

Improving Fairness and Addressing Racial Disparities in the Delaware Criminal Justice System

A Memorandum to the Subcommittee on Fairness in the Adult Criminal Justice System,
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The Subcommittee on Fairness in the Criminal Justice System has requested analysis of several aspects of the criminal justice system in the State of Delaware to determine whether reforms in policing, prosecution, adjudication and imprisonment can be accomplished in a way that would reduce racial disparities, while not increasing the incidence of violent crime. This memorandum summarizes existing scholarly research on police stops; pretrial detention; charging, plea bargaining, and sentencing; and alternatives to incarceration. For each topic, the memo surveys the extent to which each of these contributes to racial disparities as well as inaccuracies in criminal justice; identifies reforms that have worked elsewhere to ameliorate these problems; and considers the extent to which these reforms are compatible with preserving and improving public safety. The memorandum concludes with a brief discussion of recent scholarship that both highlights larger social factors that contribute to disparity and identifies programs and initiatives outside of the criminal justice system that might reduce racial disparities within the system.

The memorandum offers the following avenues of reform for consideration by the Subcommittee:

1. Collect comprehensive data on discretionary stops, searches, and seizures by police and make these data available for expert analysis.
2. Reduce arrests and prosecutions by substituting tickets and diversion.
3. After arrest, make release on recognizance pending trial the default, and ensure appearance through reminder systems.
4. If an arrestee presents a substantial risk, impose the least restrictive conditions necessary to mitigate it.
5. Improve process: Ensure access to counsel in pretrial release hearings, and accelerate proceedings for detained persons.
6. Change prosecutors' incentives in plea-bargaining.
7. Ensure effective representation for indigent defendants.
8. Make charging and plea-bargaining transparent and accountable.
9. Tether sentences to culpability.
10. Establish objective, needs-based criteria for participation in specialized courts, and collect and analyze demographic data on participants.

Each of these recommendations is discussed in greater detail below.

I. Police Stops

From the time that the Supreme Court authorized stop and frisk intrusions under the Fourth Amendment, this practice became an integral part of a larger pro-active policing paradigm aimed at preventing violent crime. The emphasis on prevention has encompassed a number of theories including “broken windows” and “quality of life” policing that have

become standards in many departments.¹ Advocates of this approach have credited the new policing with the sharp reductions in crime that we have witnessed over the past 20 years. Critics, however, have challenged this assumption and have pointed to significant constitutional problems in the manner in which stop and frisk has been employed.

Contribution to Racial Disparities and Inaccuracies in Criminal Justice

In many police departments that collect and maintain reliable data on stop and frisk and car stop practices, analysis has shown systemic Fourth and Fourteenth Amendment violations—stops and frisks conducted without the requisite reasonable suspicion and racial disparities that are not explained by non-racial factors. Further, studies and litigation call into question the claim that high rates of stop and frisk reduce violent crime and deadly weapon possession.

In *Terry v. Ohio*² the United States Supreme Court ruled that a person who was stopped for investigation by the police could be frisked if the officer had reasonable suspicion to believe that the person was “armed and dangerous.”³ Over the past forty-seven years, the Supreme Court has expanded the *Terry* doctrine in several significant respects. First, the Court has permitted stops of all persons who are reasonably suspected of *any* criminal activity, including possessory offenses and “quality of life” and traffic violations, thus significantly widening the scope of this practice.⁴ Second, the Court has approved stops and frisks on the assumption that certain conduct is predictive or associated with criminal behavior, but has rarely required an empirical basis for these judgments, many of which

¹ There is a vast literature on these issues, much of which is responsive to the early writings of James Q. Wilson, see VARIETIES OF POLICE BEHAVIOR (1968) and *Broken Windows*, ATLANTIC MONTHLY, May 1982, at 29 (with George L. Kelling). For a sample of responses, that discuss stop and frisk practices in the context of proactive policing, see Tom R. Tyler, Jonathan Jackson, & Avital Mentovich, *The Consequences of Being an Object of Suspicion: Potential Pitfalls of Proactive Police Contact*, J. EMPIRICAL LEGAL STUD. (forthcoming); BERNARD E. HARCOURT, ILLUSION OF ORDER (2001); Steven D. Levitt, *Understanding Why Crime Fell in the 1990's: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163 (2004); David Rudovsky & Lawrence Rosenthal, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117 (2013), http://scholarship.law.upenn.edu/faculty_scholarship/590/; FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSON FOR URBAN CRIME AND ITS CONTROL (2012); Tracey L. Meares, *The Law and Social Science of Stop and Frisk*, 10 ANNUAL REV. LAW. SOC. SCI. 335 (2014); David F. Greenberg, *Studying New York City's Crime Decline: Methodological Issues*, 31 JUST. Q. 154 (2013); David Weisburd, Cody W. Telep, & Brian A. Lawton, *Could Innovations in Policing Have Contributed to New York City Crime Drop*, 31 JUST. Q. 129 (2013); Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City Stop and Frisk*, 94 BOSTON L. REV. 1495 (2014); Andrew Ingram, *Breaking Laws to Fix Broken Windows: A Revisionist Take on Order Maintenance Policing*, 19 BERKELEY J. CRIM. LAW 112 (2104); John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduce Violent Crime? An Assessment of the Evidence*, in THE CRIME DROP IN AMERICA 207, 228-45 (Alfred Blumstein & Joel Waldman eds., 2d ed. 2006); John MacDonald, Jeffrey Fagan, & Amanda Geller, *The Effects of Local Police Surges on Crime and Arrests in New York City* (Columbia Public Law Research Paper No. 14-468, 2015); Bernard Harcourt & Tracey L. Meares, Foreword: *Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 SUPREME COURT REV. 733 (2000).

² *Terry v. Ohio*, 392 U.S. 1 (1968).

³ *Id.* at 27, 30.

⁴ See, e.g., *Navarette v. California*, 134 S.Ct. 1683 (2014); *Arizona v. Johnson*, 555 U.S. 323 (2009); *Illinois v. Wardlow*, 528 U.S. 119 (2000); *United States v. Arvizu*, 534 U.S. 266 (2002); *Adams v. Williams*, 407 U.S. 143 (1972).

involve conduct that is entirely consistent with innocent behavior.⁵ For example, the Court has permitted stops and frisks on vague and subjective standards such as nervousness, officer experience, furtive movements, and suspicious activity.⁶ While the Court has cautioned against use of characteristics that would permit frequent stops of a “very large category of presumably innocent travelers,”⁷ its cases over the years have failed to cabin police stop and frisk discretion.

The vagueness of the factors that may justify stops and frisks increases the risk that police will act on implicit biases in deciding whether there is sufficient suspicion for forcible intervention. If police associate racial minorities with criminal conduct where the same actions by whites are not be regarded as suspicious, or if they simply consider race or ethnicity as a surrogate for criminal conduct, even on a sub-conscious level, bias may be a determinative factor.⁸

Similar problems arise in the context of traffic stops, although there are some important distinctions between traffic stops and pedestrian stop and frisks. First, whereas many jurisdictions capture little to no data on pedestrian stops, most collect at least some basic data regarding traffic stops, though often not sufficient to enable careful analysis of race effects. Second, almost all traffic stops are with cause, at least from the perspective of the police, as traffic laws provide extraordinary discretion to the police in making these stops. Indeed, on most highways, police will observe almost every car at some point engaged in driving that will authorize a stop. Finally, and of critical importance, the Supreme Court has ruled that pre-textual stops of drivers--that is, stops made primarily for law enforcement reasons other than the traffic violation--do not offend the Fourth Amendment, even if done in a racially discriminatory manner.⁹

Many jurisdictions do not collect or publish data demonstrating how these legal standards are applied in practice.¹⁰ For those that do collect data, there is widespread

⁵ See, e.g., *United States v. Arvizu*, 534 U.S. 266, 277 (2002) (conduct that appears to be innocent may still provide reasonable suspicion based on the “totality of circumstances”).

⁶ See, e.g., *United States v. Arvizu*, 534 U.S. 266 (2002); *Florida v. Royer*, 460 U.S. 491, 494, 502 (1983) (nervousness a factor contributing to a finding of reasonable suspicion); *United States v. See*, 574 F.3d 309, 314 (6th Cir. 2009) (sitting in a car for an extended period may add to reasonable suspicion); *United States v. Logan*, (6th Cir. 2013) (presence in a high crime area); *United States v. Himmelwright*, 406 F. Supp. 889, 892-93 (1975) (suspect’s “unusually calm” demeanor supported the finding of reasonable suspicion); *United States v. Briggs*, 720 F.3d 1281, 1286, 1292 (10th Cir. 2013) (suspect’s evasive or erratic movements are part of the totality of the circumstances); Jane Bombauer, *Hassle*, 113 MICH. L. REV. 461, 505 (2015). On the question of the relevancy and characteristics of a “high crime area,” see Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High Crime Areas,”* 63 HASTINGS L. REV. 179 (2011); *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (Kozinski, J., concurring) (“just as a man with a hammer sees every problem as a nail, so a man with a badge may see every corner of his beat as a high crime area”).

⁷ *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam).

⁸ L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); Robert Myers, *Challenges to Terry for the 21st Century*, 81 MISS. L. J. 937 (2013); Kent Greenawalt, *Probabilities, Perceptions, Consequences and “Discrimination”: One Puzzle about Controversial “Stop and Frisk,”* 12 OHIO STATE J. CRIM. L. 181 (2014); Geoffrey P. Alpert, John M. MacDonald, & Roger G. Dunham, *Police Suspicion and Discretionary Decision Making During Citizen Stops*, 43 CRIMINOLOGY 407 (2005).

⁹ *Whren v. United States*, 517 U.S. 806 (1996). The Court did rule that such stops would violate the Fourth Amendment but provided no guidance as to how such violations might be remedied.

¹⁰ As most police departments do not maintain data regarding investigative stops we often lack the basic facts necessary for constitutional or social policy analysis: how many stops and frisks are conducted, what

evidence of significant disparities in rates with which minorities are stopped, questioned, and searched.¹¹ Concerns about such disparities have prompted investigations and litigation focusing on Fourteenth Amendment issues in a number of communities.

number of cases involve stops and frisks without reasonable suspicion, what is the “hit-rate” (seizures of evidence; arrests); are the hit- rates racially disproportionate, and what is the relationship of stop and frisk practices to crime rates. See David Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 J. LEG. & PUB. POLICY 833 (2013). Scholarly analysis and critiques of the *Terry* doctrine that have been published without reference to this data have ranged from high accolades, e.g., Tracey Meares, *Programming Errors*, 82 CHICAGO L. REV. 159 (2015); Steven A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911 (1998); John Q. Barrett, *Deciding the Stop and Frisk Cases*, 72 ST. JOHN’S L. REV. 749, 839 (1998) (“many think of Terry . . . as a sensible balancing of public interests in law enforcement against relatively minor intrusions on personal freedoms); Paul Butler, *Stop and Frisk and Torture Lite: Police Terror of Minority Communities*, 58 OHIO J. CRIM. L. 57 (2014); Lawrence Rosenthal, *Pragmatism, Originalism, Race, and The Case Against Terry v. Ohio*, 43 TEX. TECH.L. REV. 299 (2010), to strong criticism, Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL L. REV. 1 (1994); Scott E. Sunby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN’S L. REV. 1133 (1998). Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C. R. C. L. REV. 1, 30-35 (2011); Sherry F. Colb, *The Quantitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1648-63 (1998); Frank Rudy Cooper, *The UnBalanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling, and Arvizu*, 47 VIL. L. REV. 851 (2002); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2059-72 (2011).

¹¹ Many studies and litigation have shown racially disproportionate stops, searches, and citations of Black drivers and pedestrians, with hit-rates that are lower than for their White counterparts. See, e.g., *State v. Soto*, 734 A.2d 350, 360 (N.J. Super. Ct. Law Div. 1996) (noting that the statistical disparities between African-American and white motorists stopped for traffic offenses were “stark”); PETER VERNIERO, ATTORNEY GENERAL OF NEW JERSEY, INTERIM REPORT OF THE STATE POLICE REVIEW TEAM REGARDING ALLEGATIONS OF RACIAL PROFILING (1999), http://222.state.nj.us/lps/intm_419.pdf (finding that searches of cars on the New Jersey Turnpike were even more racially disparate than the initial stops: 77.2% of all “consent” searches were of minorities and blacks); CIVIL RIGHTS BUREAU, OFFICE OF THE ATT’Y GEN. OF THE STATE OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT’S “STOP AND FRISK” PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 88-89 (1999), http://www.oag.state.ny.us/press/reports/stop_frisk/stp_frsk.pdf (finding that African-American pedestrians in New York City were stopped six times more frequently than Whites, and that stops of African-Americans were less likely to result in arrests than stops of Whites); STEPHEN M. HAAS ET AL., DIV. OF CRIMINAL JUSTICE SERVS., CRIMINAL JUSTICE STATISTICAL ANALYSIS CTR., WEST VIRGINIA TRAFFIC STOP STUDY FINAL REPORT 1 (2009), www.djcs.wv.gov/SACDocuments/WVAC_Traffic_NEWOverviewofStatewideFindings_2009.pdf (“State-level results indicate that black drivers are 1.64 times more likely . . . [and] Hispanics were 1.48 times more likely to be stopped compared to white drivers.”); AMY FARRELL ET AL., NORTHEASTERN UNIVERSITY INSTITUTE ON RACE & JUSTICE, RHODE ISLAND TRAFFIC STOP STATISTICS ACT FINAL REPORT EXECUTIVE SUMMARY 1 (2003), www.racialprofilinganalysis.neu.edu/IRJ_docs/RIFinalReport.pdf (“In most communities in Rhode Island non-white drivers are stopped disproportionately to their presence in the driving population.”); ALEXANDER WEISS & DENNIS P. ROSENBAUM, CTR. FOR RESEARCH IN LAW & JUSTICE, UNIVERSITY OF ILLINOIS AT CHICAGO, ILLINOIS TRAFFIC STOPS STATISTICS ACT 2010 ANNUAL REPORT: EXECUTIVE SUMMARY 10 (2011), www.dot.il.gov/travelstats/2010_20ITSS_20_Executive_Summary.pdf (“[V]ehicles driven by African Americans and Hispanics are twice as likely to be the subject of consent search than[n] those driven by Caucasians”); AMERICAN CIVIL LIBERTIES UNION OF ARIZONA, DRIVING WHILE BLACK OR BROWN: AN ANALYSIS OF RACIAL PROFILING IN ARIZONA 3 (2008), www.acluaz.org/sites/default/files/documents/DrivingWhileBlackorBrown.pdf (finding that Native Americans were 3.25 times more likely, and African Americans and Hispanics 2.5 times more likely to be subjected to searches than whites); *Md. State Conference of NAACP Branches v. Md. Dep’t of State Police*, 72 F.Supp.2d 560 (D. Md. 1999); *Rodriguez v. Cal. Highway Patrol*, 89 F.Supp.2d 1131 (N.D. Cal. 2000). In the most recent study, Dr. John Lamberth found racial disparities in traffic stops in Kalamazoo, Michigan, in a sophisticated study that accounted for non-racial factors. JOHN LAMBERTH, FINAL REPORT ON TRAFFIC STOPS FOR KALAMAZOO DEPARTMENT OF PUBLIC SAFETY (2013). Traffic stops present some issues different from pedestrian stops flowing primarily from the fact that almost all drivers violate traffic laws at the same rate, thus permitting even pretextual stops, *Whren v. United States*, 517 U.S. 806 (1996).

As a legal matter, litigation over racial disparities in police searches is controlled by equal protection principles, and in particular the standard of disparate treatment or intentional discrimination based on race or ethnicity.¹² In the equal protection analysis, two key considerations emerge: the extent to which observed disparities are likely to reflect bias rather than other factors, and the extent to which stop and search practices further the governmental interest in protecting public safety. To examine the question of bias, experts often subject available data on stop, search, and seizure patterns to statistical analysis designed to determine whether non-racial factors such as crime rates, police deployment patterns, or social influences can explain racial disparities. Such analyses often involve the calculation of “hit-rates”, or the fraction of stops or searches where police actually seize weapons or contraband, effectuate an arrest, or issue a summons. Appropriate statistical analysis of search behavior must confront a number of technical issues, including identification of the most appropriate statistical benchmarks and non-racial factors.

Critics of stop and frisk also argue that this practice is of limited utility in protecting public safety. The “reasonable suspicion” standard articulated established by the Court in *Terry* requires significantly less proof of wrongdoing than the more rigorous probable cause standard traditionally required for searches. It is not surprising, therefore, that the hit-rates for traffic stops and stops and frisks are generally substantially lower than for arrests or searches conducted on full probable cause.¹³ Indeed, where police have engaged in random stops without any particularized suspicion, for example at highway checkpoints, the hit-rates have in some cases been higher than hit-rates for stops and frisks where police assert observations of objectively suspicious conduct.¹⁴

Appendix A provides a more detailed description of three recent examples—in Los Angeles, New York, and Philadelphia--where courts have turned to data to better understand patterns of racial disparity in stops. These examples illustrate ways in which experts use available data to assess police compliance with the stop and frisk “reasonable suspicion” doctrine and to examine the effectiveness of this practice by analyzing hit-rates.

Comparison of the experiences of Los Angeles, New York, and Philadelphia reveal a number of important lessons. In all three cities, available data demonstrated a striking disparity in the likelihood of being stopped and searched among African-Americans. Additional analysis revealed that in some cases these disparities could be explained by non-racial factors such as underlying crime rates, but in many cases the disparities could not be attributed to readily measurable external factors. In New York, the data were viewed as sufficiently problematic that, in highly contested civil rights lawsuit, *Floyd v. City of New York*,¹⁵ the courts found that the City had a municipal policy and practice that violated both

¹² See, e.g., *Johnson v. California*, 543 U.S. 499 (2005) (official policy of segregating prisoners by race); *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000).

¹³ See *infra*,

¹⁴ *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000) (drug checkpoint yielded drug seizures in 7.4% of stops). See also Bernard Harcourt & Tracy E. Meares, *Randomization and the Fourth Amendment*, 78 U. CHI. L. REV. 809 (2011).

¹⁵ *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013).

the Fourth Amendment protections against unreasonable searches and seizures and the Fourteenth Amendment's Equal Protection Clause prohibition on racial discrimination.

New York's experience since *Floyd* also suggests that, in the event that stop and frisk procedures are viewed as sufficiently problematic so as to prompt new policies, it may be feasible to substantially reduce the scope of stop and frisks without a significant adverse effect on crime rates. In New York City, the number of stops dropped from a high of close to 700,000 per year (2011) to approximately 50,000 per year by the City's latest calculations, with little change in the historically low murder and violent crime rate. It is also significant that other cities, including Newark, Boston and Chicago are now recording all stops and frisks and have established protocols for analysis on the relevant Fourth and Fourteenth Amendment benchmarks.

Avenues of Reform

1. Collect comprehensive data on discretionary stops, searches, and seizures by police and make these data available for expert analysis.

Neither the scope of police stop practices in Delaware nor how those practices affect arrest rates, crime patterns, or racial fairness are fully understood by the courts, police, or the public. Because such practices are a central part of policing yet have raised significant questions concerning their effectiveness, compliance with Fourth Amendment standards, and their racial distribution in other jurisdictions, Delaware would benefit from better data that might advance this type of study for the state. Whatever one's views on the effectiveness and legality of current practices, it is impossible to fairly assess any police department's conduct in this area without reliable data.

Delaware is in the position of being a beneficiary of the studies and litigation regarding police practices in other locations. Other jurisdictions have developed stop and frisk forms, electronic data bases, protocols for review and analysis, and guidelines on relevant benchmarks for evaluation and enforcement. Given the broad reliance on stop and frisk and car stops as proactive police measures and ongoing concerns about inequality and racial discrimination in policing and effectiveness of law enforcement, a decision to engage in a process of collection and analysis of stop data would provide significant information and benefits.

II. Bail and Pretrial Detention

Soon after police arrest a suspect, the government must decide what charges, if any, to file and whether to release the suspect from custody and if so on what terms. For minor crimes, this may be resolved at the police station through "station-house bail," in which a suspect is quickly released upon signing a promise to appear at later proceedings or paying

a modest amount of money bail that will be forfeited if he later fails to appear.¹⁶ Otherwise, bail is set when a suspect is brought before a judge or magistrate shortly after arrest.¹⁷

Contribution to Racial Disparities and Inaccuracies in Criminal Justice

Approximately twelve million people are jailed in the United States every year.¹⁸ On any given day, there are approximately three-quarters of a million people in jail, sixty percent of them awaiting trial.¹⁹ The U.S. detains more people pretrial than any other nation, and detains people pretrial at a rate three times the world average.²⁰ The prevalence of this practice creates profound race and class disparities in the criminal justice system and distorts the integrity of criminal proceedings.

Money bail, by definition, favors those who have money. The Constitution prohibits the detention of a person solely because of his poverty, but in the pretrial realm this prohibition has been largely a dead letter.²¹ An estimated 90% percent of U.S. pretrial detainees are held simply for inability to post bail.²² Because of disparate poverty rates, members of minority groups are more likely to be face this plight.²³

The nature of bail hearings also puts poor arrestees at a disadvantage. The two key questions at the hearing are whether an arrestee poses a risk of flight or a danger to the community, and a judge must answer them quickly, based on minimal information. Judges generally extrapolate from the police officer's arrest report, the arrestee's rap sheet, and the arrestee's own report of his residence, employment, education, family circumstances, and the like. Arrestees who are inarticulate or speak limited English have trouble presenting this information. These data, furthermore, correlate with socioeconomic status and race. Arrestees with less education, unsteady employment, uncertain immigration status, non-marital family units, or prior exposure to the criminal justice system are more likely to be

¹⁶ See TIMOTHY R. SCHNACKE, NATIONAL INSTITUTE OF CORRECTIONS, FUNDAMENTALS OF BAIL: A RESOURCE GUIDE FOR PRETRIAL PRACTITIONERS AND A FRAMEWORK FOR AMERICAN PRETRIAL REFORM 115 (2014), static.nicic.gov/UserShared/2014-11-05_final_bail_fundamentals_september_8,_2014.pdf.

¹⁷ This must occur within forty-eight hours of arrest. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

¹⁸ RAM SUBRAMANIAN ET AL., VERA INSTITUTE OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAIL IN AMERICA 4 (2015), www.vera.org/pubs/special/incarcerations-front-door-misuse-jails-america.

¹⁹ TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014, 1-4 (2015).

²⁰ SCHNACKE, *supra* note 166, at 22.

²¹ See *Bearden v. Georgia*, 461 U.S. 660, 671 (1983); *Tate v. Short*, 401 U.S. 395, 398 (1971); *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970); *Smith v. Bennett*, 365 U.S. 708, 709 (1961); see also U.S. Dep't of Justice, Statement of Interest filed in *Varden v. City of Clanton*, No. 2:15-cv-34-MHT-WC (M.D. Al., Feb. 13, 2015).

²² SCHNACKE, *supra* note 166, at 24.

²³ See, e.g., CARMEN DE NAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013 12-13 (2014); see also JUSTICE POLICY INST., BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL 15-17 (2012); Andrew Kahn & Chris Kirk, *There's Blatant Inequality at Nearly Every Phase of the Criminal Justice System*, BUSINESS INSIDER, Aug. 9, 2015, <http://www.businessinsider.com/theres-blatant-inequality-at-nearly-every-phase-of-the-criminal-justice-system-2015-8> (summarizing social science research showing, *inter alia*, that black arrestees are detained pretrial at higher rates than whites); THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS 13 (2d ed. 2008), www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf.

deemed high risk—and are disproportionately likely to be members of minority groups.²⁴ Finally, implicit bias can influence pretrial release decisions. Recent research has found that, even controlling for other factors, black and Latino defendants were more likely to be detained than white defendants.²⁵

The disproportionate pretrial detention of poor, minority, immigrant and limited-English speaking populations is a serious problem in itself. Pretrial detention disrupts lives and communities. Arrestees are prone to attempt or commit suicide, especially in the first days after arrest.²⁶ They may suffer sexual assault or physical abuse in jail. Pretrial detention of more than a few days may cost an arrestee his job; detention of more than a few weeks may cost him his apartment; detention lasting months may cost him his house and eventually his family.²⁷

Disproportionate rates of pretrial detention also create downstream disparities in criminal proceedings, because pretrial detention distorts the proceedings that follow. A detained arrestee cannot effectively locate witnesses, communicate with his lawyer, and develop a defense. As a result, people who are detained pre-trial are more likely to be convicted and receive a sentence of imprisonment than similarly situated people who are not detained.²⁸ Many people, moreover, never make it to trial. Detained people regularly face the choice of fighting their case from jail or accepting a guilty plea and release, with a sentence of probation or time served. With jobs, homes and children on the line, most people will choose the latter, regardless of the strength or propriety of the case against them. Even for wholly innocent people, it is sometimes the only possible choice.²⁹

²⁴ See, e.g., REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 9 (2013), sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf; U.S. Census Bureau, *Statistical Abstract of the United States: 2012*, CENSUS.GOV 151 tbl. 230 (“Educational Attainment by Race, Hispanic Origin and Sex: 1970-2010”), www.census.gov/prod/2011pubs/12statab/educ.pdf; Lindsey Cook, *U.S. Education: Still Separate and Unequal*, U.S. NEWS & WORLD REPORT (Jan. 28, 2015), <http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal>; Diana B. Elliott et al., *Historical Marriage Trends from 1890-2010: A Focus on Race Differences*, Presented at the Annual Meeting of the Population Association of America, San Francisco, CA (May 3-5, 2012); BUREAU OF LABOR STATISTICS, *LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY* tbl. E-16 (“Unemployment rates by age, sex, race, and Hispanic or Latino ethnicity”), www.bls.gov/web/empsit/epsee_e16.htm; JEFFREY S. PASSEL & D’VERA COHN, PEW RESEARCH CENTER, *A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES* (2009).

²⁵ See BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY – TECHNICAL REPORT (2014), www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf.

²⁶ See CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, *SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS* 1-7 (2005).

²⁷ See JUSTICE POLICY INST., *supra* note 23, at 3.

²⁸ See CHRISTOPHER LOWENKAMP, MARIE VANNOSTRAND, & ALEXANDER M. HOLSINGER, THE LAURA AND JOHN ARNOLD FOUNDATION, *INVESTIGATING THE IMPACT OF PRETRIAL DETENTION ON SENTENCING OUTCOMES* (2013); MARY T. PHILLIPS, NEW YORK CITY CRIMINAL JUSTICE AGENCY, *A DECADE OF BAIL RESEARCH IN NEW YORK CITY* 115-17 (2012). These findings are consistent with older research. See, e.g., Stevens H. Clarke & Susan T. Kurtz, *The Importance of Interim Decisions to Felony Trial Court Dispositions*, 74 J. CRIM. L. & CRIMINOLOGY 476 (1983); Caleb Foote, *Compelling Appearance in Court: Administration of Bail in Philadelphia*, 102 U. PA. L. REV. 1031, 1048-49 (1954); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

²⁹ See PHILLIPS, *supra* note 28; NAT’L ASS’N OF PRETRIAL SERVS. AGENCIES, *STANDARDS ON PRETRIAL RELEASE* 9 n.1 (3d ed. 2004).

Avenues of Reform

As awareness of these problems has grown, state and local governments have begun to consider pretrial reform. The overarching goal is to eliminate unnecessary detention and reduce reliance on money bail. To accomplish this without compromising public safety, reform efforts can look to two basic principles. First: In considering conditions of pretrial release, *courts should use the least restrictive means necessary to assure the accused's appearance at future court dates and protect the community from harm.*³⁰ As discussed below, studies to date suggest that the vast majority of arrestees can and should be released pending trial. Pre-trial detention should be a last resort. Second: *Release conditions should be tailored to their goal.*³¹ Money bail, for example, is a mechanism to ensure appearance, and it is neither appropriate nor effective as a tool to address public safety risks (other conditions of release are available for that purpose).³² Jurisdictions can pursue both legal and policy reforms to implement these principles.

1. Reduce arrests and prosecutions by substituting tickets and diversion.

Bail reform can begin with policing and prosecution. A number of jurisdictions have sought to reduce the number of people who arrive at a bail hearing in the first place by authorizing police to issue summonses or tickets, rather than arresting, for a broader swath of minor public-order offenses.³³ Among those who are arrested, people charged with low-level offenses can be channeled directly into diversion or deferred prosecution programs.³⁴

2. After arrest, make release on recognizance pending trial the default, and ensure appearance through reminder systems.

³⁰ See STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 10-1.1 & 10-1.2 (3d ed. Am. Bar. Ass'n 2007) [hereinafter ABA STANDARDS].

³¹ See ABA STANDARDS 10-1.2.

³² See ABA STANDARDS 10-1.4(d) ("Financial conditions should not be employed to respond to concerns for public safety.").

³³ See, e.g., ABA STANDARDS 10-1.3 ("Use of citations and summonses"); Standards 10-2.1–10.3.3 (encouraging jurisdictions to employ citations and summons broadly in lieu of arrest for minor offenses, and providing specific guidelines); Chris Goldstein, *Marijuana Arrests Down 73 Percent*, PHILLY.COM (Aug. 7, 2015), http://www.philly.com/philly/columnists/philly420/Philly_marijuana_arrests_down_73_percent.html (describing initiative encouraging citation rather than arrest for marijuana possession); Bruce Egger, *New Orleans City Council Reclassifies Pot Possession, Prostitution to Reduce Criminal Dockets*, NOLA.COM (Dec. 17, 2010), http://www.nola.com/politics/index.ssf/2010/12/new_orleans_city_council_recla.html; Mary T. Phillips, Desk Appearance Tickets: Their Past, Present and Possible Future (New York Crim. Just. Agency Research Brief No. 34, May 2014), www.nycja.org/library.php.

³⁴ Kentucky, for instance, operates both a pretrial diversion and a deferred prosecution program. See PRETRIAL SERVICES, ADMINISTRATIVE OFFICE OF THE COURTS, KENTUCKY COURTS OF JUSTICE, PRETRIAL REFORM IN KENTUCKY 5-8 (2013).

Because very few people willfully abscond or present a specific threat, all bail determinations should begin from a presumption of release.³⁵ Federal law and several state codes have implemented that presumption by requiring courts to release arrestees on recognizance or with an unsecured bond absent an affirmative finding that the person presents a specific risk.³⁶ A high rate of release on recognizance need not mean high rates of nonappearance. A recent study suggests, in fact, that immediate release may *decrease* the risk of both nonappearance and future criminal activity, because it minimizes the destabilization of people’s lives.³⁷ Kentucky’s experience is illuminating. In 2011, Kentucky passed legislation that requires a court to release low-risk arrestees without bail unless it finds that the person is a flight risk or danger to others.³⁸ In the year after its implementation, non-financial release rates rose from 51% to 66%, with no increase in nonappearance or rearrests (in fact, appearance rates increased slightly and rearrests fell).³⁹

For released defendants, appearance rates can be improved through simple reminder systems, like robocalls, robotexts, emails, and mailings that can be used as excuses from school and work. Counties that have implemented automated reminder systems have reported 37-38% decreases in failure-to-appear rates.⁴⁰ In Jefferson County, Colorado, a pilot study documented an appearance rate of 92% among people on pretrial release who were successfully contacted by phone.⁴¹ Jefferson County has now created a permanent Court Date Notification Program, and other jurisdictions are adopting the model.⁴² Speeding up cases so that arrestees need not accrue too many absences from work, school, and parenting may also reduce rates of nonappearance.

3. If an arrestee presents a substantial risk, impose the least restrictive conditions necessary to mitigate it.

³⁵ See ABA STANDARDS 10-5.1 9 (“It should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense.”).

³⁶ See, e.g., 18 U.S.C. § 3142 (2012); Iowa Code Ann. § 811.2; Ky. Rev. Stat. Ann. § 431.520; N.C. Gen. Stat. Ann. § 15A-534(b)-(c); S.C. Code Ann. § 17-15-10. The Delaware Code instructs courts to release arrestees on recognizance or with an unsecured bond “whenever feasible,” but implicitly lays the burden on the accused person to satisfy the court that she or he presents *no* risk of flight or danger, rather than requiring the prosecutor to show that she or he *does* present a specific risk. See 11 Del. Code §§ 2101 (2015).

³⁷ See CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUNDATION, *THE HIDDEN COSTS OF PRETRIAL DETENTION* (2013).

³⁸ See Public Safety and Offender Accountability Act, H.B. 463, 2011 Gen. Assemb., Reg. Sess. (Ky. 2011); TARA BOH KLUTE & MARK HEYERLY, *PRETRIAL SERVICES, ADMINISTRATIVE OFFICE OF THE COURTS, REPORT ON IMPACT OF HOUSE BILL 463: OUTCOMES, CHALLENGES AND RECOMMENDATIONS* 4 (2012); SUBRAMANIAN ET AL., *supra* note 18, at 33.

³⁹ See Klute & Heyerly, *supra* note 38, at 4–10; MARK HEYERLY, *PRETRIAL SERVICES, ADMINISTRATIVE OFFICE OF THE COURTS, KENTUCKY COURTS OF JUSTICE* 13–16 (2013); *IMPLEMENTING THE RECOMMENDATIONS OF THE 2011 NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE: THE 2014 PROGRESS REPORT* 9 (Pretrial Justice Institute 2015).

⁴⁰ Timothy R. Schnacke, Michael R. Jones, & Dorian M. Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County, Colorado, FTA Pilot Project and Resulting Court Date Notification Program*, 48 CT. REV. 86, 88 (2012).

⁴¹ *Id.* Among those for whom a message was left on voicemail or with a responsible adult, the appearance rate was 88%. The baseline appearance rate among the target population prior to the study was 79%. *Id.*

⁴² *Id.*

Some arrestees may pose a serious risk of nonappearance or danger, and for this group further conditions on release may be appropriate. In order to assess arrestees' risk level, jurisdictions are increasingly deploying professional pretrial services agencies and rigorous risk assessment screening tools.⁴³ While most risk assessment instruments include "static" demographic factors that correlate with race and class,⁴⁴ a new instrument called the Public Safety Assessment–Court uses no demographic factors and has shown promising results: pilot projects resulted in higher pretrial release rates, lower jail populations, and no increase in crime.⁴⁵ Twenty-one jurisdictions across the country are slated to adopt the PSA-Court in the near future.⁴⁶

With a rigorous risk assessment regime in place, courts can identify high-risk arrestees and impose the least restrictive measure that will address the risk. There are many alternatives short of detention.⁴⁷ For arrestees at high risk of nonappearance, property bonds or personal sureties can be effective: few arrestees will flee if their parents' home is on the line. Pre-trial supervision, which can include drug testing and electronic monitoring as well as assistance in pursuing social services, also facilitates appearance. If cash bail is necessary, it should be the minimum amount that will "reasonably" assure the accused's appearance in court, given his or her resources, and should be as easy to post as possible (credit-card kiosks and online payment systems can streamline the process).⁴⁸ For arrestees who pose a serious threat to the public, courts can impose conditions like electronic or GPS monitoring that restrict movement and discourage crime.⁴⁹ If the threat arises from an arrestee's substance abuse or mental illness, courts can require periodic drug testing or outpatient mental-health treatment.⁵⁰

Many jurisdictions are working to put these principles into practice. The District of Columbia has long sought to minimize reliance on money bail, and benefits from an experienced Pretrial Services Agency. The District releases approximately 80% of arrestees

⁴³ Besides conducting risk assessments, pretrial services agencies can verify arrestees' personal information to inform the pretrial release decision, operate a court-date notification program, and supervise moderate- or high-risk people who have been released pretrial.

⁴⁴ See Melissa Hamilton, *Risk-Needs Assessment: Constitutional and Ethical Challenges*, 52 AM. CRIM. L. REV. 231 (2015); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803 (2014).

⁴⁵ The PSA–Court uses only factors related to criminal history, current charge, and current age. This does not eliminate its potentially disparate racial impact, but does make it less concerning than others. See Press Release, Laura & John Arnold Foundation, *More Than 20 Cities and States Adopt Risk Assessment Tool to Help Judges Decide Which Defendants to Detain Prior to Trial* (June 26, 2015); Shaila Dewan, *Judges Replacing Conjecture With Formula for Bail*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/us/turning-the-granting-of-bail-into-a-science.html?_r=0; LAURA & JOHN ARNOLD FOUNDATION, *RESULTS FROM THE FIRST SIX MONTHS OF THE PUBLIC SAFETY ASSESSMENT-COURT IN KENTUCKY* (2014) [hereinafter LJAF, PSA RESULTS].

⁴⁶ See sources cited *supra*.

⁴⁷ See ABA STANDARDS 10-1.4, 10-5.2.

⁴⁸ "Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

⁴⁹ See ABA STANDARDS 10-5.2; Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1348 (2014).

⁵⁰ Financial conditions are not an appropriate means of addressing a public safety risk, and pre-trial detention for dangerousness is not warranted unless the state, in an adversary hearing, demonstrates by clear and convincing evidence that "no conditions of release can reasonably assure the safety of the community or any person." *United States v. Salerno*, 481 U.S. 739, 750 (1987).

without bail, yet rates of nonappearance and rearrest are lower than national averages.⁵¹ In Kentucky, courts now assess arrestees' risk level with the PSA-Court. Low-risk arrestees are released without bail or supervision.⁵² Moderate- and high-risk arrestees may be referred for "Monitored Conditional Release" (MCR), a supervision program that tailors a risk reduction strategy to the arrestee's needs and the specific risk he presents. In the first six months that Kentucky deployed the PSA-Court, it released more people pending trial, but crime by released defendants *fell* by 15%, and appearance rates remained extremely high.⁵³ New Orleans, New Jersey and New York City are also undertaking reforms to reduce pretrial detention.⁵⁴

In order to ensure that money bail does not result in detention and is never imposed to address a public safety risk, courts should have the authority to detain the narrow category of arrestees who *do* pose an acute danger pursuant to transparent and fair procedures.⁵⁵ The proposed constitutional amendment before the Delaware legislature would provide detention authority—but does not articulate its limits. That raises the concern that future legislatures may authorize pretrial detention of increasing scope. To ensure that pre-trial release remains the norm and pre-trial detention "the carefully limited exception," any constitutional grant of power to preventively detain should specify that no person may be detained unless the state shows, by clear and convincing evidence in an adversarial proceeding, that the person poses such a severe threat of danger that no condition or conditions of release suffice to mitigate the risk.⁵⁶

⁵¹ In 2008, 12% of released defendants missed a court appearance and 12% were rearrested before trial. In 2012, 11% of released defendants were rearrested and 11% missed a court date. Nationally, 16% of released defendants were rearrested and 17% missed a court date. *See Performance Measures*, PRETRIAL SERVICES AGENCY FOR THE DISTRICT OF COLUMBIA, www.psa.gov/?q=data/performance_measures; ARTHUR W. PEPIN, CONFERENCE OF STATE COURT ADMINISTRATORS, 2012-2013 POLICY PAPER: EVIDENCE-BASED PRETRIAL RELEASE, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/evidencebased_pretrialrelease.aut_hcheckdam.pdf (last accessed Sept. 29, 2015); SUBRAMANIAN ET AL., *supra* note 18, at 33.

⁵² Unless the court overrides the low-risk designation with an affirmative finding of risk. *See* LJAF, PSA RESULTS, *supra* note 45.

⁵³ LJAF, PSA RESULTS, *supra* note 45.

⁵⁴ In 2012, New Orleans launched a pilot project with the Vera Institution of Justice that includes comprehensive pretrial services and a court-date reminder system. (The city also built a smaller jail, and the police department shifted toward issuing summonses for low-level nonviolent offenses.) *See* The Ed. Bd., *The New Orleans Jails, 10 Years Later*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/opinion/the-new-orleans-jails-10-years-later.html?_r=0; Tara Boh Klute & Lori Eville, *An Assessment of the New Orleans Pretrial Services Program* (Nat'l Inst. Corrections Technical Assistance Paper No. 13C1066, 2014). In 2014, New Jersey passed a law that ties pretrial release decisions to risk rather than resources, encourages individualized release conditions, and creates a pretrial services agency. *See* Margaret Talbot, *The Case Against Cash Bail*, THE NEW YORKER (Aug. 25, 2015), <http://www.newyorker.com/news/news-desk/the-case-against-cash-bail>; Matt Arco, *Christie Signs Bail Reform Measure, Lauds Lawmakers for Bipartisanship*, NJ.COM (Aug. 11, 2014), http://www.nj.com/politics/index.ssf/2014/08/christie_signs_bail_reform_measure_lauds_lawmakers_for_bipartisanship.html. In 2015, New York City announced a plan to release thousands of low-risk defendants by substituting pretrial supervision for money bail. *See* Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html>.

⁵⁵ *See* SCHNACKE, *supra* note 166, at 44–45.

⁵⁶ *United States v. Salerno*, 481 U.S. 739, 755 (1987) (asserting that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception"); *see also id.* at 750–52 (upholding provisions of federal Bail Reform Act that provide for pretrial detention on basis that they are narrowly focused

4. Improve process: Ensure access to counsel in pretrial release hearings, and accelerate proceedings for detained persons.

Only a small percentage of defendants should be detained pending trial because they pose an ineradicable danger to the community or risk of flight. For these, managing court dockets more aggressively to speed up their cases, and capping pretrial detention at three or six months, would lower the costs of pretrial detention and the overwhelming pressures to plead guilty.

Finally, providing counsel to arrestees beginning at the bail hearing helps to reduce unnecessary detention and improve the accuracy of criminal proceedings.⁵⁷ It may prevent innocent people from pleading guilty simply to get out of jail by increasing the chance of release and decreasing the chance of an ill-advised plea. It reduces the risk of wrongful conviction at trial by allowing defense counsel to investigate the facts of the case and preserve evidence in a timely way. It enables early but informed plea-bargaining, which benefits all actors in the system. And it ensures future appearance by creating a line of communication between the accused and his counsel.

III. Charging, Plea Bargaining, and Sentencing

Once an arrest has been made, prosecutors decide what formal charges, if any, to file. Plea-bargaining follows. The process varies dramatically from county to county and state to state, but at core it entails the defendant's agreement to plead guilty to a specified charge or charges in exchange for a sentence that is less than what he can expect to receive if convicted at trial. Sentences are imposed by judges. Depending on the jurisdiction, judges may be constrained by the terms of the plea bargain or the substantive law, or they may have broad discretion to impose the sentence they think best.

Contribution to Racial Disparities and Inaccuracies in Criminal Justice

One might think that prosecutors would charge on the basis of the crime(s) committed, that innocent people would not plead guilty, and that sentences would approximately reflect the blameworthiness of the person convicted. None of these things is necessarily true. Factors other than culpability often drive charging, plea-bargaining and sentencing, to the

and guarantee extensive procedural protections to accused). New Jersey amended its constitution in 2014 to authorize pretrial detention, but did not specify limitations on that power. See N.J. CONST. art. 1 § 11.

⁵⁷ See SIXTH AMENDMENT CENTER AND PRETRIAL JUSTICE INSTITUTE, EARLY IMPLEMENTATION OF COUNSEL: THE LAW, IMPLEMENTATION AND BENEFITS (2014), sixthamendment.org/6ac/6ACPJI_earlyappointmentofcounsel_032014.pdf; see also, e.g., Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719 (2002); Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 MICH. L. REV. 1513 (2013).

disadvantage of poor and minority defendants, and with the result that criminal conviction may have little to do with guilt.

A range of factors unrelated to the crime(s) committed often animate charging decisions. Prosecutors consider the defendant's rap sheet, substance abuse history, and the office's enforcement priorities and resource constraints. Defendants who are considered better risks—that is, those who come from intact families and good neighborhoods, who are well educated, who do not have an extensive criminal record, and who have stable personal and professional lives—are more likely to have charges declined, dropped, reduced, or diverted for drug treatment, mental-health treatment, restitution, or the like.⁵⁸ As with bail, these factors correlate with socioeconomic status and race. Some, like prior convictions, may be appropriate considerations nonetheless, but others may not. Prior arrests that did not result in conviction, for instance, may have low predictive value and flow from racially disparate arrest practices, such as those documented in New York City.⁵⁹

Another charging practice that distorts the accuracy of criminal process and may contribute to racial disparities is “overcharging,” in which prosecutors file more charges or more severe charges than the case warrants with the goal of inducing a plea or the defendant's cooperation through charge-bargaining.⁶⁰ Overcharging pressures defendants to accept plea bargains that may not reflect their actual conduct or culpability. It exerts most pressure on those with least leverage in the bargaining process (i.e. those with criminal records and few resources), who are disproportionately likely to belong to minority groups.

Charging disparities and distortions play out in plea bargaining. An additional wrinkle is that, by the time of plea bargaining, defendants have defense counsel, who vary widely in their funding, ability, and expertise. The variation affects outcomes. Defendants who can afford to pay experienced private counsel can investigate more and credibly threaten to put up a fight, instead of meekly accepting whatever deal is on offer. They are more likely to strike cooperation deals, earning discounts if they provide useful information against other defendants. Defendants with unskilled or overworked counsel are at a disadvantage, as are those who speak limited English; the need for interpreters impedes communication.⁶¹

The incentives of prosecutors and defense counsel can also distort the process. To the extent that prosecutors are rewarded for convictions and defense counsel benefit from resolving cases quickly, both sides have strong incentives to prioritize a quick conviction over

⁵⁸ Cf. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 SO. CAL. L. REV. 501 (1992) (finding that AUSAs sought to craft lower sentences for defendants they viewed as “salvageable”).

⁵⁹ See N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE'S STOP-AND-FRISK PRACTICES (2013) (finding that only about half of arrests made subsequent to a stop-and-frisk resulted in conviction).

⁶⁰ See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85-105 (1968) (describing this practice); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879 (2009) (describing incentives to overcharge and effect on plea-bargaining).

⁶¹ Cf. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2468 (2004) (observing that “plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence.”).

a disposition that reflects culpability.⁶² That causes distortions in both directions: it sometimes leads to bargains that are unduly lenient, which prosecutors may prefer to the uncertainty of trial, but in other cases produces negotiated sentences that are excessive, when prosecutors insist on a guilty plea in the face of weak evidence and defense counsel has little incentive to fight.⁶³ The effect is corrosive. As Ronald Wright and Marc Miller have written, “[t]he public in general, and victims in particular, lose faith in a system where the primary goal is processing and the secondary goal is justice.”⁶⁴

The substantive law, finally, can render plea bargaining coercive and exacerbate racial disparities in the system. Where prosecutors can credibly threaten that defendants will receive a sentence that is many years or decades longer than the plea offer if convicted at trial, most defendants will plead. Innocent people will and do plead guilty.⁶⁵ Habitual offender laws and mandatory minimums, in particular, enable this dynamic. Aside from distorting the accuracy of convictions, habitual offender laws have a disparate impact on black men, who are disproportionately likely to have prior convictions.⁶⁶

The sentencing process itself adds another layer of distortion. Criminal histories often drive sentences. As a result, recidivists may receive greatly enhanced sentences, even if prior convictions were for relatively minor, non-dangerous crimes. Other perceived indicators of risk have a similar effect. Prosecutors may insist on, and judges may impose, a higher sentence for defendants who lack stable employment or an intact community—factors that also correlate with race and socioeconomic status.⁶⁷ Finally, privileged, non-minority defendants may benefit from prosecutors’ and judges’ implicit biases, particularly if they remind judges and lawyers of themselves. Even controlling for variables like criminal history, recent studies have found measurable racial disparity in criminal sentencing.⁶⁸

⁶² *Id.* at 2470–82; Barkow, *supra* note 60, at 881–82.

⁶³ *Id.* at 2472.

⁶⁴ Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 33 (2002).

⁶⁵ See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>; cf. John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 191 (2014); Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 48 (2013) (“As is now evident from the study described herein, the Supreme Court was wrong to place such confidence in the ability of individuals to assert their right to trial in the face of grave choices.”); Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74 (2008) (noting that nine of first two hundred people exonerated by Innocence Project had pled guilty); John L. Kane, *Plea Bargaining and the Innocent*, THE MARSHALL PROJECT (Dec. 26, 2014), <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent>; D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 778-79 (2007).

⁶⁶ Reliable statistics about the number of Americans with past convictions are surprisingly hard to come by, but current and recent rates of imprisonment are much higher among black Americans than white. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013 tbl. 8 (2014) (recording imprisonment rate of 2,805 per 100,000 black Americans and 144 per 100,000 white Americans); TUSHAR KANSAL & MARC MAUER, THE SENTENCING PROJECT, RACIAL DISPARITIES IN SENTENCING: A REVIEW OF THE LITERATURE 12 (2005).

⁶⁷ See sources cited *supra* note 27.

⁶⁸ See, e.g., KANSAL & MAUER, *supra* note 66; David Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the Federal Courts*, 44 J. L. & ECON. 285 (2001); Sonja B. Starr & M. M. Rehavi, *Racial Disparity in Federal Criminal Sentences*, 6 J. POL. ECON. 122 (2014).

Avenues for Reform

To mitigate racial disparities and inaccuracies in this arena, jurisdictions can pursue reforms designed to ensure that culpability, rather than demographic status, is the touchstone of charging, plea-bargaining, and sentencing. With extremely limited exceptions, *charges filed, offers extended through plea-bargaining, and final sentences should always reflect, and never be disproportionate to, the defendant's culpable conduct.* This is no easy goal to attain, but there are clear avenues for policy and legal reform.

1. Change prosecutors' incentives in plea-bargaining.

Legislatures can change prosecutors' incentives by ensuring that they are not evaluated and rewarded according to absolute conviction numbers, but rather according to measures that reflect a healthy and effective system of criminal justice. Prosecutors should be praised and rewarded, for example, for high "as-charged conviction" rates (the rate at which they convict on the initial charge filed), low custodial and probation populations, low crime and recidivism rates, and high ratings for fairness and skill by peers, defense lawyers, judges, victims, and defendants.⁶⁹ A legislature could require prosecutors' offices to collect and publicize these data, so that the public can assess their performance accordingly.

Chief prosecutors themselves are best situated to implement these performance criteria. In addition, separating charging decisions from the prosecution of a case can reduce the incentive to overcharge.⁷⁰ For example, Harry Connick Sr., when he led the New Orleans District Attorney's Office, created a separate charging division staffed with experienced attorneys to ensure consistency and accuracy in charging.⁷¹ Alternately, Rachel Barkow has proposed that prosecutors' offices should separate their "investigative" and "adjudicative" functions to prevent bias from infecting charging and bargaining decisions.⁷²

2. Ensure effective representation for indigent defendants.

⁶⁹ See Wright and Miller, *supra* note 64, at 35 (arguing that prosecutors should be evaluated by as-charged conviction rates); LAUREN-BROOKE EISEN, NICOLE FORTIER, & INIMAI M. CHETTIAR, BRENNAN CENTER FOR JUSTICE, FEDERAL PROSECUTION FOR THE 21ST CENTURY (2014) (proposing new performance measures for federal prosecutors' offices, including low prison populations, recidivism and crime rates); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 989 (2009) ("Fellow prosecutors, judges, defense counsel, defendants, victims, and jurors could routinely submit anonymous numerical and qualitative feedback on head and line prosecutors' performance."); Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 447 (2009) (suggesting that prosecutors be evaluated according to aggregated ratings from other criminal justice actors).

⁷⁰ *Cf.* Barkow, *supra* note 60, at 884 ("Consolidating all the important decisions in a criminal case with one actor who faces no outside check creates the risk that improper factors will enter the decision-making calculus without being exposed.").

⁷¹ See Wright & Miller, *supra* note 64, at 58–84 (describing screening division of New Orleans District Attorney's office under Harry Connick Sr.).

⁷² See generally Barkow, *supra* note 60.

Perhaps the single most important thing a jurisdiction can do to reduce class-based disparity and inaccuracies in plea-bargaining is to adequately fund an independent public defender's office that employs qualified, well trained, full-time, salaried lawyers. As documented by Paul Heaton and James M. Anderson in a Philadelphia case study, these institutional conditions minimize perverse incentives and enable effective representation, producing better outcomes for poor defendants.⁷³

3. Make charging and plea-bargaining transparent and accountable.

A central part of the problem with charging and plea-bargaining processes is that they are opaque. Bringing them out into the open would allow for better public scrutiny and more informed debate, which can protect against disparate and inaccurate results.⁷⁴

To begin with, legislatures could require or encourage prosecutors' offices to develop internal policies for charging and plea-bargaining, commit them to writing, and make them public.⁷⁵ Such policies, subject to public scrutiny, can further fairness and equality in prosecutors' charging and plea-bargaining practices.⁷⁶

Making the plea-bargaining process itself more public and transparent would help tether plea bargains to culpability. One simple reform option is to require that all plea offers be placed on the record. If the prosecution is willing to accept a one-year plea early in the process, it strains credulity to later demand twenty years as essential to public safety. Some post-trial sentencing differential is warranted to reflect the cost of trial and the foregone risk of acquittal, but judges at sentencing could consider what sentence the prosecution initially deemed appropriate as a benchmark for their post-trial sentences. Doing so would shrink the gap between pleas and trials, reducing their coercive effect and thus the dangers posed to innocent and minority defendants.

Judges could also improve plea-bargaining by exercising more oversight. They need not passively await the parties' deal; as New York federal judge Jed Rakoff recommends, judges could actively participate in the process, making nonbinding recommendations as to the appropriate bargain. This level of neutral oversight could protect innocent defendants against pressures to plead guilty, create better records, and better inform defendants' choices,

⁷³ James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 188 (2012) (finding that indigent defendants with public defenders fared significantly better than those with appointed counsel, where appointed counsel had fewer resources, "more difficult incentives," and were more isolated than public defenders, and so engaged in less preparation).

⁷⁴ See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912 (2006).

⁷⁵ See Wright & Miller, *supra* note 64, at 48 (urging prosecutors' offices to establish "hard screening" procedures including early assessment, reasoned selection, barriers to plea-bargaining and enforcement mechanisms).

⁷⁶ See Bibas, *Prosecutorial Regulation*, *supra* note 69, at 1003 (collecting examples of states and prosecutors' offices that have developed and publicized such guidelines).

as long as each defendant remained free to reject the recommendation and have his case tried before a different judge.⁷⁷

Delaware could also take a page from the military justice system. Military judges take great care in reviewing the factual bases for guilty pleas, offering little deference to the parties' bargains, and applying stringent appellate review of what the military calls improvident pleas. That would make pleas more accurate, insure better information, and provide a check upon sloppy investigation and poor lawyering.

Ultimately, though, it is the substantive law that makes plea-bargaining coercive. If sentence exposure at trial is excessive and prosecutors offer a dramatic plea discount, innocent but rational people will plead guilty. Reform of the plea-bargaining process must go hand in hand with reform of the substantive law.

4. Tether sentences to culpability.

A number of states have undertaken sentencing reform in the last few years, and more is on the horizon. At least ten states, including Delaware, have repealed or narrowed mandatory minimum sentencing laws.⁷⁸ At least six states have narrowed habitual offender enhancements.⁷⁹ At least eleven states have reclassified or redefined drug offenses to reduce penalties for certain conduct.⁸⁰ The voters of California, the state with perhaps the harshest three-strikes law on the books, passed Proposition 36 in 2012 to modify the law, such that only serious, violent third-strike crimes now trigger life sentences.⁸¹ Delaware should join this trend and modify its own habitual offender law to ensure that non-violent offenses do not trigger mandatory life imprisonment.⁸²

Finally, Delaware needs to assess fines carefully in each case to ensure that jails do not turn into debtors' prison. No one should remain imprisoned simply because he is poor, but in many counties and states this is a common event.⁸³ The Missouri Supreme Court, for

⁷⁷ See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/>; Robert Swartz & Michael M. Baylson, reply by Jed S. Rakoff, *Plea Bargains & Prosecutors: An Exchange*, N.Y. REV. BOOKS (Dec. 8, 2014), <http://www.nybooks.com/articles/archives/2014/dec/18/plea-bargains-prosecutors-exchange/>; Nancy Gertner, Bruce Brower, & Paul Shechtman, reply by Jed S. Rakoff, *Why the Innocent Plead Guilty: An Exchange*, N.Y. REV. BOOKS (Jan. 8, 2015), <http://www.nybooks.com/articles/archives/2015/jan/08/why-innocent-plead-guilty-exchange/>; see also Christopher Slobogin, *Lessons from Inquisitorialism*, 87 S. CAL. L. REV. 699, 723 (2014); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199 (2006).

⁷⁸ RAM SUBRAMANIAN & REBECCA MORENO, *VERA INST. JUSTICE, DRUG WAR DÉTENTE? A REVIEW OF STATE-LEVEL DRUG LAW REFORM, 2009–2013* (2014).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ David Mills & Michael Romano, *The Passage and Implementation of the Three Strikes Reform Act of 2012 (Proposition 36)*, 25 FED. SENT'G REP. 265 (2013).

⁸² Currently, it appears that a number of drug offenses qualify for third-strike treatment. See 11 Del. C. § 4214.

⁸³ See, e.g., A.C.L.U., *IN FOR A PENNY: THE RISE OF AMERICA'S MODERN DEBTORS PRISONS* (2010); HUMAN RIGHTS WATCH, *PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY* (2014); U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., *INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT* (2015); Complaint, *Foster v. City of Alexander City*, No. 3:15-CV-647-WKW (M.D. AL., Sept. 8, 2015); *Guilty and Charged Series, 2014–2015*, NPR, www.npr.org/series/313986316/guilty-and-charged; *Debtors' Prisons*, SOUTHERN CENTER FOR

example, recently changed its rules to require judges to assess defendants' ability to pay fines; if they cannot, courts must either put them on appropriate payment plans or reduce or waive the fine.⁸⁴

IV. Alternatives to Incarceration

For some individuals, criminal behavior is a symptom of an underlying issue, like drug addiction or mental illness, which is not well addressed by incarceration or fines. In such cases, an alternative to incarceration (ATI) may potentially generate a larger reduction in future crime at lower cost to society than conventional punishment. Two of the most common ATI strategies currently in use in western countries are essentially specialized types of court systems: drug courts, for people with underlying substance abuse problems, and veteran's courts, which handle crimes committed by current or former members of the US armed forces. A third ATI, commonly referred to as "restorative justice", is an approach to punishment which focuses on the victim and perpetrator coming to a mutually agreed upon resolution.

To date, there have been only a handful of large scale, high quality, evaluations of modern ATI programs. Existing scholarly research does suggest factors that affect whether or not an ATI program is able to reduce recidivism and be politically feasible to implement. First, a successful ATI program must provide a treatment whose efficacy is based on sound scientific principles—there has to be evidence that the intervention can work. Second, the eligibility requirements for ATI should be based on characteristics that are easily observable to court officials—there must a reliable method to identify which individuals should receive the treatment. Third, in order to be politically feasible, the program must be able to continually demonstrate that it is providing the public some benefit and not contributing to racial or socioeconomic disparities in the criminal justice system or society at large. This last point is critical; while currently politically unpopular, the rise of sentencing guidelines in the 1970s and 1980s was in part a response to concerns about racial and socioeconomic disparities in the punishments chosen by judges, who had almost complete discretion about sentences.

A. Drug Courts

Drug addiction is widely regarded as a form of disease in the medical community, in part because drug addiction has clearly defined and quantifiable physical markers and is amenable to resolution through medical intervention.⁸⁵ At the same time, reflective of popular views in the U.S. regarding the role of choice and agency in drug use, criminal codes have designated possession of many addictive substances as a criminal offense. Rather than

HUMAN RIGHTS, www.schr.org/our-work/debtors-prisons (chronicling SCHR litigation and resources); Sarah Stillman, *Get Out of Jail, Inc.: Does the alternatives-to-incarceration industry profit from injustice?*, THE NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc>.

⁸⁴ Order re: Rule 37.65 Fines, Installment or Delayed Payments (S. Ct. Mo., Dec. 23, 2014) (en banc).

⁸⁵ See NATIONAL INSTITUTE ON DRUG ABUSE, UNDERSTANDING DRUG ABUSE AND ADDICTION, <http://www.drugabuse.gov/publications/drugfacts/understanding-drug-abuse-addiction>.

process people charged with lower-level drug offenses through the traditional criminal justice system, individuals transferred to drug courts have their cases adjudicated by specially trained judges who are authorized to require individuals to undergo medical treatment for their addiction. Officials in these courts also frequently have the authority to require mandatory drug testing post-adjudication.

Drug courts carry the potential to satisfy all three desirable features of ATIs noted above. There are a large number of drug-specific medical interventions that are known to be effective at curbing substance abuse, particularly for opioids – including methadone treatment, therapy, or detoxification – with clear medical protocols that can be applied in a consistent way by trained professionals.⁸⁶ Moreover, in contrast to the early 1990s, public opinion in the US is increasingly in favor of reducing the number of drug offenders behind bars; contributing explanations for this shift in attitude include state decriminalization of marijuana possession, state-level fiscal concerns about correctional spending, and increased public concern about drug violations contributing to racial inequities in incarceration rates. However, in practice, the ability of court officials to identify the set of people who will benefit from treatment seems to vary across contexts.

Research indicates that drug courts that successfully require drug treatment for those who need it are effective at reducing crime. A recent analysis of a nationally representative sample of offenders found that adults assigned to drug courts committed 52% fewer criminal acts and spent about 30 fewer days in prison over an eighteen-month period than otherwise similar adults.⁸⁷ Of course, those who fail to complete the mandated drug treatment appear to recidivate at levels roughly equal to people in a control group, and a recent attempt by California to institute drug courts on a large scale essentially failed to reduce recidivism at all. Angela Hawken and Jeremy Grunert present evidence that not only were the California courts unable to successfully require that defendants complete treatment, the courts were essentially overwhelmed by the sheer number of defendants, and were unable to successfully match individuals with appropriate treatments.⁸⁸ The California experience suggests that, in order to reduce crime, drug courts must effectively target treatment to addicts and other individuals who will respond to medical intervention.

Other ATIs that are closely related to drug courts are intensive probation programs such as Hawaii's Hope Probation and South Dakota's 24/7 Sobriety Program. In contrast to treatment-based approaches, these programs focus on using incentives to shape the behavioral choices of offenders. Recent research suggests that, at least for many drug offenders, swift and certain but limited sanctions are both better deterrents and far less disruptive of inmates' jobs, families, and communities. Hope Probation is aimed at drug

⁸⁶ Laura Amato et al., *An Overview of Systematic Reviews of the Effectiveness of Opiate Maintenance Therapies: Available Evidence to Inform Clinical Practice and Research*. 28 J. SUBSTANCE ABUSE TREATMENT 321 (2005).

⁸⁷ Michael Rempel & Mia Green, *Do Drug Courts Reduce Crime and Incarceration?* in 4 THE MULTI-SITE ADULT DRUG COURT EVALUATION: THE IMPACT OF DRUG COURTS 61 (Shelli Rossman et al. eds., 2011), http://www.courtinnovation.org/sites/default/files/documents/MADCE_4.pdf; see also John Roman & Christine DeStefano, *Drug Court Effects and the Quality of Existing Evidence*, in JUVENILE DRUG COURTS AND TEEN SUBSTANCE ABUSE 107 (Jeffrey A. Butts & John Roman eds., 2004).

⁸⁸ Angela Hawken & Jeremy Grunert, *Treatment for All Means Real Treatment for Few*, 13 OFFENDER PROGRAMS REP. 81 (2010).

offenders, whereas 24/7 Sobriety is focused on people convicted of DUIs. In both, participants avoid jail time by submitting to either continual (24/7) or random (Hope Probation) biophysical testing, essentially requiring near total abstinence on the part of the offender. Participants who test positive for alcohol or drug use, via scientifically accepted metrics, are immediately incarcerated for a relatively short period of time, typically a few days. So long as the threats are immediate and predictably carried out, the threatened punishments can be modest. Evaluations of both programs have found substantially large reductions in recidivism, and in the case of 24/7 Sobriety, improved health outcomes.⁸⁹ That said, with the experience of California in mind, both Hope Probation and 24/7 Sobriety should be replicated in larger courts before they are considered “proven.” Moreover, intensive probation could in the future be used in concert with drug courts, with probation acting as a form of behavioral triage to separate those who are able to abstain by choice from those who require court-directed medical intervention to overcome an addiction.

B. Veteran’s Courts

As of 2013, there are almost 200 courts in the US that are set up explicitly for veterans.⁹⁰ Veteran’s courts typically operate on a separate docket from the general city, county, or state court and, in addition to standard legal counsel, employ a Veteran’s Justice Outreach (VJO) or community mentor to provide additional support for the defendant.⁹¹

The underlying assumption justifying the use of veteran’s courts is that felony or misdemeanor behavior by veterans may be caused, at least in part, by an underlying mental health or substance abuse problem that is directly related to military service. For example, a veteran may have committed an aggravated assault because of post-traumatic stress disorder resulting from a traumatic experience in active combat. Homeless veterans may be accused of petty theft or vandalism, all of which may be the result of an undiagnosed traumatic brain injury sustained while deployed. In such an instance, court-ordered mental health treatment, or simply connecting the veteran with appropriate services through the VJO can possibly meaningfully reduce recidivism.

⁸⁹ See Sam Kornell, *Probation That Works*, SLATE (June 5, 2013, 6:45 AM), http://www.slate.com/articles/health_and_science/science/2013/06/hawaii_hope_probation_program_reduces_crime_drug_use_and_time_in_prison.html; ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE: EXECUTIVE SUMMARY (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf>; Angela Hawken, *Behavioral Triage: A New Model for Identifying and Treating Substance-Abusing Offenders*, 3 J. DRUG POL’Y ANALYSIS 1 (2010); Press Release, Laura and John Arnold Foundation to Fund Research on Hawaii’s Opportunity Probation with Enforcement (HOPE) Model (April 24, 2015); Beau Kilmer et al., *Efficacy of Active Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota’s 24/7 Sobriety Project*, 103 AM. J. PUB. HEALTH 37 (2013); Nancy Nicosia, Beau Kilmer, & Paul Heaton, *Can a Criminal Justice Intervention Improve Public Health? Assessing the Effect of 24/7 Sobriety Programmes on Alcohol-Related Mortality*, LANCET PSYCHIATRY (forthcoming).

⁹⁰ Letter from William J. Sabol, Acting Director, National Institute of Justice, to Colleague (Dec. 5, 2014), <http://nij.gov/funding/documents/fv15-dear-colleague-courts.pdf>.

⁹¹ JIM MCGUIRE ET AL., VA VETERANS JUSTICE PROGRAMS, AN INVENTORY OF VA INVOLVEMENT IN VETERANS COURTS, DOCKETS AND TRACKS (Feb. 7, 2013), <http://www.justiceforvets.org/sites/default/files/files/An%20Inventory%20of%20VA%20involvement%20in%20Veterans%20Courts.pdf>.

There are important conceptual differences between drug courts and veteran's courts. Veterans are diagnosed PTSD at almost four times the rate of the general population (30% vs. 8%), and have elevated rates of other mental health disorders.⁹² Thus, mental health concerns may more readily surface when the accused offender is a veteran. However, compared to substance abuse, appropriate protocols for treating mental health issues like post-traumatic stress disorder or depression are less clearly defined; treatments vary from anger management therapy to anxiety medication.⁹³ In other words, unlike requiring someone addicted to opiates to undergo suboxone therapy, a commonly agreed-upon treatment, there is less consensus within the psychotherapy community regarding the most appropriate pathways to improve mental health.⁹⁴

To date, there are no large scale evaluations of the cost effectiveness of veteran's courts compared with the traditional criminal justice system, and there is also only scant empirical evidence on the post-adjudication outcomes for those involved.⁹⁵ This does not mean that veteran's courts are not a promising approach to reducing both criminal justice expenditure and crime, but that they are simply too new for long-term outcomes to yet be meaningfully understood. Moreover, unlike drug users, veterans have historically been perceived by the public as deserving of special treatment, meaning that these alternate justice systems are likely to remain politically feasible to implement.

C. Restorative Justice

Restorative justice relies heavily on the individual victim in the determination of what punishment, if any, a convicted offender receives. Local community members who are respected by both the offenders and victims are also frequently involved.⁹⁶ In such a system, the victim and offender participate in a series of mediation sessions, during which the parties reach an agreement about steps an offender will take to compensate the victim for the offense. These steps can include apologizing, participating in some sort of community outreach program, or directly compensating the victim for a financial loss. Cases which cannot be resolved are referred back to the court system.⁹⁷

Perhaps because of its focus on rehabilitation, restorative justice approaches to punishment are more common among juveniles, and a meta-analysis of 36 studies of Restorative Justice programs conducted for the UK Home Office found that, overall, offenders involved in these programs did no worse than offenders sentenced through in traditional criminal justice courts. Further, victims appeared to be more satisfied with the final case outcome.⁹⁸

⁹² *What is PTSD (Post Traumatic Stress Disorder)?*, NEBRASKA DEPARTMENT OF VETERANS' AFFAIRS (2007), <http://www.ptsd.ne.gov/what-is-ptsd.html>.

⁹³ *Diseases and Conditions: Post-traumatic Stress Disorder*, MAYO CLINIC (Apr. 15, 2014), <http://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/basics/treatment/con-20022540>.

⁹⁴ See, e.g., Bruce Wampold, *The Good, the Bad, and the Ugly: A 50-year Perspective on the Outcome Problem*, 50 PSYCHOTHERAPY 16 (2013).

⁹⁵ See *supra* note 90.

⁹⁶ See JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (Cambridge University Press 1989).

⁹⁷ *Id.*

⁹⁸ LAWRENCE SHERMAN & HEATHER STRANG, *RESTORATIVE JUSTICE: THE EVIDENCE* (The Smith Institute 2007).

That said, researchers found a fair amount of variation in these effects, and it can be difficult to identify when, exactly, a restorative justice approach will be successful. On average, violent offenders appear to be more responsive than those who committed property crimes, but even then restorative justice appears to be less effective at reducing future criminal behavior among people who Lawrence Sherman and Heather Strang refer to as “defiant,” a classification which may be difficult for practitioners to use to screen defendants.⁹⁹

Advocates of restorative justice argue that directly involving victims, offenders, and community members can reduce both perceived and actual racial disparities in the justice system, as all parties involved should agree to the outcome of a case.¹⁰⁰ However, empirical evidence on the effects of these programs on attitudes towards justice system fairness remains limited, and it is unclear whether such programs could operate at a scale sufficient to impact racial disparities at an aggregate level. Sherman and Strang note that all of the restorative justice programs they reviewed encompassed a small number of participants, and it is possible that scaling up these programs would produce very different outcomes.¹⁰¹

In summary, to be viable, ATI programs should be targeted at populations that will respond to scientifically sound treatments, and must be able to produce statistics that demonstrate their efficacy to a sometimes skeptical public. Among three common ATI programs, drug courts, veteran’s courts, and restorative justice, drug courts are the most extensively studied, and also are able to impose sanctions that have the firmest basis in science. Currently, public attitudes towards drug users are softening, making this a viable option for local jurisdictions. Veteran’s courts are targeted at a population that is generally viewed as deserving of special treatment, but it is less clear that an appropriate therapeutic treatment exists in all cases. Restorative justice appears to be promising on a small scale, but like veteran’s courts there are no large scale evaluations of the efficacy of this ATI at reducing recidivism or justice costs.

Contribution to Racial Disparities and Inaccuracies in Criminal Justice

By design, people who commit the same offense may receive different punishments in jurisdictions that use ATI based on some assessment of the why that person engaged in crime. There is an unavoidable tension between individually-tailored criminal justice solutions and concerns about fairness which any jurisdiction using an ATI must try to balance. Failure to achieve proper balance can lead to real concerns about corruption, discrimination, and unequal justice, or, alternatively, produce a system that does not adequately respond to the unique underlying reasons someone has committed a harmful act. Because ATI systems increase the variation in potential punishments that offenders can receive, utmost care must

⁹⁹ *Id.*

¹⁰⁰ *Restorative Justice Around the World*, RESTORATIVE JUSTICE ONLINE, <http://rjonline.org/university-classroom/02world> (last visited Sept. 29, 2015).

¹⁰¹ *See supra* note 96.

be used to ensure that access to ATI is based on objective and verifiable treatment goals, rather than simply offering special consideration for a particular favored group.

When properly implemented, specialized courts offer the potential of actually reducing racial disparities within the criminal justice system. This is because minorities are often overrepresented among the target populations for these programs: those arrested for low-level drug offenses and, in some communities, veterans.¹⁰² Diverting offenders to treatment, when successful, can allow these populations to avoid developing criminal records and suffering the other adverse ancillary consequences of repeated contact with the criminal justice system. The extent to which restorative justice initiatives affect racial disparities, if at all, depends on the specifics of the particular program.

Avenues for Reform

1. Establish objective, needs-based criteria for participation in specialized courts, and collect and analyze demographic data on participants.

Delaware has been a leader in developing and expanding specialized courts, and already has operational drug courts and veteran's courts in the state. To ensure that these specialized courts to the extent possible reduce rather than exacerbate racial disparities, the courts should collect and assess data on demographics of participants on an ongoing basis.

Policies and practices regarding the process for determining who is assigned to ATI can influence these programs' impact on disparities. To the extent that decisions regarding diversion are determined primarily by individual decision-makers such as prosecutors, defense attorneys, and judges, the system is open to possible influence from real or implicit bias. Similarly, determining eligibility based pre-existing characteristics such as prior criminal record or ability to pay for treatment that have been shown to exhibit race/ethnic disparities increases the likelihood that ATI will become a tool that increases rather than decreases disparity. While many practical considerations must govern eligibility factors, from the perspective of mitigating disparity, an approach that defaults to ATI for low-level offenses, offers ATI without reference to income, and determines eligibility based upon race-neutral factors such as clinical history seems most desirable.

When appropriately targeted, specialized courts offer the potential to increase public safety by addressing substance abuse or mental illness before these problems spiral into violence or more serious felonies. These programs need not exacerbate racial disparities, and, when ably implemented, can actually serve to reduce disparities.

¹⁰² See, e.g., OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE, 2013 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY (2013), <http://download.militaryonesource.mil/12038/MOS/Reports/2013-Demographics-Report.pdf>.

V. Non-Criminal Justice Policies

A comprehensive treatment of the enormous body of research discussing social and environmental contributors to racial disparities in crime is beyond the scope of this memorandum. However, clearly there are numerous root cause factors outside of the direct control of the criminal justice system that can fuel disparities. This section summarizes some of the current research on three types of non-criminal justice programs that likely impact crime: social insurance (including job training), investments in infrastructure, and education. These represent three domains where recent advances in the research knowledge base suggest possible new approaches to addressing the problem of racial disparities in criminal involvement.

A. Social Insurance and Job Training

A growing body of highly credible empirical research demonstrates that reducing household financial strain, especially if accomplished by improving employment outcomes, reduces recipients' criminal behavior.

Evidence from the UK, which dramatically reduced unemployment insurance generosity in 1996, demonstrates that lessening the amount of time someone can claim unemployment benefits and making it more difficult for individuals to receive any benefits at all can increase crime.¹⁰³ In the US, the impact of welfare reform on crime appears to be multilayered, as changes in benefits have historically been accompanied by an increase in either job training or additional work incentives like the Earned Income Tax Credit. Price Fishback et al. show that work programs in the New Deal were associated with substantial reductions in crime, more so than programs which simply provided families with cash assistance.¹⁰⁴ Hope Corman et al. present evidence that work incentives put in place by the Personal Responsibility and Work Opportunity Reconciliation Act in 1994 reduced the rate at which women were arrested for property offenses by roughly 5%.¹⁰⁵ General changes in the low-wage labor market in the UK are associated with changes in crime as well.¹⁰⁶

While these studies have focused on adult crime, there is some evidence that promoting employment opportunities for young people can have similar behavioral effects. Sara Heller tracks the arrest records of at risk youth who are enrolled in a summer jobs program, and demonstrates that individuals randomly assigned to summer jobs are substantially less likely to be involved in acts of violence, even during the school year.¹⁰⁷

¹⁰³ Olivier Marie & Stephen Machin, *Crime and Benefit Sanctions*, 5 PORTUGUESE ECON. J. 149 (2006).

¹⁰⁴ Price Fishback, R.S. Johnson, & S. Kantor, *Striking at the Roots of Crime: The Impact of Welfare Spending on Crime During the Great Depression*, 53 J. LAW & ECON 715 (2006).

¹⁰⁵ Hope Corman, D.M. Dave, & N.E. Reichman, *Effects of Welfare Reform on Women's Crime*, 40 INT'L REV. L. & ECON 1 (2014).

¹⁰⁶ Stephen Machin & Costas Meghir, *Crime and Economic Incentives*, 39 J. HUM. RESOURCES 958 (2004).

¹⁰⁷ Sara Heller, *Summer Jobs Reduce Violence among Disadvantaged Youth*, 346 SCIENCE 1219 (2014).

B. Infrastructure Improvements

Government actions that affect the physical environment can also generate meaningful changes in criminal behavior. Although the “broken windows” theory of crime has been criticized due to its potential to promote over-policing of young men of color¹⁰⁸, quasi-experimental evaluations of literal broken windows policies show promise. Kondo et al. followed crime patterns in the vicinity of blighted Philadelphia homes that were, or were not, given surface improvements such as replacing boarded up windows with plexiglass.¹⁰⁹ Crime in areas that were given touch-ups fell relative to otherwise similar neighborhoods where no such work was done. A similar Philadelphia program aimed at cleaning up or greening vacant lots was also associated with statistically significant reductions in gun violence, vandalism, and in intensity of resident’s concerns about crime.¹¹⁰ Researchers have also found that crime increased in close proximity to homes that are foreclosed upon during the Great Recession.¹¹¹

Governments can also encourage private real estate developers to reduce social disorder by providing incentives for urban renewal. The Department of Housing and Urban Development’s Low Income Housing Tax Credit (LIHTC) program provides state governments with funding to pay for tax credits that are awarded to developers who construct or rehabilitate rental housing for low income residents. Developers who make investments in the housing stock in low income neighborhoods, areas identified as Qualified Census Tracts (QCTs), are awarded credits that are 30% larger. Matthew Freedman and Emily Owens showed that crime fell in counties where developers built more new low-income housing in QCTs, rather than wealthier areas.¹¹² They attribute this empirical finding to the fact that the new developments in QCTs represent improvements in the quality of the physical environment, whereas new developments in less-poor areas are less likely to replace dilapidated or abandoned structures.

Improving the housing stock may also reduce crime when it reduces childhood exposure to intoxicants, particularly lead. Jessica Reye points out that states where were more aggressive in limiting the use of lead paint and leaded gasoline in the 1970s and 1980s saw larger declines in violent crime in the 1990s, when cohorts of individuals exposed to the improvements were entering their higher crime years.¹¹³

It is important to note that reducing social disorder in a blighted area is not the same thing as providing an incentive for people living in blighted areas to move; evidence from the

¹⁰⁸ See, e.g., BERNARD HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (Harvard University Press 2001).

¹⁰⁹ Michelle Kondo et al., *A Difference-In-Differences Study of the Effects of a New Abandoned Building Remediation Strategy on Safety*, 10 PLOS ONE (2015), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0136595>.

¹¹⁰ Charles C. Branas et al., *A Difference-in-Differences Analysis of Health, Safety, and Greening Vacant Urban Space*, 174 AM. J. EPID. 1296 (2011).

¹¹¹ Ingrid G. Ellen, Johanna Lacoé & Claudia A. Sharygin, *Do Foreclosures Cause Crime?*, 74 J. URBAN ECON. 59 (2013).

¹¹² Matthew Freedman & Emily Owens, *Low Income Housing and Crime*, 70 J. URBAN ECON. 115 (2010).

¹¹³ See Jessica Reyes, *Lead Exposure and Behavior: Effects on Aggression and Risky Behavior among Children and Adolescents*, 53 ECON. INQ. (forthcoming); Jessica Reyes, *Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime*, 7 B.E. J. ECON. ANAL. & POL’Y (2007).

Moving to Opportunity Experiment, which provided housing vouchers and search assistance to low income residents in cities across the US found a mixed impact on crime- in fact, boys who were moved to better neighborhoods were more likely to be involved in property crime than those who did randomly receive housing vouchers, although there were slightly less likely to engage in violent crime.¹¹⁴

Finally, investments in transportation infrastructure can affect the criminal environment in ways that reduce social harm. C. Kirabo Jackson and Emily Owens analyzed arrests made by the Washington, DC Metropolitan Police Force during the early 2000s, a period during which the Metro Rail (the local subway system) expanded its late night operating hours from 12 am to 3 am.¹¹⁵ They found that this increase in public transportation was associated with small increases in arrests for minor offenses, like vandalism and simple assault, but reductions in the rate of drunk driving- arguably a more serious and socially costly crime than the offenses that became more prevalent. This reduction in drunk driving was particularly salient once the implied increase in alcohol consumption in bars and restaurants was taken into account, and was most evident in neighborhoods where bars were located in close proximity to Metro stations.

C. Education

Education and crime are intrinsically linked. There is a persistent and strong negative relationship between the number of years that someone stays in school and their involvement with the criminal justice system. This pattern likely reflects a bi-directional relationship--more education likely causes a person to commit fewer crimes in the future, while involvement in the criminal justice system also disrupts the educational process.¹¹⁶

The best evidence on the impact of education on crime has come from studies of mandatory schooling laws, which increased the number of years of schooling that children were required to complete before dropping out. Lance Lochner and Enrico Moretti and Stephen Machin et al. show that such “shocks” to the education attainment of young people are associated with reduced criminal participation in the US and UK, respectively.¹¹⁷ The underlying mechanism here appears to be that the longer period of schooling increases the general productivity (or “human capital”) of the affected individuals, allowing them to earn higher wages, making crime less attractive.

¹¹⁴ Jens Ludwig, Greg Duncan, & Paul Hirschfield, *Urban Poverty and Juvenile Crime: Evidence from a Randomized Housing-Mobility Experiment*, 116 Q. J. ECON. 655 (2001); Jens Ludwig & Jeffrey Kling, *Is Crime Contagious?*, 50 J. LAW & ECON. 491 (2007).

¹¹⁵ C. Kirabo Jackson & Emily Owens, *One for the Road: Public Transportation, Alcohol Consumption, and Intoxicated Driving*, 52 J. PUB. ECON. 106 (2010).

¹¹⁶ See, e.g., Isaac Ehrlich, “On the Relation Between Education and Crime,” in EDUCATION, INCOME, AND HUMAN BEHAVIOR 313 (National Bureau of Economic Research 1975); Randi Hjalmarsson, *Criminal Justice Involvement and High School Completion*, 63 J. URBAN ECON. 613 (2008); Micahel Lovenheim & Emily Owens, *Does Federal Financial Aid Affect College Enrollment? Evidence from Drug Offenders and the Higher Education Act of 1998*, 8 J. URBAN ECON. 1 (2014).

¹¹⁷ Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence from Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155 (2004); Stephen Machin, Olivier Marie, & S. Vujic, *The Crime Reducing Effect of Education*, 121 ECON. J. 463 (2011).

Of course, school also has an incapacitative effect on crime; Brian Jacob and Lars Lefgren show that juveniles are more likely to be involved in property crimes on teacher planning days, when school is out of session in the middle of the week.¹¹⁸ Similar increases in property crime are observed during teacher's strikes.¹¹⁹ Nevertheless, violent crimes involving youth appear to fall when school is out of session; school serves as a meeting place for students, and can actually increase inter-personal conflict.¹²⁰

Finally, there is strong evidence that which school a child attends can affect their criminal involvement. Historically, counties which were forced to desegregate their public school systems experienced lower homicide rates in subsequent years.¹²¹ The reverse also seems to hold--Stephen Billings et al. find that increased school segregation that followed the end of intra-county busing in Charlotte-Mecklenburg in 2001 was associated with an increase in crimes committed by non-white men.¹²² Additional research on school quality suggests the mechanism here may be a reduction in the rigor of schools the minority students attended after the end of busing; students who were able to attend selective charter schools in Chicago via lottery were substantially less likely to be arrested than otherwise identical students who received low lottery numbers.¹²³ David Deming found that similar lottery winners in North Carolina were less likely to be incarcerated in their adult years as well, implying that having the opportunity to go to a more selective school can have long run impacts on an individual's criminal involvement.¹²⁴

Emerging new high-quality empirical evidence indicates that investments in education, public infrastructure, and social welfare programs that help people get back to work can reduce criminal behavior. To the extent that such investments are targeted towards disadvantaged communities, they offer potential for reducing racial disparities at the front end of the system by lowering the criminal involvement of minorities. Moreover, such non-criminal justice interventions might reduce disparities while enhancing overall public safety. However, for the most part, the impacts of these programs on crime tend to be small compared to impact of criminal justice interventions. Moreover, the cost of educational and infrastructure improvements can be high, such initiatives may have limited political support, and the details of how programs are carried out matter. Nevertheless, there are many other social benefits associated with improving public transportation or providing high quality public education beyond crime reduction and diminishment of racial disparity. In addition, addressing disparities by improving the quality of schools or housing for low-income

¹¹⁸ Brian Jacob & Lars Lefgren, *Are Idle Hands the Devil's Workshop? Incapacitation, Concentration and Juvenile Crime*. 93 AM. ECON. REV. 1560 (2003).

¹¹⁹ Jeremy Luallen, *School's Out...Forever: A Study of Juvenile Crime, At-Risk Youths and Teacher Strikes*, 59 J. URBAN ECON. 75 (2006).

¹²⁰ See Jacob and Lefgren, *supra* note 118.

¹²¹ D.A. Weiner, Byron Lutz & Jens Ludwig, *The Effects of School Desegregation on Crime* (NBER Working Paper No. 15380, 2009).

¹²² Stephen Billings, David Deming, & Jonah Rockoff, *School Segregation, Educational Attainment, and Crime: Evidence from the End of Busing in Charlotte-Mecklenburg*, 129 Q. J. ECON. 435 (2014).

¹²³ Julie Cullen, Brian Jacob, & Steven Levitt, *The Effect of School Choice on Participants: Evidence from Randomized Lotteries*, 74 ECONOMETRICA 1191 (2006).

¹²⁴ David Deming, *Better Schools, Less Crime?*, 126 Q. J. ECON. 2063 (2011).

individuals does not generate the additional ancillary social costs that fall on the families and loved ones of incarcerated criminals.

Appendix A: Recent Examples of Courts' Use of Data to Understand Racial Disparities in Police Stop and Search Behavior

A number of large city police departments have collected data relating to pedestrian stops, and in some locations, courts and scholars have measured compliance with the Fourth and Fourteenth Amendment standards. A review of these efforts illustrates how courts can use data to better understand racial disparities, and, where needed, craft appropriate measures to diminish disparity.

I. Los Angeles

As a result of a number of high visibility problems in the Los Angeles Police Department, the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice initiated an investigation of policing practices. In 2002 a consent decree was entered between DOJ and Los Angeles setting forth a number of reforms within the police department, including collection of data on car and pedestrian stops.¹ In 2008, Professor Ian Ayres published a study in which he analyzed the stops to determine possible race effects.² The study reported:

1. African Americans were much more likely to be stopped than non-minorities. There were more than 4,500 stops for every 10,000 African American residents, but only 1,750 stops for every 10,000 non-minority residents. In two divisions (Central and Hollywood), there were more stops of African Americans in one year than there were African American residents.
2. The racial disparity was not the result of differing crime rates. In regressions controlling for both violent and property crime rates, the stop rate per 10,000 residents was more than 3,400 stops higher for African Americans and more than 350 stops higher for Hispanics than for non-minorities.
3. The disparity in the likelihood of being stopped was not driven by a policy of assigning more police to minority neighborhoods. Indeed, the racial disparity in stop rates was higher in non-minority neighborhoods than in minority neighborhoods.
4. Large racial disparities were estimated with regard to specific police investigative techniques.
 - a. Stopped African Americans were 166% more likely and Hispanics were 132% more likely to be asked to exit vehicles than stopped whites.

¹ Under 42 U.S.C. §14141 (2012), the Department of Justice is empowered to bring pattern and practice lawsuits against police departments for systemic violations of constitutional or federal statutory rights. See Myriam E. Gilles, *Reinventing Structural Reform Litigation*, 2 BUFF. CRIM. L. REV. 815 (1999).

² IAN AYRES & JONATHAN BOROWSKY, ACLU, A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT (2008), <http://islandia.law.yale.edu/ayers/Ayres%20LAPD%20Report.pdf>. See also CHRISTOPHER STONE ET AL., POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD 22 (2009), <http://www.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf>.

- b. Stopped African Americans were 127% more likely and Hispanics were 43% more likely to be frisked or patted down than stopped whites.
 - c. Stopped African Americans were 76% more likely and stopped Hispanics were more than 16% more likely to be asked to consent to being searched than stopped whites.
5. Stops of African Americans were less productive than the stops of whites. Stopped African Americans were 21% more likely to be stopped without being either cited or arrested thus suggesting that police required less justification to stop African Americans than to stop whites.
6. Searches and frisks of African Americans and Hispanics were systematically less productive in producing weapons, drugs or other contraband than those conducted upon whites:
- a. Searched African Americans were 37% less likely than searched whites to be found with weapons, 24% less likely to be found with drugs, and 25% likely to be found with other contraband.
 - b. Searched Hispanics were 33% less likely than searched whites to be found with weapons, 34% less likely to found with drugs, and 12% less likely to be found with other contraband.
 - c. Frisked African Americans were 42% less likely than frisked whites to be found with weapons, 25% less likely to be found with drugs, and 33% less likely to be found with other contraband.
 - d. Frisked Hispanics were 32% less likely than frisked whites to be found with weapons, 38% less likely to be found with drugs, and 15% less likely to be found with other contraband.

Based on this data and statistical analysis, Professor Ayres concluded that “it is implausible that higher frisk and search rates were justified by higher minority criminality, when these frisks and searches were less likely to uncover . . . contraband.”³

II. New York City

In New York City, stop and frisk practices have generated strong political debate and significant litigation. A decision in a highly contested civil rights lawsuit, *Floyd v. City of New York*,⁴ found that the City had a municipal policy and practice that violated both the Fourth Amendment protections against unreasonable searches and seizures and the Fourteenth Amendment’s Equal Protection Clause prohibition on racial discrimination. In a separate remedial order, the court appointed a monitor to assist in the implementation of the broad equitable relief necessary to remedy the long-standing and pervasive constitutional violations.

³ AYRES & BOROWSKY, *supra* note 2, at 27.

⁴ *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013).

From January 2004 through June, 2012, the New York City Police Department (NYPD) made 4.4 million pedestrian stops in New York City, of which over 80% were of African-Americans or Latinos. More than half of those stopped were also subjected to a frisk. *Floyd* presented a challenge to these stop and frisk practices on two grounds. First, that many were conducted without the requisite reasonable suspicion and, therefore, violated the Fourth Amendment. Second, that the disparity in stops based on race were not explained by non-racial factors and therefore the statistical and other evidence, including stated practices in the NYPD, proved a violation of the Equal Protection Clause of the Fourteenth Amendment.

The court found the following facts after a several-week trial:

1. Between January 2004 and June 2012, the NYPD conducted over 4.4 million stops.
2. The number of stops per year rose sharply from 314,000 in 2004 to a high of 686,000 in 2011.
3. 52% of all stops were followed by a protective frisk for weapons. A weapon was found in 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.
4. 6% of all stops resulted in an arrest, and 6% resulted in a summons. The remaining 88% of the 4.4 million stops resulted in no further law enforcement action.
5. In 52% of the 4.4 million stops, the person stopped was black, in 31% the person was Hispanic, and in 10% the person was white. In 2010, New York City's resident population was roughly 23% black, 29% Hispanic, and 33% white
6. In 23% of the stops of blacks, and 24% of the stops of Hispanics, the officer recorded using force. The number for whites was 17%.
7. Weapons were seized in 1.0% of the stops of blacks, 1.1% of the stops of Hispanics, and 1.4% of the stops of whites.

On the issue of Fourth Amendment compliance, only 12% of all stops resulted in an arrest or citation, some which were unrelated to the reason for the stop. While courts have generally refused to quantify the level of proof necessary for a finding of probable cause (for arrests and searches) or for reasonable suspicion sufficient to allow a stop or frisk, the low "hit-rate" in New York City has been interpreted by many to be far below any normatively reasonable assessment of the evidence or facts necessary for an intrusive stop and frisk.⁵ In particular, the low rate of seizure of guns raised questions regarding the validity of the factors

⁵ See Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 405 (2006); Max Minzer, *Putting Probability Back Into Probable Cause*, 87 TEXAS L. REV. 913 (2009); Christopher Slobogin, *The Exclusionary Rule: Is It On Its Way Out?*, 10 OHIO STATE J. CRIM. LAW 341, 352-53 (2013); Kin Kinports, *The Dog Days of the Fourth Amendment*, 108 NW. U. L. REV. COLLOQUY 64 (2013).

upon which police rely in frisking for guns; from the data the supposed “tell-tale” signs of a weapon are very poor predictors of possession.⁶

On the race discrimination claim, the court first had to decide which of the competing “benchmarks” used by the experts provided the best statistical approach on the issue of possible racial profiling. Dr. Fagan used population and reported crime as benchmarks for understanding the racial distribution of stops. The City proposed a benchmark consisting of the rates at which various races appear in suspect description from crime victims (“suspect race description data”). According to the City, the fact that blacks and Hispanics represented 87% of persons stopped in 2011 and 2012 was not disproportionate given that 83% of all known crime suspects and 90% of all known violent crime suspects were black and Hispanic.⁷

The court found that the City’s assumption that the racial distribution of stopped pedestrians will resemble the racial distribution of the local criminal population, even if “the people stopped are not criminals” to be flawed.⁸ Given that nearly 90% of all persons stopped were not involved in criminal conduct (and only 13% of those stopped were done so pursuant to a specific suspect description), the court concluded that crime suspect data may serve as a proxy for the pool of criminals exhibiting suspicious behavior, but not for innocent persons, particularly where the “behavior” descriptions are so vague and often consistent with innocence.⁹ Moreover, one would expect that a racially neutral practice would result in equal stop rates by race of innocent persons (90% of those stopped in New York City) as it is highly unlikely that innocent Blacks who are stopped are exhibiting more criminal like behavior than Whites.¹⁰

Based on regression analysis—a statistical methodology that seeks to determine whether a measurable relationship exists between an explanatory factor (e.g. race) and an outcome (e.g. probability of a stop or a search) holding constant other relevant factors--the court determined that several factors supported a finding of intentional race discrimination. First, more stops were made of blacks and Hispanics, and even when other relevant variables were held constant, the best predictor of stops was the racial composition of the precinct or census tract. Second, regardless of the racial composition of the geographic areas, blacks and Hispanics were more likely to be stopped (again holding other variables constant), even in

⁶ In 2011, the NYPD made 525,000 more stops than in 2003, but recovered only 176 more guns, an incremental recovery rate of 0.03%. NEW YORK CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011 (May 9, 2011), http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf. See also *United States v. McCrae*, 2008 U.S. Dist. LEXIS 2314 (E.D.N.Y. Jan. 11, 2008) (50 stops made on “tell-tale signs” of possession of guns as reported by officer making stops, resulted in a single gun seizure). And, a study by the New York Attorney General on the outcome of the cases in which arrests were made after a stop in New York City for the years 2009-2012 (6% of the total stops) showed that close to a half did not result in a conviction, fewer than one in four (or 1.5% of all stops) resulted in a jail or prison sentence, one in fifty (or 0.1% of all stops) resulted in a conviction of a crime of violence and for possession of a weapon, and close to one-quarter of these arrests were dismissed before arraignment or downgraded to an infraction or violation. NEW YORK STATE ATTORNEY GENERAL, A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT’S STOP-AND-FRISK PRACTICES (2013). In cases with random stops, the rate of seizures of guns and drugs has been appreciably higher. See, e.g., *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000) (random stops of cars yielded drugs in 7.4 % of stops).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

predominantly white areas. Third, blacks and minorities were 30% more likely to be arrested, as opposed to receiving a summons (holding variables constant). Fourth, blacks and Hispanics were 14% more likely to be subjected to the use of force during the stop. And fifth, the hit rate for blacks and Hispanics as measured by further law enforcement action following a stop and/or frisk was 8% lower for blacks and Hispanics, thereby indicating that they are being targeted for stops based on lesser degree of objectively-founded suspicion.¹¹

Beyond the statistical evidence, the court found evidence of intentional discrimination through an examination of “institutional evidence,” and specifically the deliberate indifference of the NYPD to patterns of racial discrimination in stop and frisk practices. Patterns of race discrimination were known to the NYPD as early as 1999 when the State Attorney General issued a report on stop and frisk practices that documented unexplained racial disparities in stops. Further, the NYPD put great pressure on commanders and others in the chain of command (down to patrol officers) to increase the number of stops (from 97,000 in 2002 to 686,000 in 2011), but that the NYPD failed to audit the stops in a manner that would examine possible racial discrimination. There was also evidence that officers were encouraged to make stops based on racial characteristics or stereotypes, and in some cases direct orders to the target the “right people,” which was understood to mean Blacks and Hispanics since it was young men of color who were committing violent crimes most often.

III. Philadelphia

In 2009, Mayor Michael Nutter implemented a plan to increase stop and frisks to combat high levels of murder and other violent crime. Over the next two years, stops increased by almost 30%, and in the 2009-2011 period approximately 260,000 stops of pedestrians were *recorded* on an annual basis. Given that the population of Philadelphia at that time was approximately 1.6 million persons, the rate of pedestrian stops was higher than that in New York City.

In 2011, in a class action lawsuit filed against the City of Philadelphia, alleging Fourth and Fourteenth Amendment violations, the parties agreed to a Consent Decree that required the City to conduct stops and frisks within constitutional limits, prohibited stops and frisks without reasonable suspicion (specifying certain conduct that did not establish reasonable suspicion, such as “loitering” “high crime areas” “disturbances” and “furtive movements”), prohibited the use of race as a basis for a stop except in cases of suspect identifications by race, mandated the creation of an electronic data base of all stops and frisks with relevant information as to each stop, provided for the appointment of a monitor, and established a monitoring and auditing process under which plaintiffs’ counsel and the monitor would have access to all relevant data and information.¹²

From 2010 to 2012, the number of stops dropped to approximately 215,000 per year. However, the high rate of impermissible stops and frisks has persisted. In a report filed with

¹¹ *Id.*

¹² *Bailey v. City of Philadelphia*, C.A. No. 10-5902 (E.D. Pa. 2010). Rudovsky is counsel for plaintiffs in the litigation of the Philadelphia stop and frisk federal class action.

the court that analyzed stops and frisks for the first six months of 2014, the following matters were documented with respect to Fourth Amendment issues:

1. 37% of all stops were made without the requisite reasonable suspicion. Significantly, the Philadelphia Police Department (“PPD”) audits show similar rates of stops without reasonable suspicion: the audits for the first two quarters of 2014 by the PPD show patrol officer stops without reasonable suspicion at 39% and 29%, respectively. These results show very modest improvement from the previous data reviews (that showed impermissible stops at 40-50%), but tens of thousands of persons in Philadelphia continue to be stopped each year without reasonable suspicion.
2. 39% of all frisks were made without reasonable suspicion and an additional 14% were made in cases where the stop itself was not supported by reasonable suspicion.
3. Contraband of any kind was recovered in only 60 stops (2.5 % of all stops) and 5 guns were seized (0.2 % of all stops). Arrests occurred in 7.5% of all stops, excluding arrests made on probable cause even before a stop or frisk was conducted.
4. Of 442 frisks, only 2 weapons were seized and contraband other than weapons was seized in only 19 other frisks; in over 95% of all frisks, no evidence was seized. In 131 incidents where police reported that the suspect was armed or involved in a violent crime, a weapon was recovered in only 2 cases.
5. Of 211 stops in which guns or gun-related activity is referenced as a basis for the stop, there were no frisks recorded on 80 stops, or 38% of the total.

The very low hit-rates raise concerns that stops and frisks are not being conducted based upon a legally sufficient level of suspicion. Focusing on frisks only, where it would be expected that there would be the opportunity for recovery of weapons or other contraband in many cases, since the officer claims to have reasonable suspicion that the suspect is armed, the rate of recovery of weapons is vanishingly small. Moreover, the fact that many stops reportedly based on concerns about weapons do not result in frisks raises serious questions as to whether the police are accurately reporting what they observe, and whether their proxies for weapon possession are appropriate.

With respect to racial effects, the data showed that in all districts, Blacks and minorities account for a higher share of stops than they do in the population; in some districts, they are stopped at a rate over 5 times their share of the population. Thus, in the 7th Police District, where the population is 5% Black, 25% of the stops were of Blacks and in the 9th District where the population is 11% Black, 69% of the stops were of Blacks. By contrast, in the 22d Police District, where Blacks make up 89% of the population, the ratio of stops by race was close to a 1:1 ratio.

Approximately 11.3 more Black individuals were stopped than White individuals for every 10,000 residents of a district. After appropriate statistical adjustments, this difference

translates to an expected disparity in annual stops citywide of approximately 73,600, or 34% of the total annual stops.

Raw data establishing disparate rates of stops and frisks by race do not demonstrate that disparities arise due to racial bias. Regression analysis offer one tool for assessing whether disparities can be explained by non-racial causative factors, such as demographic makeup and crimes rates by district. Applying regression analysis to the Philadelphia data and controlling for detainee age, Latino identity, district racial composition, employment rates, sources of information for the stops, the share of the male population under 24, and prior year district crime rates indicates that districts with higher crime rates have more stops, but accounting for these other factors can eliminate the racial effects seen in the raw population and stop data.

The Philadelphia data indicate that the frisk rate for Black detainees is 7.5– 9.5 percentage points higher than for Whites. Since the pedestrian frisk rate for Whites is 9.7%, this translates to an increased likelihood of 75% to almost 100% that Black detainees are frisked relative to Whites. Using regression analysis to account for factors such as age, district demographic variables, or crime rates demonstrates a robust pattern of racial disparity that cannot be attributed to these additional non-race factors.

The data also demonstrate significant variation by race in the share of stops lacking reasonable suspicion, which ranged from 32% for Whites to 39% for Blacks to 41% for Latinos. There is a 29% higher unfounded stop rate for Latinos and 21% higher rate for Blacks relative to Whites.

As noted above, an important measure of the propriety of stops and frisks—both as to the Fourth and Fourteenth Amendment issues--is the rate at which they lead to the discovery of contraband, and particularly weapons, since frisks are permitted only where the officer reasonably believes that the suspect is armed and dangerous. Moreover, seizures of weapons are often cited as justification for a robust stop and frisk program.

In Philadelphia, fewer than 1 in 200 pedestrian *frisks* yielded a firearm. Including other weapons raises the overall rate of detection of weapons to only 0.92%. None of the frisks of Whites yielded firearms and 1 of the 47 frisks yielded other weapons. By comparison the 333 frisks of Blacks yielded 2 firearms and 1 other weapon. Although the racial differences in hit-rates are not statistically significant, this is unsurprising given the rarity with which firearms are interdicted.

Drugs were detected in about 1 in 60 frisks, including 1.75% of frisks of Black pedestrians, 2.13% of Whites, and 0% of Latinos. These patterns do not suggest that minorities possess drugs more frequently than Whites; indeed, the data points in the opposite direction. Further, although suspicion of drug activity may be grounds for a stop, a frisk may not be undertaken in a search for drugs and many of the “stops” for narcotics-related conduct that are recorded by police are actually arrests based on probable cause (e.g., observed drug transactions).

Although it remains to be seen how courts will ultimately interpret the developing evidence from Philadelphia discussed above, clearly the availability of data covering searches

and their outcomes by race affords the courts very valuable information on the nature and potential explanations for disparities.