committee held over S. 619, but approved a revised version of S. 1410 by a 13-5 vote. *See* SENATE JUDICIARY COMM., 113TH CONG., RE-

pand a district court's discretion to sentence a defendant below a statutory mandatory minimum sentence in certain circumstances.⁸ At the back end of the process, the Second Chance Reauthorization Act of 2013⁹ would reauthorize various grant programs that help released prisoners assimilate themselves back into the community.¹⁰ In between those bookends are bills such as the Public Safety Enhancement Act of 2013¹¹ and the Recidivism Reduction and Public Safety Act of 2013.¹² Those bills propose some moderate reforms to the federal early-release programs and laws that have been in place since the 1980s. They would require the Bureau of Prisons (BOP) to use risk-needs assessments endorsed by the Attorney General in making some types of prisoner classification decisions and would increase the amount of good-time and earned-time credit that a prisoner can receive if he keeps his nose clean, completes certain rehabilitation programs, and proves himself unlikely to recidivate.

Each of those proposed reforms has positive and negative features, and each one is consistent with the others Congress could decide to reform every stage of the process, some of them, or none of them. That last outcome, however, is unlikely. Current fiscal pressures, humanitarian impulses, and bipartisan calls for reform may create the critical mass necessary to

SULTS OF EXECUTIVE BUSINESS MEETING—JANUARY 30, 2014, *available at* <http://www.judiciary.senate.gov/legislation/upload/113thCongressBusinessMeeting.pdf>.

8. The Smarter Sentencing Act of 2013 would permit a district judge to impose sentences without regard to any mandatory minimum if the court finds that the defendant has no more than two criminal history points, as defined by the U.S. Sentencing Guidelines, and the defendant was not convicted of a disqualifying offense, such as a violent crime. On January 30, 2014, the Senate Judiciary Committee approved a revised version of the original bill. SENATE JUDICIARY COMM., *supra* note 7.

9. Second Chance Reauthorization Act of 2013, S. 1690, 113th Cong.

10. *See* Larkin, *Reconsidering Early Release*, *supra* note 4, at 32–33 (discussing the Second Chance Act).

11. Public Safety Enhancement Act of 2013, H.R. 2656, 113th Cong.

12. Recidivism Reduction and Public Safety Enhancement Act of 2014, S. 1675, 113th Cong. Senator John Cornyn introduced a related bill, the Federal Prison Reform Act of 2013, S. 1783, 113th Cong., that sought to achieve the same goals as S. 1675. On March 6, 2014, the Senate Judiciary Committee reported a substitute version of S. 1675, one combining that bill with S. 1783. *See* SENATE JUDICIARY COMM., 113TH CONG., RESULTS OF EXECUTIVE BUSINESS MEETING—MARCH 6, 2014, *available at* <http://www.judiciary.senate.gov/legislation/upload/113thCongressBusinessMeeting.pdf>.

change public policy.¹³ If so, the question is, what reform(s) will Congress enact? Considerable scholarship has addressed the wisdom of mandatory minimum sentences and re-entry programs.¹⁴ Far fewer authors have addressed the middle issue: reform of the good-time system.¹⁵ This Article attempts to make up for that imbalance.

Part I explains that criminal justice officials historically have considered the likelihood that a particular offender will recidivate when those officials make decisions regarding how an offender should be treated before he is passed on to the next stage of the process. Part II explains how the current federal good-time system works. Part III then turns to how some proposed reforms of the federal good-time system would work and why they may improve the status quo. Part III.A. discusses the use of risk-needs assessments in making prisoner release decisions. It starts by summarizing the history, content, and value of risk-needs assessments that some parties—principally criminologists—have argued militate in favor of their use. It then goes on to describe the criticisms that some parties—principally lawyers—have levied against risk-needs assessments like the ones that the proposed good-time reforms would direct the Attorney General to adopt. That Part concludes by explaining how the current good-time reforms reasonably address those competing concerns by entrusting the Attorney General with the responsibility for balancing them. Part III.B. addresses why back-end reform of the correctional process through greater use of good-time credits not only may be valuable as a matter of policy, but also may prove more politically appealing than front-end reforms of the sentencing process.

13. For a discussion of the theory that society witnesses major public policy shifts only when three “streams” meet—the “problem” stream, the “policy” stream, and the “political” stream—see Paul J. Larkin, Jr., *John Kingdon’s “Three Streams” Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25 (2012).

14. For a discussion of the arguments pro and con on the wisdom of mandatory minimum sentences, see Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010). For a discussion of the equal protection and policy challenges to mandatory minimum sentences for possession and distribution of “crack” cocaine, see Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL’Y 241 (2013).

15. For one such effort, see Larkin, *Reconsidering Early Release*, *supra* note 4, at 31–34, 40–43.

I. THE UNAVOIDABLE BURDEN OF PREDICTING FUTURE
DANGEROUSNESS

Yogi Berra is reputed to have said that, "Making predictions is difficult, especially about the future." Here, as elsewhere, Yogi's homespun aphorism was on the mark. Making predictions is a difficult undertaking regardless of whether the issue is what stock will rise, who will win an upcoming election, who will prove to be a Major League Baseball star, or whether a particular offender will continue his errant ways. Indeed, imperfect knowledge and subjective biases make it difficult for each of us to predict our *own* futures, let alone someone else's. Complicating the process is the limited opportunity we may have to analyze the consequences of decisions (Where did I go wrong?) and our inability to compare those results with foregone alternatives (What if my life had been different?). Pharmaceutical companies can run double-blind tests to assess the therapeutic value of a new drug, but people cannot establish a parallel life to use for comparison.

Yet, the criminal justice system demands that personnel regularly make predictions about arrested and convicted offenders. If a suspect is released on bail, will he abscond? If a convicted defendant is given probation, will he turn his life around or continue to victimize the community? If he is incarcerated, where should he be confined—in a minimum-, intermediate-, or maximum-security facility? If a prisoner is allowed to participate in a work-release program, will he learn a trade or disrupt the workforce? If an inmate is released on parole, will he take advantage of that opportunity or commit another crime? If a probationer or parolee has violated a condition of his liberty, should he be allowed to retain that status or, if so, will he lose respect for the criminal justice system and commit more and more serious infractions down the road?

At numerous stages of the criminal process either a government official (a police officer, magistrate, judge, probation officer, parole board member, and so forth) or a member of the community (for example, a juror) must decide how to proceed based on his or her best judgment about the likely consequences of releasing or confining an offender. This almost always entails making a prediction of the offender's future dangerous-

ness.¹⁶ It may be difficult to estimate the likelihood that someone will commit a crime, but it is not an inherently impossible task.¹⁷ In fact, making such judgments was critical to the proper implementation of the rehabilitative ideal that the criminal justice system pursued throughout most of the twentieth century.¹⁸ The question always has been, not whether the criminal justice system should make such predictions, but how it should do so.¹⁹

The importance of making accurate predictions of recidivism has recently become a matter of critical concern to the criminal justice system. In the summer of 2013, U.S. Attorney General Eric Holder gave a speech to the American Bar Association in which he noted that, over the last forty years, the United States

16. See, e.g., *Kansas v. Crane*, 534 U.S. 407, 409 (2002) (upholding statute authorizing post-sentence indefinite commitment of sex offenders with a mental illness or abnormality creating a likelihood of future acts of sexual violence); *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (same); *United States v. Salerno*, 481 U.S. 739, 741 (1987) (upholding statute authorizing pre-trial confinement of defendants likely to be a danger to the community); *Barefoot v. Estelle*, 463 U.S. 880, 896 (1983) (upholding reliance on psychiatric prediction of future dangerousness); *Jurek v. Texas*, 428 U.S. 262, 275–76 (1976) (lead opinion) (upholding statute authorizing the jury in a capital case to determine if the offender will commit future criminal acts of violence).

17. As the Supreme Court explained in *Barefoot*, 463 U.S. at 897 (quoting *Jurek*, 428 U.S. at 274–76 (lead opinion)):

It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. Any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a [state] jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury has before it all possible relevant information about the individual defendant whose fate it must determine.

18. See, e.g., Larkin, *Parole: Corpse or Phoenix?*, *supra* note 4, at 307–15.

19. Some commentators criticize the criminal justice system's willingness to make legal decisions based on *disguised*, rather than *overt*, predictions of criminality or violence. See, e.g., Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001). That issue is beyond the scope of this Article, which focuses on the legitimacy of particular tools used in making quite overt predictions.

has greatly increased the number of prisoners in federal custody.²⁰ The growth in incarceration over that period has produced swollen prisons, tremendous increases in correctional budgets, and diversion of scarce criminal justice resources from institutions functioning at the pretrial and trial stages (for example, the FBI, Federal Public Defenders) to ones found at the back end of the system (for example, BOP).²¹ There seems to be a nascent consensus that this trend is unsustainable from a fiscal perspective and undesirable from a penological one.²²

The increase in the federal prison population over the last four decades has put considerable stress on the ability of the federal government to continue its current sentencing and correctional policies. Some of that stress is economic because the increase in the federal prison population has led to an increase in the cost of the current sentencing approach. As a practical matter, the result has been an increased share of the Department of Justice's budget that must be devoted to the housing and care of inmates. The remaining pressure is in part penological and in part humanitarian. Different parties have highlighted the disastrous personal and societal costs of large-scale imprisonment.²³ The result is a

20. See Eric Holder, U.S. Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>.

21. See, e.g., SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R41177, ECONOMIC ASPECTS OF PRISON GROWTH 15 (2010), available at <https://www.fas.org/sgp/crs/misc/R41177.pdf> ("The U.S. prison system has exploded in size and economic impact during the past three decades, due to a variety of factors including mandatory sentencing laws and tougher drug enforcement efforts.").

22. See, e.g., H.R. REP. NO. 112-169, at 64 (2011) ("[D]espite a dramatic increase in corrections spending over the past two decades, re-incarceration rates for people released from prison are largely unchanged. This trend is both financially and socially unsustainable . . ."); Memorandum from Michael Horowitz, Inspector General, U.S. Department of Justice, to the Attorney General and Deputy Attorney General Regarding Top Management and Performance Challenges Facing the Department of Justice (reissued Dec. 23, 2013), available at <http://www.justice.gov/oig/challenges/2013.htm> ("The crisis in the federal prison system is two-fold. First, the costs of the federal prison system continue to escalate, consuming an ever-larger share of the Department's budget with no relief in sight. . . . Second, federal prisons are facing a number of important safety and security issues, including, most significantly, that they have been overcrowded for years and the problem is only getting worse.").

23. See, e.g., TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 103 (2007); Jeffrey Fagan, *Crime, Law, and the Community: Dynamics of Incarceration in New York City*, in THE FUTURE OF IMPRISONMENT 27, 42-47 (Michael Tonry ed., 2004); Joan Petersilia,

bipartisan concern with the current use of imprisonment to serve the needs of the criminal justice system.

II. THE FEDERAL GOOD-TIME LAWS

The government may confine a lawfully convicted offender for whatever term is imposed by the sentencing court.²⁴ Nonetheless, the federal and state criminal justice systems have used several different mechanisms for deciding whether and, if so, when a prisoner should be released from custody before the expiration of his sentence.²⁵ The two best-known tools were executive clemency and parole, but a third procedure has existed alongside those two for more than a century.²⁶ Originally known as “commutation laws,” good-time statutes are a longstanding prison management tool.²⁷ New York adopted the first good-time statute nearly two centuries ago, and by the end of the century forty-four other states had similar laws.²⁸ The federal government enacted its first good-time law in 1875.²⁹ Good-time statutes help a warden and guards maintain discipline by offering an inmate the carrot of a limited amount of credit toward an early release in return for “good behavior.”³⁰ In theory, prisoners would have to earn early release credit. In practice, however, wardens often have applied good-time laws “perfunctorily, so

Community Corrections, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL 494 (James Q. Wilson & Joan Petersilia eds., 2002).

24. See, e.g., *Meachum v. Fano*, 427 U.S. 215, 224 (1976). A prisoner has no constitutional right to any form of early release. See, e.g., *Swarthout v. Cooke*, 131 S. Ct. 859, 862 (2011); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

25. See, e.g., Larkin, *Reconsidering Early Release*, note 4, at 5–11.

26. For a discussion of the history and operation of executive clemency and parole, see, for example, JEFFREY CROUCH, *THE PRESIDENTIAL PARDON POWER* (2009); RONALD L. GOLDFARB & LINDA R. SINGER, *AFTER CONVICTION* (1973); PETER B. HOFFMAN, *HISTORY OF THE FEDERAL PAROLE SYSTEM* (2003); KATHLEEN DEAN MOORE, *PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST* (1989); JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003); Larkin, *Reconsidering Early Release*, *supra* note 4, at 5–10.

27. See, e.g., GOLDFARB & SINGER, *supra* note 26, at 262; Larkin, *Reconsidering Early Release*, *supra* note 4, at 11.

28. *Id.*

29. See Act of Mar. 3, 1875, ch. 145, 18 Stat. 479, 480.

30. See, e.g., GOLDFARB & SINGER, *supra* note 26, at 262; KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 17 (1998); Larkin, *Reconsidering Early Release*, *supra* note 4, at 11.

that earning good time became automatic. Thus discipline was exercised by withholding good-time credit for gross misconduct, instead of by using early release as a reward.”³¹

For most of the twentieth century, a prisoner in the federal system was eligible for a graduated scale of good-time credit per month depending on the length of his sentence, whether he was employed in a prison industry or camp, and whether he had performed an “exceptionally meritorious service” or a duty “of outstanding importance in connection with institutional operations.”³² A prisoner could forfeit good time credit if he committed a crime or violated a disciplinary rule (although the Attorney General could restore lost good time).³³ Congress revised the good-time system in 1984. Today, a prisoner earns up to fifty-four days of credit for each year unless BOP finds that he has not satisfactorily complied with disciplinary rules.³⁴ The BOP also may grant a nonviolent offender additional credit if he completes a substance abuse program.³⁵ The formula for calculating the amount of good-time credits that a federal prisoner can earn, and the procedural protections that those prisoners enjoy, have undergone some minor revisions throughout the last century, but the basic purpose and outline of good-time laws have remained unchanged since their origin.

That stability makes the good-time laws stand out among the mechanisms historically used to fix an offender’s punishment. The last century witnessed fundamental changes in the nature of the sentencing and parole processes, as well as in the frequency with which presidents and governors have exercised their clemency power.³⁶ Under the indeterminate sentencing model used by the federal government and states for most of the twentieth century to rehabilitate offenders, trial courts had

31. GOLDFARB & SINGER, *supra* note 26, at 262.

32. *See* 18 U.S.C. §§ 4161–4162 (1982) (repealed). The 1875 federal good time statute offered prisoners five days of credit per year toward release for good conduct. *Id.*; 18 U.S.C. § 4161 (1982) (repealed 1984). Congress later increased the maximum available good time credit to fifty-four days. *See* 18 U.S.C. § 3624(b) (2012).

33. *See* 18 U.S.C. §§ 4161–4162, 4165 (1982) (repealed); *Barber v. Thomas*, 560 U.S. 474, 480–83 (2010); S. REP. NO. 98-225, at 146 & n.359 (1983).

34. *See* 18 U.S.C. § 3624(b) (2012); 28 C.F.R. §§ 523.20, 541.13 (2011); S. REP. NO. 98-225, at 147 (1983).

35. *See* 18 U.S.C. § 3621(e)(2) (2012).

36. *See, e.g.,* Larkin, *Parole: Corpse or Phoenix?*, *supra* note 4, at 306–20; Larkin, *Reconsidering Early Release*, *supra* note 4, at 5–11.

broad discretion to select the potential period of confinement that an offender could be made to spend in prison, and parole boards had comparably broad authority to decide exactly when an inmate had been rehabilitated and therefore should be released. As parole boards exercised their power to release prisoners whom they concluded had been rehabilitated (or just to ease prison overcrowding), chief executives exercised their clemency powers less and less often. By the 1980s, parole had become the principal mechanism for deciding exactly what term of imprisonment an offender would serve, vastly outpacing the other mechanisms in frequency of use.³⁷

The last quarter of the twentieth century, however, witnessed two fundamental changes in the criminal process. First, retribution, deterrence, and (most importantly) incapacitation replaced rehabilitation as the governing rationales for punishment.³⁸ Second, legislatures, including Congress, substituted determinate for indeterminate sentencing schemes, sometimes by using sentencing guidelines,³⁹ sometimes via fixed or mandatory minimum sentences,⁴⁰ and sometimes with recidivist or so-called “three strikes laws.”⁴¹ In each case, however, legislation imposed, or contemplated that the U.S. Sentencing Commission would promulgate, stiff penalties for breaking the law.⁴²

The new approach to sentencing and the elimination of parole, however, did not affect the rationale for or the operation of the good-time laws. Those statutes existed side-by-side with the determinate sentencing and parole laws but served a very different purpose. Rather than help a judge decide what punishment is necessary to satisfy the public’s demand for retribution or incapacitation or to assist a correctional official in determining

37. See, e.g., Larkin, *Reconsidering Early Release*, *supra* note 4, at 7.

38. See, e.g., Larkin, *Parole: Corpse or Phoenix?*, *supra* note 4, at 312-15.

39. See, e.g., Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3586 and 28 U.S.C. §§ 991-998 (1988)).

40. See, e.g., Armed Career Criminal Act, 18 U.S.C. § 924 (2006); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 841 (2006), as amended by the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372).

41. See, e.g., *Ewing v. California*, 538 U.S. 11, 20 (2003) (rejecting an Eighth Amendment challenge to California’s “three-strikes” law).

42. See, e.g., Larkin, *Parole: Corpse or Phoenix?*, *supra* note 4, at 317-20; Larkin, *Reconsidering Early Release*, *supra* note 4, at 5-11.

whether an inmate had reformed his ways, good-time laws give prison officials a tool, or “carrot,” that they could use to manage the prison environment.⁴³ That environment has not changed over the last thirty years. If anything, current conditions may be worse today than they were when Congress enacted the Sentencing Reform Act of 1984 because of the greater number of federal prisoners crowded into BOP facilities.⁴⁴

III. A NEW APPROACH TO CORRECTIONAL DECISIONMAKING

One way to address the prison-overcrowding problem is to grant an early release to prisoners who are unlikely to reoffend. Two bills pending before Congress—the Public Safety Enhancement Act of 2013 (PSEA)⁴⁵ and the Recidivism Reduction and Public Safety Act of 2013 (RRPSA)⁴⁶—would move the federal criminal process toward that goal. Two features of those bills are of particular importance here. Together they would direct the Attorney General to develop a risk-needs assessment for BOP use in connection with a revised good-time or earned-time credit system that would provide an early release for some federal prisoners. Each of those components works with the other. The bills would empower BOP officials to use risk-needs assessments—predictive tools used to gauge the likelihood that a prisoner will recidivate—making classification decisions, which affect the amount of good-time credit available.

Risk-needs assessments are valuable because, according to their supporters, they are designed to help eliminate errors caused by subjective decisionmaking. They also are controversial because, according to their detractors, they use factors such as sex and age that raise troublesome equal protection issues. Part III.A. surveys those potential plusses and minuses. The reform bills also involve use of good-time and earned-time

43. See, e.g., 18 U.S.C. § 3624(b) (2012) (good-time credits offer a prisoner an incentive to “compl[y] with institutional disciplinary regulations”); *Barber v. Thomas*, 560 U.S. 474, 483–85 (2010).

44. See, e.g., Larkin, *Reconsidering Early Release*, *supra* note 4, at 12–13.

45. Public Safety Enhancement Act of 2013, H.R. 2656, 113th Cong.

46. Recidivism Reduction and Public Safety Act of 2014, S. 1675, 113th Cong. The Senate Judiciary Committee combined the RRPSA and the Federal Prison Reform Act of 2013, S. 1783, 113th Cong. (FPRA), into one bill, which the committee reported as the RRPSA. Going forward, this Article will refer to the RRPSA, not the FPRA.

statutes, which establish an incentive-based system for prisoners. Such laws hold out the prospect of credit toward an early release for inmates who maintain good behavior (good-time laws) or who complete available rehabilitative or drug-treatment programs (earned-time laws). The bills would allow inmates to earn different credit depending on whether they are classified as low-, medium-, or high-risk prisoners. Part III.B. discusses that feature.

A. *The Use of Risk-Needs Assessments to Make Prison Classification and Release Decisions*

Risk-needs assessments are tools that correctional officials can use to make classification decisions when an offender is slated for imprisonment and to make predictions as to the likelihood that a prisoner will recidivate if he is released. Of course, many tools (for example, a hammer) can be used for their intended benign purposes (to pound nails) or for harm (as a weapon), but are not deemed inherently flawed or illegitimate. Some parties, however, have challenged use of risk-needs assessments on such grounds. Before addressing those criticisms, this Article will examine the argument advanced in favor of risk-needs assessments.

1. *The Endorsement of Risk-Needs Assessments by Criminologists*

There are two methods for predicting the likelihood that a particular offender will commit future crimes or acts of violence. One is to make a so-called “clinical” assessment of the offender to predict that risk. For most of our history, judges, probation and parole officers, wardens, and other correctional officials have made those judgments based on their individual reviews of an offender’s case file filtered through their personal assumptions, beliefs, education, training, intuitions, and experiences. “The theory was that new medical, sociological, and psychological theories and techniques could transform a prison from ‘the black flower of civilized society’ into the equivalent of a hospital where prisoners would be treated and reformed, rather than punished.”⁴⁷ The key was to grant officials unlimited discretion and allow them to consider any and all evidence

47. Larkin, *Parole: Corpse or Phoenix?*, *supra* note 4, at 309 (quoting NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 38 (1962)) (footnotes omitted).

that they deemed relevant.⁴⁸ The principal criticism of that approach is, and always has been, that it is entirely subjective in nature. Even if each professional had access to a complete history of the offender and focused exclusively on what steps should be taken to benefit the offender and the public, there always was the risk that comparable professionals would treat seemingly identical cases differently. The result was the actuality or appearance of arbitrary or discriminatory decisionmaking. In fact, that was Congress's complaint with the discretionary sentencing process that federal district court judges used for most of the twentieth century and was the reason why in 1984 Congress established a sentencing guidelines system to bring order to the federal sentencing process.⁴⁹

The second approach is a statistical or actuarial approach, commonly known today as a risk-needs assessment.⁵⁰ A risk-needs assessment is an actuarially-based prediction of the likelihood of a particular individual committing one or more types of infractions while on release pending trial or sentencing, while in custody, or while on probation or parole.⁵¹ This tool directs the decisionmaker away from resort to personal knowledge, experience, and judgment and towards reliance on a formula consisting of scored objective factors based on data compiled from a

48. See, e.g., 18 U.S.C. § 3577 (2006) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); *Williams v. New York*, 337 U.S. 241, 247 (1949).

49. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 363–67 (1989); Larkin, *Parole: Corpse or Phoenix?*, *supra* note 4, at 329–31.

50. The literature discussing risk-needs assessments is sizeable. See, e.g., CHRISTOPHER BAIRD, NAT'L COUNCIL ON CRIME & DELINQUENCY, A QUESTION OF EVIDENCE: A CRITIQUE OF RISK ASSESSMENT MODELS USED IN THE JUSTICE SYSTEM (2009); MARSHALL CLEMENT ET AL., THE COUNCIL ON STATE GOV'TS JUSTICE CTR., THE NATIONAL SUMMIT ON JUSTICE REINVESTMENT AND PUBLIC SAFETY: ADDRESSING RECIDIVISM, CRIME, AND CORRECTIONS SPENDING (2011); THE COUNCIL ON STATE GOV'TS JUSTICE CTR., STATES REPORT REDUCTIONS IN RECIDIVISM (2012); MIKE EISENBERG ET AL., THE COUNCIL ON STATE GOV'TS JUSTICE CTR., VALIDATION OF THE WISCONSIN DEPARTMENT OF CORRECTIONS RISK ASSESSMENT INSTRUMENT (2009); Don A. Andrews, *Recidivism Is Predictable and Can Be Influenced: Using Risk Assessments to Reduce Recidivism*, RISK ASSESSMENT & PREDICTION, Dec. 1989, at 11; James Austin, *The Proper and Improper Use of Risk Assessment in Corrections*, 16 FED. SENTENCING REP. 194 (2004); Garth Davies & Kelly Dedel, *Violence Risk Screening in Community Corrections*, 5 CRIMINOLOGY & PUB. POL'Y 743 (2006).

51. See, e.g., John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391 (2006).

large number of cases. Risk-needs assessments enable criminal justice professionals to make predictions in a manner akin to the actuarial calculations that insurance companies use to set life insurance premiums. Just as a person who smokes will pay a higher premium than a nonsmoker will, so, too, will an unemployed, drug-using, recidivist gang member receive a score indicating a higher risk of reoffending than someone without those characteristics.⁵² Criminologists have long endorsed these tools because research has shown that predictions of future dangerousness or recidivism are more accurate when based on a pool of actuarial data than on clinical judgments.⁵³

Once described as “a uniform report card” for offenders,⁵⁴ a risk-needs assessment evaluates pluses and minuses, shortcomings and needs, related to an offender’s life in order to estimate the likelihood of his dangerousness or recidivism with and without treatment to reduce that risk.⁵⁵ Among the relevant offender characteristics are the following: age; sex; criminal, educational, and employment history; financial, family, and mental history and status; living arrangements; leisure and recreational activities; friends, companions, and associates; alcohol and drug use; emotional issues; antisocial thinking; and personal attitudes.⁵⁶ There is more than one type of risk-needs assessment, but they all rely on those factors because research has shown

52. See, e.g., Edward J. Latessa & Brian Lovins, *The Role of Offender Risk Assessment: A Policy Maker Guide*, 5 VICTIMS & OFFENDERS 203 (2010).

53. See, e.g., JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES 77 (1981) (clinical predictions of future violence are inaccurate more often than not); FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 96–97, 318 n.19 (2006) (listing studies favoring actuarial assessments); J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1343 & n.88, 1347–68, 1372 & nn.338–40 (2011) (describing and listing studies); Christopher Lowenkamp, et al., *The Risk Principle in Action: What Have We Learned from 13,676 Offenders and 97 Correctional Programs?*, 52 CRIME & DELINQUENCY 77 (2006).

54. PUB. SAFETY PERFORMANCE PROJECT, PEW CTR. ON THE STATES, RISK/NEEDS ASSESSMENT 101: SCIENCE REVEALS NEW TOOLS TO MANAGE OFFENDERS 1 (2011) [hereinafter RISK/NEEDS ASSESSMENT 101].

55. See, e.g., *Malenchik v. State*, 928 N.E.2d 564, 566–67 (Ind. 2010).

56. See, e.g., Oleson, *supra* note 53, at 1353–68. Those offender characteristics are similar to the ones that Congress directed the U.S. Sentencing Commission to consider when defining the formula for use in calculating an offender’s criminal history score under the U.S. Sentencing Guidelines. See 28 U.S.C. § 994(d) (2006).

that they have powerful predictive ability.⁵⁷ A risk-needs assessment does not, however, substitute for the judgment that correctional officials must exercise when making classification or release decisions; it merely supplements the official's exercise of his or her discretion by providing objective information.⁵⁸

Risk-needs assessments are now in their fourth generation. The first generation of instruments involved purely clinical assessments of the likelihood of recidivism. The second generation started the process toward relying on analyses of macro-level statistical results to make predictive judgments. At that point, all of the factors were static (for example, arrest record) and, therefore, were unable to change or be changed over time. The third generation of risk-needs assessments added dynamic factors (for example, substance abuse, lack of education) that enabled professionals to identify the particular areas that need to be addressed and that allow an offender to demonstrate improvement. The inclusion of dynamic factors is a particularly valuable advance. Common sense suggests, and research indicates, that factors such as substance abuse, poor family or marital relationships, poor performance in school or in the job market, and having other offenders as friends and associates are closely related to continuing criminal behavior. Once correctional officials identify relevant dynamic factors, also known as criminogenic needs, the correctional process can attempt to

57. See, e.g., Monahan, *supra* note 51, at 415 ("Few would dispute the conclusion that . . . [a]ge is one of the major individual-level correlates of violent offending. In general, arrests for violent crime peak around age 18 and decline gradually thereafter." (footnote omitted)); *id.* at 416 ("That women commit violent acts at a much lower rate than men is a staple in criminology and has been known for as long as official records have been kept."); *id.* at 418 ("[A] constellation of related psychological characteristics including hyperactivity, attention or concentration deficits, impulsivity, and risk taking has revealed . . . consistent predictions of violence." (footnote omitted)); *id.* at 420 ("[T]here appears to be a greater-than-chance relationship between mental disorder and violent behavior. Mental disorder may be a statistically significant risk factor for the occurrence of violence."); *id.* at 423 ("Criminologists have repeatedly demonstrated that prior violence and criminality are strongly associated with future violence and criminality."); *id.* at 425 ("It is a widely recognized tenet of developmental psychology that exposure to a pathological family environment as a child is a risk factor for violence committed as an adult."); *id.* at 426–27 ("Those who had been abused or neglected as children were more likely to be arrested as juveniles (27 percent versus 17 percent), adults (42 percent versus 33 percent), and for violent crime (18 percent versus 14 percent)."). See generally Oleson, *supra* note 52, app. at 1399 (summary of variables used in different risk-needs assessments).

58. See, e.g., Latessa & Lovins, *supra* note 53, at 210–12.

help an offender overcome them through available programs (for example, drug treatment, literacy education, and cognitive behavioral treatment). The current generation tops off the analysis by introducing case management techniques.⁵⁹

Criminal justice officials currently use risk-needs assessments to make everyday decisions at each stage of the criminal process: to identify offenders most likely to commit another crime or to violate a condition of their release; to determine the level of supervision an offender needs (for example, low, medium, or high intensity); to make placement decisions regarding available programs (for example, day reporting centers, half-way houses, substance abuse counseling); and to select release conditions most likely to keep someone from reoffending (for example, holding a job, avoiding old associates, weekly random drug testing).⁶⁰ In conclusion, criminologists have persuaded numerous policymakers that risk-needs assessments are superior to purely discretionary decisionmaking.

2. *The Criticism of Risk-Needs Assessments by Lawyers*

Opponents of risk-needs assessments have assailed their use principally on constitutional grounds.⁶¹ Their threshold argu-

59. See, e.g., *Malenchik*, 928 N.E.2d at 569–71; RISK/NEEDS ASSESSMENT 101, *supra* note 54, at 3; Latessa & Lovins, *supra* note 52, at 203. Among the risk-needs assessments used are the Level of Service/Case Management Inventory (both the original and revised versions), the Violence Risk Appraisal Guide, the Lifestyle Criminality Screening Form, the Correctional Offender Management Profiling for Alternative Sanctions, the Risk Prediction Index, and the U.S. Parole Commission's Salient Factor Score. See, e.g., Oleson, *supra* note 53, at 1348–49.

60. For example, research has shown that the criminal justice system must focus its attention on high-risk parties, the ones with the greatest likelihood of reoffending. Focusing on high-risk parties can reduce a greater number of offenses, and more serious ones, than concentrating on low-risk offenders, thereby giving the criminal justice system a greater return from the investment of its scarce resources. What is more, subjecting low-risk offenders to intensive treatment has the undesirable consequence of increasing the likelihood of their recidivism. For example, low-risk offenders do not require the highly structured residential programs necessary for high-risk offenders, and forcing them to participate in such programs likely would disrupt their family lives and cost them their jobs. Moreover, bringing low-risk offenders into contact with high-risk offenders in a residential setting would teach them all the wrong lessons. See, e.g., *Malenchik*, 928 N.E.2d at 569–71; Christopher T. Lowenkamp & Edward J. Latessa, *Increasing the Effectiveness of Correctional Programming Through the Risk Principle: Identifying Offenders for Residential Placement*, 4 CRIMINOLOGY & PUB. POL'Y 263 (2005).

61. See, e.g., BERNARD E. HARCOURT, *AGAINST PREDICTING: POLICING, PROFILING, AND PUNISHMENT IN AN ACTUARIAL AGE* (2007); Sonja B. Starr, *Evidence-Based*

ment is that risk-needs assessments are illegitimate tools for making release decisions about suspects, defendants, and convicted offenders because those assessments rely on impermissible factors. For example, although risk-needs assessments do not use race as an aggravating factor, they classify low income or lack of employment in that manner even though those factors might highly correlate with race and therefore could mask racial discrimination.⁶² Moreover, risk-needs assessments clearly denominate an offender's sex (and age) as an aggravating factor, because assessments treat men (especially young men) as more likely to commit crimes (particularly violent crimes) than women. Equal protection law and principles, however, make it impermissible, or at least presumptively unlawful, to rely on sex as a basis for enhancing a penalty.⁶³

Critics' second line of attack goes as follows. Discrimination based on sex and age is not only offensive, but also arbitrary, for at least three reasons. First, it is unfair to predict an offender's likelihood of recidivism due to factors over which he or she has no control, such as sex and age. Second, it is irrational to treat sex and age as aggravating factors because they are unrelated to blameworthiness. And, third, it is unreasonable to base a prediction of the likelihood that *a particular offender* will recidivate based on one or more features that he or she shares with *a category of people*. Accordingly, critics maintain that, when predicting recidivism or dangerousness, criminal justice actors should focus on the aggravating and mitigating features of

Sentencing and the Scientific Rationalization of Discrimination, 66 STAN. L. REV. 803 (2014); Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism* (Minnesota Legal Studies Research Paper No. 13-51, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2329849&download=yes.

62. *Cf., e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 661–62 (1983) (holding unconstitutional a trial judge's decision to revoke an indigent offender's probation for non-payment of court-ordered restitution).

63. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 192 (1976) (holding unconstitutional a state law that set a higher drinking age for men than women despite evidence showing that men were arrested for drunk driving more often than women); *cf.* 28 U.S.C. § 994(d) (2006) ("The [U.S. Sentencing] Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.").

each particular crime and criminal and should eschew group characteristics, such as sex and age.⁶⁴

There are, of course, responses to those arguments. Income level is not an inherently invidious basis for classification,⁶⁵ and it is hardly irrational to conclude that a parolee without a lawful source of income is likely to return to crime to make ends meet. If, however, there is too great a risk that correctional officials might use poverty as camouflage for race, then courts can carefully scrutinize use of that particular feature or eliminate it altogether without condemning risk-needs assessments in the process. Moreover, equal protection law does not flatly prohibit the government from using sex or age as a basis for classification. The government must have a rational explanation for differentiating among offenders based on their age⁶⁶ and must have a strong justification for resting differential treatment of offenders on their sex.⁶⁷ The evidence, however, would support the use of both factors in making recidivism predictions. Indeed, there seems to be little disputing that males, particularly relatively young men, commit more crimes, particularly violent crimes, than females of any age. If so, it would be irrational *not* to take those factors into account when predicting future criminality.⁶⁸

64. Another criticism is that risk-needs assessments irrationally treat as aggravating factors offender characteristics that arguably mitigate blameworthiness, such as having been a victim of child abuse.

65. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17–29 (1973).

66. *See, e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83–84 (2000) (ruling that the government may discriminate based on age unless the distinction is so unrelated to a legitimate governmental function as to be irrational); *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (noting that discrimination on the basis of age may be upheld if it is rationally related to a legitimate governmental interest); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (ruling that age is not a “suspect category” and that discrimination on the basis of age is subject to only rational basis review).

67. *See, e.g.*, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) (stating that the government may discriminate based on sex if the classification serves important government interests and the means chosen are substantially related to their achievement); *United States v. Virginia*, 518 U.S. 515, 531 (1996) (stating that governmental sex-based discrimination can be upheld only based on “an exceedingly persuasive justification” (citation omitted)).

68. *See, e.g.*, MELISSA S. KEARNEY ET AL., *THE HAMILTON PROJECT*, BROOKINGS, TEN ECONOMIC FACTS ABOUT CRIME AND INCARCERATION IN THE UNITED STATES: POLICY MEMO 6 (2014), available at <http://www.brookings.edu/research/reports/2014/05/10-crime-facts> (“55 percent of offenders committing crimes against persons (such as assault and sex offenses) were ages eleven to thirty. For crimes against property (such as larceny-theft and vandalism) and crimes against society

Additionally, the criminal justice system has not unfairly targeted men, especially young men, for disparate treatment simply due to statistically and morally unjustified stereotypical views about their sex and age. The evidence justifies treating men differently from women. Finally, there is no reason to forbid the criminal justice system from relying on sex and age as a means of compensating for a history of invidious discrimination.⁶⁹

What is more, contrary to what critics say, risk-needs assessments reduce the peril of arbitrary decisionmaking. Risk-needs assessments rely on objective, statistically defensible factors. With exceptions for sex and age, risk-needs assessment factors are the type of considerations that, in 1984, Congress directed the United States Sentencing Commission to use when drafting the U.S. Sentencing Guidelines.⁷⁰ Risk-needs assessments therefore reduce the danger that an official's individual attitudes, beliefs, experiences, and prejudices will prove dispositive. Moreover, it is no argument to posit that correctional officials must have unlimited discretion to make release decisions on the grounds that the only legitimate punishments are ones that assume free will on the part of every offender, that every sanction must be entirely rehabilitative in nature, or that every particular

(including drug offenses and weapon law violations), 63 percent and 66 percent of offenders, respectively, were individuals in the eleven-to-thirty age group. . . . A stark difference in the number of offenders by gender is also evident. Most crimes—whether against persons, property, or society—are committed by men; of criminal offenders with known gender, 72 percent are male. This trend for gender follows for crimes against persons (73 percent), crimes against property (70 percent), and crimes against society (77 percent) Combined, these facts indicate that most offenders in the United States are young men." (citation omitted)). Monahan, *supra* note 51, at 432 ("Professors Martin Daly and Margo Wilson have recently reported violence rates for 'a community made up exclusively of one' gender. They assembled data from twenty studies of homicides among unrelated people in which the offender and the victim were of the same gender. The studies were conducted in the United States, Canada, England, Mexico, Iceland, India, Nigeria, Uganda, Kenya, and Botswana over periods ranging from the 1920s to the 1990s. Their results showed that male offender/male victim homicides made up ninety-eight percent of the total while female offender/female victim homicides made up the remaining two percent. Regarding violence, it is hard to gainsay the conclusion of Professors Michael Gottfredson and Travis Hirschi's classic, *A General Theory of Crime*: '[G]ender differences appear to be invariant over time and space.'" (footnotes omitted)); Robinson, *supra* note 19, at 1451 ("Evidence suggests that criminality is highly age-related. Whether due to changes in testosterone levels or something else, the offending rate drops off steadily for individuals beyond their twenties." (footnote omitted)); *supra* note 57.

69. See, e.g., SCHAUER, *supra* note 53, at 150–51 (explaining compensation theory).

70. See *supra* text accompanying note 49.

offender must receive an individualized sentence, one that rests entirely on his or her blameworthiness as shown by the facts and circumstances of each crime.⁷¹ Congress can justify punishment on several grounds, including the need to incapacitate dangerous offenders.⁷² Congress also can make generalizations by defining specific punishments for crime, rather than leave sentencing decisions to the unrestrained discretion of judges or juries.⁷³ Of course, Congress is free to delegate to judges, juries, and other criminal justice actors the authority to make case-specific judgments about a particular offender's future dangerousness or likely recidivism.⁷⁴ But Congress also can cabin that party's authority by directing a decisionmaker to use objective deci-

71. Not everyone believes that a discussion of "free will" advances the ball very far in criminal justice. *See, e.g.*, HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 74–75 (1968) ("Very simply, the law treats man's conduct as autonomous and willed, not because it is, but because it is very desirable to proceed as if it were."). To some extent opponents of risk-needs assessments mistakenly posit that the criminal justice system must choose between different sentencing goals, such as retribution and rehabilitation. *See* GEORGE BERNARD SHAW, *22 THE COLLECTED WORKS OF GEORGE BERNARD SHAW* 173, 184 (1932) ("Now, if you are to punish a man retributively, you must injure him. If you are to reform him, you must improve him. And men are not improved by injuries."). In fact, the criminal process tries—however roughly, however imperfectly, however unsuccessfully—to achieve several of those goals simultaneously. *See, e.g.*, MODEL PENAL CODE § 1.02(2) (1962); *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme.") (citations and internal quotation marks omitted); Robinson, *supra* note 19, at 1454 ("Real world problems commonly present us with conflicting interests that cannot be reconciled but can only be compromised."). Finally, there is no guarantee that individualized decisionmaking is invariably more accurate than rule-based approaches. *Cf.* *United States v. Fior D'Italia, Inc.*, 536 U.S. 238, 251–52 (2002) (upholding on that ground the IRS "aggregate" rule used to calculate the quantity of tips received by employees for tax purposes).

72. *See, e.g.*, *Ewing*, 538 U.S. at 25 (plurality opinion) ("[T]he Constitution does not mandate adoption of any one penological theory Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.") (citations and internal quotation marks omitted); Robinson, *supra* note 19, at 1438 ("[C]onflicts between pursuing justice and incapacitating dangerous persons should come as no surprise. Dangerousness and desert are distinct criteria that commonly diverge. Desert arises from a past wrong, whereas dangerousness arises from the prediction of a future wrong. A person may be dangerous but not blameworthy, or vice versa.").

73. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding legislature's authority to impose mandatory sentences); *Chapman v. United States*, 500 U.S. 453 (1991) (same); *Ex parte United States*, 242 U.S. 27 (1916) (same).

74. *See supra* note 16 (collecting cases upholding such judgments).

sionmaking factors in order to reduce the hazard of making decisions arbitrarily.⁷⁵

Each side—the advocates for and critics of risk-needs assessments—has a reasonable argument. The questions, then, are these: Who should decide whether those claims have merit, what weight should each argument receive, and which side is right? The political branches have the final word on matters of federal policy,⁷⁶ but the courts have the final say on all matters of law.⁷⁷ It turns out, however, that the PSEA and RRPSA reasonably seek to accommodate both sides of this debate.

3. *Balancing the Pros and Cons of Risk-Needs Assessments*

In their current form, the PSEA and RRPSA are not identical, but they are quite similar. The two bills would direct the Attorney General, after consulting with certain other specified federal officials and private experts,⁷⁸ to develop a post-sentencing risk-needs assessment for BOP's use that would measure the likelihood an incoming offender might recidivate.⁷⁹ Using that system, the BOP would classify prisoners as having a low,

75. See, e.g., MODEL PENAL CODE § 210.6 (recommending various aggravating and mitigating factors for use in capital sentencing); *Gregg v. Georgia*, 428 U.S. 153, 912–15 (1976) (lead opinion) (approving the use of aggravating and mitigating factors in capital sentencing).

76. See, e.g., *INS v. Chadha*, 462 U.S. 919, 944 (1983) (“We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained[.]”).

77. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

78. Under the PSEA, the Attorney General must consult with federal government officials such as the BOP Director, the Director of the Administrative Office of the United States Courts, the Assistant Director of the Office of Probation and Pretrial Services, the Chair of the U.S. Sentencing Commission, the Director of the National Institute of Justice, and other “relevant stakeholders.” PSEA § 3(a). The RRPSA directs the Attorney General to confer with “academic and other criminal justice experts as appropriate.” RRPSA § 3(a) (quoting proposed new 18 U.S.C. § 3621A(b)(1)(A)). The proposed new Section 3621A(a) would create a “Post-Sentencing Risk and Needs Assessment System.”

79. See PSEA § 3(b)(3)–(4); RRPSA §§ 2(b), 3(a) (quoting proposed new 18 U.S.C. § 3621A(b)–(c)). The new federal risk-needs assessment must include “dynamic risk factor[s]”—that is, “characteristic[s] or attribute[s] that [have] 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 completion of appropriate programming or other means, in a prison setting.” RRPSA § 3(h) (quoting proposed new 18 U.S.C. § 3621A(h)(1)).

moderate, or high risk of recidivism.⁸⁰ In so doing, the Attorney General must consider the best risk-needs assessment tools already in use and must validate whatever assessment he or she chooses based on the then-current federal prison population.⁸¹ The BOP, in turn, would use that assessment when assigning prisoners to specific facilities, deciding which recidivism reduction programs are appropriate for a particular inmate, and periodically reassessing a prisoner's likelihood of reoffending.⁸² With the exception of certain prisoners who would be ineligible to earn early release credit, such as offenders convicted of violent crimes,⁸³ every prisoner would be eligible for credit toward an early release⁸⁴ for "successful completion"⁸⁵ of a "recidivism reduction program."⁸⁶ Prisoners with early release credit equal

80. See PSEA § 3(b)(3)–(4); RRPSPA §§ 2(b), 3(a) (quoting proposed new 18 U.S.C. § 3621A(b)–(c)).

81. See PSEA § 4(a)–(c) (directing the Attorney General to consider "the best available risk and needs assessment tools" and to "validate" whatever risk-needs assessment he or she chooses based on the then-current federal prison population); RRPSPA §§ 3 (quoting proposed new 18 U.S.C. § 3621A(5)) (directing the Attorney General to provide information concerning "best practices concerning the tailoring of recidivism reduction programs to the specific criminogenic needs of each prisoner so as to effectively lower the prisoner's risk of recidivating").

82. See PSEA §§ 4(c)(1)–(3) & (d)(3), 7(a); RRPSPA § 3(a) (quoting proposed new 18 U.S.C. § 3621A(a)(1) & (c)); *id.* § 4(a); *see also* RRPSPA § 3(a) (quoting proposed new 18 U.S.C. § 3621A(h)(2) (defining "recidivism risk" as "the likelihood that a prisoner will commit additional crimes for which the prisoner could be prosecuted in a Federal, State, or local court in the United States").

83. See PSEA § 4(d)(2)(D)(i)–(xlvii); RRPSPA § 2(b) (quoting proposed new 18 U.S.C. §§ 3621(h)(6)(A)(iii) & 3621(h)(8)(A)).

84. See PSEA § 4(d)(2)(A). The PSEA and RRPSPA differ in this regard. Under the PSEA, prisoners rated at a low, medium, or high risk of recidivism can receive credit toward an early release for each month's successful participation in "a recidivism reduction program or productive activity." PSEA § 4(d)(2)(A). Prisoners rated at a low, moderate, or high risk for recidivism can receive up to thirty, fifteen, and eight days credit, respectively. PSEA § 4(d)(2)(A)(i)–(iii). The PSEA also would allow prisoners who successfully complete rehabilitation programs to receive additional time for communication with family by telephone or in-person visitation. *See* PSEA § 4(d)(1). Under the RRPSPA, a low risk prisoner can earn ten days of credit for every thirty days spent in a recidivism reduction program that he successfully completes, while other prisoners can earn five days. *See* PSEA § 4(d)(2)(A)(i)–(iii).

85. See RRPSPA §§ 2(b) (quoting proposed new 18 U.S.C. § 3621(h)(6)(D)) (defining "successful completion" as regular attendance, completion of assignments, and not "regularly engag[ing] in regular disruptive behavior" for at least thirty days).

86. See PSEA § 8(2) (defining a "recidivism reduction program" as "a group or individual activity" that "has been shown by evidence to reduce recidivism" and "is designed to help prisoners succeed in their communities upon release from prison"); RRPSPA §§ 2(b) (quoting proposed new 18 U.S.C. § 3621(h)(8)(C)) (defining a "recidi-

to their remaining term of imprisonment would be eligible for pre-release home confinement.⁸⁷ Finally, the bills would require that the Attorney General review the federal risk-needs assessment on an ongoing basis and update it as he or she sees necessary,⁸⁸ as well as require him or her to consider other re-entry programs for prisoners.⁸⁹

The Attorney General is ideally situated to carry out those responsibilities, for several reasons. First, the Attorney General is well positioned to collect all of the relevant data and opinions. The Justice Department has criminologists and lawyers who are experts in analyzing the usefulness and constitutionality of risk-needs assessments.⁹⁰ There also are multiple types of assessment tools available today. As two scholars have recently noted, “policy-makers and practitioners in the field of sentencing must now choose among a dizzying array of risk assessment options that are oriented toward risk prediction and/or toward risk reduction.”⁹¹ Moreover, the different types of risk-needs assessments may not all be equal. No one tool will accurately predict the likelihood of recidivism one hundred percent

vism reduction program” as a “group or individual activity” that “has been shown by evidence to reduce recidivism or promote successful reentry”).

87. See PSEA § 4(d)(2)(C), 7(b); RRPSEA §§ 4(a). The PSEA is limited to low risk prisoners, while the RRPSEA would grant that opportunity to low and moderate risk prisoners. See PSEA § 7(b)(1); RRPSEA § 4(a)(2).

88. See PSEA § 3(b)(3)–(4); RRPSEA §§ 3(a) (quoting proposed new 18 U.S.C. § 3621A(c)(2)); *id.* §§ 5(a)(3) & 6.

89. Section 7(c) of the RRPSEA requires the Attorney General to consider “a recidivism reduction and recovery enhancement pilot program, premised on high-intensity supervision and the use of swift, predictable, and graduated sanctions for noncompliance with program rules” in selected federal districts. That provision would authorize federal pilot programs like the HOPE program currently used in Hawaii. See *supra* note 2.

90. Interestingly, criminologists generally seem to find them valuable, while lawyers generally seem to find them flawed. Some of that disagreement is because risk-needs assessments use factors, such as sex and age, which raise equal protection issues that lawyers may be more sensitive to than criminologists. But critics also raise questions regarding the accuracy of risk-needs assessments. See Oleson, *supra* note 53, at 1368.

91. John Monahan & Jennifer L. Skeem, *Risk Redux: The Resurgence of Risk Assessment in Criminal Sanctioning* 13 (Virginia Public Law and Legal Theory Res. Paper No 2013-36, 2013), available at <http://ssrn.com/abstract=2332165>. Some assess only risk, some evaluate risk and needs. Some are used at sentencing; some at prison admittance classification decisions; some at parole hearings; and some elsewhere. There may be no one tool that every state and the federal government can use at every stage of the criminal process, but some may be useful at more than one stage.

of the time, and some risk-needs assessments may be better predictors than others. In fact, risk assessment may be an art that uses science rather than just the latter. Finally, some risk-needs assessments have been closely analyzed, but many have not,⁹² and some particular risk-needs assessments have received substantial criticism.⁹³ It would be valuable if a trusted and independent third-party analyzed the full range of tools currently in use and offered an opinion as to which, if any, of those assessments have worked best at the different stages of the criminal process. The Attorney General has the necessary resources and personnel to conduct the appropriate analyses.

Second, the Attorney General can best decide what risk-needs assessments are appropriate for the federal system. The typology of federal crimes is materially different from the one found in state criminal codes, so the population of offenders also may be very different. Most federal criminal prosecutions are for violations of the controlled substances or immigration laws, and a goodly part of the remainder is for white-collar crimes. Perhaps the risk-needs assessments currently available work better for blue-collar than white-collar crimes, perhaps the reverse is true, perhaps they are equally effective for all offenses, or perhaps the same risk-needs assessments can be used in the federal system so long as the factors are weighted differently. It is prudent for Congress to have the Attorney General make that decision, at least in the first instance.

Third, the Attorney General can help Congress make a difficult fiscal decision. If the federal government must choose between uniformly performing risk-needs assessments for every offender and providing rehabilitative programs for obviously needy ones (for example, drug addicts, the illiterate), the decision as to which alternative works best can be a difficult one. It is a truism to say that scarce public funds must be allocated over a large number of valuable and desirable government programs. Legislators must make difficult choices among competing needs. Even in the area of corrections, there is a limited pool of money available for assessment tools and rehabilitative programs because the cost of providing housing, food, and medical care for

92. *See id.*

93. *See, e.g.,* BAIRD, *supra* note 50.

prisoners has increased greatly over the past few decades.⁹⁴ It may turn out that this question cannot be answered at all or with any degree of generality because moral considerations—such as the comparative weight of the interests of offenders and potential future victims—heavily weight one option or the other. That conclusion, however, is worth knowing.

Finally, the Attorney General wears two hats in this regard: He or she has the responsibility to enforce both the federal criminal laws *and* the federal civil rights laws. Different Justice Department components may have very different views about particular factors that risk-needs assessments use. The BOP and Justice Department Criminal Division may prefer the greater accuracy that comes with using factors such as sex in making predictions, while the Civil Rights Division may find it offensive to aggravate an offender's sentence on such a ground. As the cabinet official responsible for refereeing such intra-agency disputes, the Attorney General can decide whether, on balance, the use of such controversial factors best serves the public interest. In sum, the PSEA wisely directs the Attorney General to attempt to determine if those questions can be answered.⁹⁵

*B. The Benefits of Using Good-Time Laws to Address
the Prison Population*

The sentencing and good-time reform proposals start from opposite ends of the spectrum. The sentencing proposals rest on the assumption that a life-tenured district judge is in the best position to decide what term of imprisonment serves the retributive, deterrent, incapacitative, and educative functions of the law. By contrast, the good-time proposals assume that professional correctional officials are best situated to determine what effect (if any) rehabilitative programs have had on an offender. Of course, those options do not compete with each other for the same seat in class; Congress could select both of them. But Congress could find that pursuing both reforms simultaneously

94. See, e.g., Larkin, *Reconsidering Early Release*, *supra* note 4, at 9.

95. The federal government also may be able to guide the States make their decisions. Some states may have ample resources for assessment tools and rehabilitative programs; others may not. Some states may emphasize the importance of evaluating the risk that each offender poses; other states may focus on the importance of reducing the risk that offenders would pose after receiving treatment. States may look to the Attorney General for advice on how to design their own programs.

would be an unnecessary overreaction to the high rate of imprisonment the current correctional process has produced. Moreover, although the current number of federal prisoners is high, Congress could decide that the correctional system has made a measurable contribution to the decline in the crime rate that we have witnessed since the 1990s⁹⁶ and that they should not revise the current system more than is necessary to avoid wasting scarce public funds and causing needless public harm. Accordingly, legislators desirous of moving cautiously may decide that they should select only one option at this time, either sentencing reform or good-time reform, and await the results of that liberalization of the current system before revisiting the issue. If so, those legislators could find that good-time reform offers advantages that sentencing reform does not.⁹⁷

First, legislators concerned with the potential rehabilitation of offenders could reasonably prefer to rely on the retrospective judgment of correctional officials rather than on the predictive judgment of trial judges. A sentencing judge must decide exactly what sentence will promote the purposes of the criminal law (retribution, incapacitation, and so forth) and, to do so properly, the judge must consider the aggravating and mitigating circumstances of the offense and the history and character of the offender. Yet, the judge will not have the benefit of seeing whether, and if so how much, an offender has benefitted from whatever rehabilitation programs the BOP has available for that individual; only the BOP can make such observations. Under the PSEA and the RRPSA, the Attorney General will decide what risk-needs assessments are appropriate for the federal system and, after identifying the appropriate tool, he or she will direct the BOP to use them when making initial and follow-up classification decisions. Afterwards, BOP officials will decide on a yearly basis whether a prisoner has earned good-time credit. District court judges cannot revisit their sentencing

96. Penologists seem to agree that the current incarceration policy has contributed to the drop in crime, but disagree over how of much of an impact that policy has had. Estimates vary from approximately ten percent on the low end to roughly twenty-five percent on the high end. *See, e.g.*, FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 55 (2008); Joan Petersilia, *Beyond the Prison Bubble*, WILSON Q., Winter 2011, at 50, 52. *See generally* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 765 n.213 (2013) (listing authorities).

97. *See, e.g.*, Larkin, *Reconsidering Early Release*, *supra* note 4, at 40–43.

decisions to consider whether to shorten the sentence of an offender who has demonstrated an effort to turn his life around because the Sentencing Reform Act of 1984 prohibits a court from revising a sentence in all but rare and unusual circumstances.⁹⁸ Accordingly, it is far from irrational to conclude that the BOP is likely to make a better judgment because it has available evidence that a sentencing court can never see.

Second, insofar as politics is the art of the possible, legislators could decide that it is easier to persuade the public that good-time reform is preferable to sentencing reform. People, especially those who are risk averse, may fear that shorter terms of incarceration will, over time, allow the crime rate to creep back up to the levels witnessed from the 1960s through the early 1990s. Legislators may find that a public fearful of losing the crime reduction benefits that they have enjoyed for two decades can be persuaded to endorse correctional reform if it is limited to only those inmates who have *proved* that they are on the road to rehabilitation and no longer are a likely threat. The public may be willing to give offenders a second chance if they can demonstrate that they are entitled to that benefit by virtue of their good in-prison conduct and their successful completion of the BOP's rehabilitation programs. "A prisoner must *earn* good-time credit toward release for *past good conduct*; he does not receive it based on a prediction that he will go and sin no more."⁹⁹ Sentencing reform cannot offer the public the same reassurance because the trial judge imposes a sentence before the offender can participate in whatever rehabilitative options are made available to him.

Third, the good-time statutes have never been as controversial as sentencing laws. The criminal justice system has gone from pillar to post over the last century with regard to the optimal sentencing theory and practice. Rehabilitative theory and discretionary sentencing systems existed nationwide for most of the twentieth century but were replaced by the determinate

98. Section 3582(c) of Title 18 states that a district "court may not modify a term of imprisonment once it has been imposed" unless the BOP Director moves for a reduction due to "extraordinary and compelling reasons" or the U.S. Sentencing Commission retroactively lowers the relevant Sentencing Guidelines range. *See United States v. Blewett*, Nos. 12-5226, 12-5582, 2013 WL 6231727, at *8-9 (6th Cir. 2013) (en banc).

99. *See, e.g., Larkin, Reconsidering Early Release, supra* note 4, at 41.

sentencing laws we now have. One consequence is that there is something for everyone to criticize. Late in the twentieth century, the criticism was that discretionary sentencing systems produced arbitrary and discriminatory results; early in the twenty-first century, the criticism is that mandatory sentencing laws have produced arbitrary and discriminatory results. Late in the twentieth century, the criticism was that sentencing judges and parole boards exercised unchecked sentencing power; early in the twenty-first century, the criticism is that legislatures enjoy absolute authority to define punishments and that prosecutors have the same power to stack charges. The only common denominator has been that no sentencing process is perfect; the difference is just how far each process strays from what society deems just. By contrast, even though good time systems have existed alongside the indeterminate and determinate sentencing systems for more than a century, good-time systems have not been subjected to the same unrelenting assault on their legitimacy that various groups have launched against the sentencing and parole systems. The academy, correctional officials, and—perhaps most importantly—the public have not assailed the good-time laws with the same vehemence that they have displayed toward whatever correctional regime happens to be dominant. Legislators therefore may find it easier to persuade the public to support a more liberal use of the good-time laws than to get behind what will be pilloried by some as a more lenient sentencing approach.

Finally, reforming the good-time laws does not require anyone to admit to making a mistake. People do not like to admit to mistakes, and legislators are people. The good-time reform proposals seen in the PSEA and the RRPSA are new and do not ask a legislator to admit an error or to criticize a colleague for making one. Personal and interpersonal dynamics therefore may spur legislators to follow what seems to be a more “colleague-friendly” path.

Yet, advocates for prison reform should not be pessimistic about the prospects of seeing both type of proposals become law. The proposals do not conflict with each other, so there is no logical reason why only one could be adopted. Different members have introduced the bills, which allows each group of sponsors and co-sponsors to engage in logrolling with their colleagues. Moreover, each type of reform has bipartisan support,

which reduces the ability of either party to claim that the other is being “soft on crime”—a charge often levied in election campaigns over the last forty years.¹⁰⁰ The result may be that both sets of reforms become law. Given that this is an even-numbered year, each member up for re-election will be on the lookout for legislation that he or she can support and that will become law in order to claim a victory and establish his or her effectiveness as a legislator. Accordingly, it is likely that Congress will pass at least one set of reforms, and perhaps equally likely that it will enact both.

IV. CONCLUSION

The criminal justice system directs actors to make predictions about an offender’s likely recidivism. Today, many criminal justice systems use some form of a risk-needs assessment as a classification tool at various stages of the criminal process, especially when deciding where a particular offender will be housed or whether he should be granted credit toward an early release. Research has shown that risk-needs assessments have valuable predictive power and therefore can be worthwhile tools for making the myriad predictions needed in the federal criminal justice system. Yet, risk-needs assessments also are controversial. Some commentators have criticized them on the ground that they offend equal protection principles. The PSEA and the RRPSA attempt to navigate the path toward criminal justice reform by directing the Attorney General to study the value and legality of risk-needs assessments. Legislators who choose to pursue correctional reform by revising the back end of the process would find that the PSEA and the RRPSA are valuable efforts to improve the system.

100. See, e.g., Larkin, *supra* note 97, at 760–61.