

BRENNAN

CENTER

FOR JUSTICE

REDUCING RACIAL AND
ETHNIC DISPARITIES IN JAILS
RECOMMENDATIONS FOR LOCAL PRACTICE

Jessica Eaglin and Danyelle Solomon

Foreword by Baltimore Police Commissioner Anthony W. Batts

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ABOUT THE AUTHORS

Jessica Eaglin is counsel in the Justice Program at the Brennan Center for Justice. Ms. Eaglin began her legal career as a litigation associate at Simpson Thacher & Bartlett LLP, where she focused on white collar crime and antitrust litigation. She clerked with the Honorable Damon J. Keith for the Sixth Circuit Court of Appeals. She has in-depth expertise on sentencing reforms across the United States, correctional reforms, and policies at the intersection of civil rights and the administration of justice. Ms. Eaglin previously taught federal sentencing law and civil rights in San Diego, California, and recently developed and taught a course at Yale College on mass incarceration in the United States. She holds a B.A. from Spelman College, an M.A. in Literature from Duke University, and a J.D. from Duke University School of Law.

Danyelle Solomon is policy counsel in the Washington, D.C. Office of the Brennan Center for Justice. Ms. Solomon focuses on justice and democracy issues in the D.C. Office. Prior to joining the Brennan Center, she served as Legislative Counsel at the White House Office of National Drug Control Policy within the Office of Legislative Affairs. Ms. Solomon also served as counsel to Senator Benjamin L. Cardin, Chairman of the Terrorism and Homeland Security Subcommittee of the Senate Judiciary Committee. She also served as lead attorney on the Judiciary Committee during the Supreme Court confirmation hearings of Justices Sotomayor and Kagan. Ms. Solomon obtained her J.D. from Pennsylvania State University and received her B.A. in Political Science from the University of Miami.

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FOREWORD

Anthony W. Batts

Public safety is of paramount importance in creating healthy communities. Because of the work of countless law enforcement professionals, crime today is down to a level not seen since the 1960s. In the last 25 years, violent and property crime has declined almost 50 percent.

Yet along with this crime reduction have come inadvertent and costly consequences. Since 1990, the United States increased its incarcerated population by 61 percent. There are now 2.3 million Americans behind bars. If current trends persist, one in three African American men born today will be incarcerated in his lifetime. Not only do we live in an era of reduced crime, we also live in an era of excessive incarceration. We lock up too many — especially people of color — for too long, without a clear public safety rationale.

Over incarceration and racially disparate law enforcement are counterproductive to the goal of improving public safety. These policies call into question the legitimacy of the justice system. In Baltimore City, and in many urban minority communities, there is an inherent mistrust of people who wear police uniforms. By reversing these trends, we can actually better protect and serve our communities. Key reforms will restore the public's trust in government. Rebuilding trust will increase the likelihood that citizens will work with law enforcement — police, prosecutors, judges, and corrections officials — to keep our neighborhoods safe and vibrant.

Since beginning my career as a police officer over three decades ago, I have witnessed various changes in our field: from the dramatic decrease in crime, to a concentration on crime prevention, to today's new focus on reducing incarceration and racial disparities while preserving public safety. How we police — and whom we police — is the subject of an important national conversation. A crucial part of this analysis is the role of race in our justice system.

My experiences growing up a young black kid in South Central Los Angeles inform my view on this vital topic. I remember asking my mother whether any of our leaders cared about the black kids dying in our streets. My mother encouraged me to be a change agent. I have dedicated my career to that goal. How can we move forward to break harmful trends and reinforce beneficial ones? How can we keep our country safe while reducing incarceration and racial injustices in our system?

We can do what works. We can learn from successes based on tested innovations. We can improve our policies, practices, and every day decisions. In everything from policing to pretrial detention to prosecution to probation and parole, modern data-driven techniques can reduce crime without over-relying on incarceration. These techniques can also reduce racial disparities.

This report provides recommendations to reduce racial disparities in jails. It provides local actors with a roadmap to modernize how we enforce criminal laws. We can and should move away from selective enforcement and harsh punishment — which research tells us does not work — toward a system that is more effective and just. This important report provides a path to that goal.

Batts is the Police Commissioner for the City of Baltimore. He previously served as Chief of Police for Oakland and Long Beach, California.

LETTER FROM THE DIRECTORS

Inimai Chettiar & Nicole Austin-Hillery

As we work to reduce racially disparate outcomes in our criminal justice system, we face two challenges. First, we must find a way to reduce racial disparities in the justice system without creating unnecessary polarization. Second, we must move beyond merely discussing the problem to firmly focus on *solutions*. This report seeks to advance both these goals.

Recent controversies in Ferguson, Mo., Staten Island, N.Y., North Charleston, S.C., and Baltimore, Md., have reopened a national conversation on race, crime, and punishment. As we grapple with these issues, we must remember one critical point: The goals of increasing public safety, decreasing overreliance on incarceration, and decreasing racial disparities are not in tension. Research and experience have shown that we can do all three. Many leaders in law enforcement and corrections believe this as well.

In this report, we called upon the experts who oversee criminal justice every day — police, prosecutors, defense attorneys, judges, sheriffs, and corrections heads — to work with community leaders, advocates, and researchers to devise solutions. Through a Roundtable discussion held in October 2014, we asked these experts to propose changes to local practices that would lead to a reduction in racial and ethnic disparities reflected in the country's jail population. Jails — as opposed to prisons — are largely a local function. They house individuals who have been arrested, those awaiting trial, and those serving sentences for low-level offenses. While participants recognized the need to change laws to achieve change in the system, the recommendations in this report focus on ways in which local actors can alter outcomes without legal changes.

Based on the conversations and ideas generated by the Roundtable, this report sets forth concrete recommendations. We hope they prove valuable to practitioners, policymakers, and advocates.

Chettiar is Director of the Brennan Center's Justice Program. Austin-Hillery is Director and Counsel of the Brennan Center's Washington, D.C. Office.

ROUNDTABLE PARTICIPANTS

On October 21-22, 2014, the Brennan Center hosted *Racial and Ethnic Disparities in American Jails: A Roundtable Discussion*, bringing together leading law enforcement, corrections officials, judges, practitioners, researchers, scholars, and advocates.

During the Roundtable, experts discussed a variety of topics related to reducing racial disparities in the criminal justice system, including which reforms have worked to reduce disparities, how reducing racial disparities could be measured, and what reforms could achieve these goals. Participants focused on reforms to be implemented at the local level through changes to practices and decision making (instead of legal changes) to reduce racial disparities reflected in locally run jails (instead of federal and state prisons).

The authors' recommendations are based on ideas generated by the Roundtable discussions. While the report draws on statements by Roundtable participants to demonstrate the high impact these recommendations could have on reducing incarceration and racial disparities in jails, the recommendations of this report should not necessarily be ascribed to any individual participant.

Experts participating in the Roundtable included:

- **Nicole Austin-Hillery**, Washington, D.C. Office Director, Brennan Center for Justice.
- **Mario Barnes**, Associate Dean for Faculty Research and Development, University of California, Irvine School of Law.
- **Diane Beer-Maxwell**, Program Manager, International Association of Chiefs of Police.
- **Spike Bradford**, Director of Communications, Pretrial Justice Institute.
- **Paul Butler**, Professor of Law, Georgetown University Law Center; former federal prosecutor.
- **Juan Cartagena**, President and General Counsel, LatinoJustice PRLDEF.
- **Inimai Chettiar**, Justice Program Director, Brennan Center for Justice.
- **Michaela Davis**, Criminal Justice and Drug Policy Attorney, ACLU of Northern California.
- **Cristine DeBerry**, Chief of Staff, Office of District Attorney George Gascón, City and County of San Francisco.
- **Cynthia Figueroa**, President and CEO, Congreso de Latinos Unidos.
- **Nazgol Ghandnoosh**, Research Analyst, The Sentencing Project.

- **Greg Hamilton**, Sheriff, Travis County, Texas.
- **Alan Jenkins**, Executive Director, Opportunity Agenda.
- **Cynthia Jones**, Associate Professor of Law, Washington College of Law, American University.
- **Tracie Keese**, Director of Research Partnerships, Center for Policing Equity; Project Director, Department of Justice National Initiative for Building Community Trust and Justice, John Jay College of Criminal Justice Network for Safe Communities; retired Captain, Denver Police Department.
- **David LaBahn**, President & CEO, Association of Prosecuting Attorneys; former Director, American Prosecutors Research Institute; former Director of Research and Development, National District Attorneys Association; former Deputy District Attorney, Orange and Humboldt Counties, California.
- **Clinton Lacey**, Director of the District of Columbia Department of Youth Rehabilitation Services, former Deputy Commissioner, Department of Probation, City of New York.
- **Marc Levin**, Policy Director, Right on Crime; Director, Center for Effective Justice, Texas Public Policy Foundation.
- **Glenn Martin**, President, JustLeadership USA; former Vice President, Fortune Society.
- **Marc Mauer**, Executive Director, The Sentencing Project.
- **Jerome McElroy**, Executive Director, New York City Pretrial Justice Agency.
- **Rick Raemisch**, Executive Director, Colorado Department of Corrections.
- **Norman Reimer**, Executive Director, National Association of Criminal Defense Lawyers; former criminal defense attorney, Gould Reimer Walsh Goffin Cohn LLP.
- **Hon. Louis Trosch, Jr.**, District Court Judge, Mecklenburg County, North Carolina.
- **Nicholas Turner**, President and Director, Vera Institute of Justice.
- **Arthur Wallenstein**, Director, Department of Correction and Rehabilitation, Montgomery County, Maryland.

EXECUTIVE SUMMARY

From October 21-22, 2014, the Brennan Center for Justice and the John D. and Catherine T. MacArthur Foundation convened a group of 25 criminal justice leaders — prosecutors, police, correctional officers, sheriffs, defense attorneys, community advocates, and researchers — at New York University School of Law for a series of discussions on racial disparities in local jails. Our goal for the two days: identify changes in local practices to reduce racial and ethnic disparities in jails, while alleviating unnecessary incarceration and maintaining public safety.

People of color are overrepresented in the criminal justice system. Race, whether consciously or unconsciously, affects every discretionary point in the criminal justice system. Even race-neutral policies can yield differential treatment and outcomes. These disparate outcomes are commonly referred to as “racial and ethnic disparities.” While some crimes are disproportionately committed by certain races, which can produce some racial imbalances, this report seeks to reduce *unjustified* disparities in jails.

Why focus on jails? Much attention has been given to racial disparities in our nation’s prisons, but they have not been fully examined in jails. “Jails” are city or county-level incarceration facilities. Unlike state prisons, which hold people convicted of crimes and serving longer sentences, jails primarily hold people awaiting trial and serving short sentences for low-level offenses. Jails provide a gateway to deeper entanglement in the criminal justice system. Often, decisions made before a defendant arrives at the jailhouse door — by police, prosecutors, judges, or others— result in the racial disparities that are eventually reflected in jails. These disparities in turn help create racial disparities throughout the rest of the criminal justice system.

Roundtable participants identified the following drivers of racial and ethnic disparities in local systems:

- *Treatment of Low-Level Offenses:* African Americans are almost four times more likely to be arrested for selling drugs and almost three times more likely to be arrested for possessing drugs, even though whites are more likely to sell drugs and equally likely to consume them. Research from various jurisdictions indicates that African Americans are also more likely to receive jail sentences when convicted of low-level offenses.
- *Overuse of Pre-Trial Detention:* Studies consistently find that African American and Hispanic defendants are more than twice as likely to be detained in jail pending trial. Research indicates that pretrial detention significantly increases the likelihood that a defendant will be sentenced to incarceration after trial and for longer periods of time.
- *Parole and Probation Lengths and Revocations:* African Americans and Hispanics remain on probation and parole longer than similarly situated white offenders. The longer the supervision term, the higher the chance of committing a low-level, technical violation of conditions and ending up back in jail. Longer supervision also decreases an individual’s ability to lead his or her life, including securing employment and housing. Failure to reintegrate successfully into society increases the likelihood of recidivism, which often results in re-incarceration.

- *Perverse Financial Incentives:* Throughout the criminal justice system, financial incentives are embedded in funding structures. They often directly or inadvertently encourage an increase in the number of arrests, pretrial detentions, prosecutions, convictions, or sentences. Too often, this is how “success” is measured in criminal justice.
- *Collection of Fees and Fines:* The collection of court costs and other financial obligations from defendants disproportionately burdens African Americans and Hispanics who cannot pay. Aggressive collection practices result in onerous and compounding debt, and even jail stays, for many defendants.
- *Unconscious Bias:* Everyone has unconscious and unintentional biases that affect their understandings and actions. These biases may affect the decisions of criminal justice actors without their awareness, and result in racial and ethnic disparities.

This report identifies changes to local practice to reduce these disparities while protecting public safety. Why focus on localities? Though Roundtable participants universally agreed that reforms to federal, state, and local laws are necessary, they also agreed that changing the daily practices and decisions made at the local level — by police, prosecutors, judges, and parole and probation officers — are imperative to reduce racial disparities. Such changes can be implemented without waiting for legislatures to act. Participants also agreed that a systemic over-reliance on jails contributes to the underlying causes that create racial disparities. Accordingly, the recommendations set forth in this report, drawn from the Roundtable discussion, focus both on reducing jail usage and on changing local practices. They include:

- Limiting the use of pretrial detention to individuals who pose a threat to public safety;
- Increasing diversion programs for low-level offenses at the arrest, pre-charge, and pretrial phases to reduce the number of people entering jails;
- Setting specific goals to reduce racial disparities, including incentives to steer decisions and success measures to track progress;
- Creating cross-departmental task forces to identify drivers of racial disparities and devise strategies to address them;
- Requiring training to reduce implicit racial bias for all justice system actors — including police, judges, prosecutors, probation officers, parole board members, correctional officers, and court administrators;
- Encouraging prosecutors to prioritize serious and violent offenses;
- Increasing public defense representation for misdemeanor offenses;
- Developing checklists (referred to as “bench cards”) for judges to use in hearings to combat implicit biases in decision making and encourage alternatives to incarceration.

Each of these concrete recommendations can help decrease disparities. Implemented together, they can work to reduce disparities and unnecessary incarceration across the justice system.

I. RACIAL DISPARITIES: A LOCAL LOOK

Millions of people come into contact with local justice systems and spend time in America's jails. On any given day, approximately 740,000 Americans are in jails. Over the course of a year, 11.4 million are admitted to the country's 3,283 jails.⁶

Local jail systems, like prisons, have expanded since the 1980s and 1990s. The number of people entering local jails has nearly doubled. And those who enter jails are more likely to stay there for longer. In 1983, the average jail stay was 14 days. By 2013, it was 23 days.⁷

Today, counties spend millions to house this expanded jail population. New York City, with over 12,200 daily jail inmates, spends \$460 per day per person — costing taxpayers more than \$5.6 million per day. Los Angeles County spends \$129 per day per inmate to house an average of 17,400 inmates — at a daily cost of \$2.2 million.⁸

This section provides a summary of who is held in our jails. It then discusses the drivers of racial disparities in jails as identified by Roundtable participants and the opportunity for reform.

What are “racial and ethnic disparities”?

Racial and ethnic disparities refer to instances where a person experiences differential treatment or outcomes based on his or her race or ethnic background.

Examples abound:

- Almost one in three people arrested for drug law violations are African American, even though drug use rates do not differ significantly by race or ethnicity.¹ Though drug laws are racially neutral, they are enforced in a way that disproportionately affects minorities.
- Nationally, police stop African American drivers for traffic reasons slightly more often than whites and Hispanics. A closer look at state and local data demonstrate that police are significantly more likely to search, question, and arrest African Americans and Hispanics once stopped.² A recent report from the Sentencing Project concluded, “[o]nce pulled over, African American and Hispanic drivers were three times as likely as whites to be searched and blacks were twice as likely as whites to be arrested during a traffic stop.”³
- Another study of misdemeanor arrest rates in New York City indicated that African Americans were more than five times more likely to be arrested as whites, and Hispanics were four times more likely to be arrested.⁴

Roundtable participants discussed these disturbing trends extensively. As one local government participant explained, “When you look at a particular decision point, you see similarly situated people treated differently. It may be unfair. It may be biased. There may be various reasons for these disparities. The challenge for a jurisdiction is to go beneath the percentages and proportions to dig down to the decision points where actual disparate treatment is taking place. We need to change decision making at those points.”

Throughout this report, we refer to “racial disparities” as shorthand to encompass both racial and ethnic disparities.⁵ While research indicates that troubling disparities exist for other minority groups, particularly Native Americans, this report does not focus on these populations due to the limited data available.

A. Who is in Local Jails and Why?

The United States incarcerates 2.3 million people. This includes people held in two different types of facilities: prisons and jails.

Prisons hold people convicted of state or federal crimes, serving long term sentences. They are operated in a unified manner by a state or the federal government. Jails, on the other hand, are run by cities, counties, or other local entities. They house higher volumes of people for shorter terms. People in jail are either: detained while awaiting trial, convicted and awaiting transfer to prison, convicted of low-level crimes with short sentences, or incarcerated for violations of parole or probation. Some jails house immigration detainees.⁹ Jails are not centrally managed. They operate independently and vary in practice from jurisdiction to jurisdiction. On any given day there are approximately 740,000 people in jails.

Entry Points to Jail

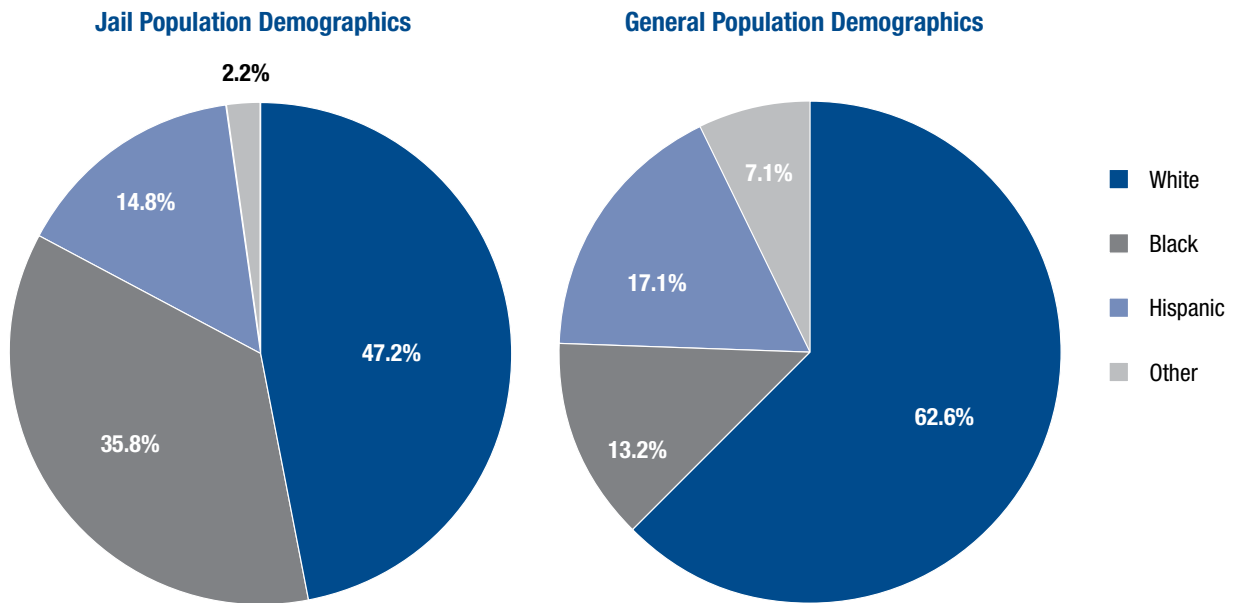
People reach jail in a variety of ways:

- *Jail Booking:* Once an officer arrests someone, the officer must make a record of that arrest (i.e. “book” the person). An officer takes the suspect to a local jail and places the individual behind bars until the officer makes a full record of the arrest, including taking fingerprints, collecting personal information, and documenting details of the alleged crime. Whether someone arrested is admitted to jail — or simply cited and released — is a policy decision made by each jurisdiction. A report from the Vera Institute of Justice suggests that police are more likely to jail a suspect after arrest today than in the 1980s or 1990s.¹⁰
- *Pretrial Detention:* If a prosecutor chooses to file charges based on an arrest, a person must wait for trial. While waiting, a defendant can be released, given the opportunity to pay bail (or be held if they cannot pay), or detained without bail. “Pretrial detention” is the practice of incarcerating a defendant pending trial. Currently, 63 percent of those in jails are pretrial detainees, accused of either misdemeanor or felony crimes.¹¹
- *Misdemeanor Convictions:* Misdemeanors are low-level criminal offenses that typically carry a maximum sentence of less than a year in jail. These include nonviolent, traffic, property, drug, or public order offenses. About 80 percent of state court dockets involve misdemeanor prosecutions.¹² Nearly 75 percent of people in jails are there for misdemeanor crimes — either awaiting trial or convicted.¹³
- *Probation and Parole Violations:* When someone violates the conditions of their parole or probation, they are often held in jail for at least a short period of time. Probation typically refers to a court-imposed sentence which a person serves under supervision in the community, instead of behind bars. Parole typically refers to early release before the completion of a sentence, and is usually granted for good behavior in prison. Both parole and probation

involve strict conditions of supervision. If a person violates these conditions — which may range from failing a drug test to committing a new crime — he is usually sent to jail until a hearing occurs. Sometimes, he may serve the remainder of the sentence in jail, or he may be sent back to prison.¹⁴ The rates at which people on probation and parole are re-incarcerated vary by jurisdiction. For example, New York City’s probation revocation rate is 20 percent, while revocation rates in Madison and Seneca counties approach 60 percent.¹⁵

- *Transfers:* Jails sometimes hold people temporarily while they await transfer to another facility. These facilities include: juveniles detention centers, mental health facilities, hospitals, or prison. Jails may also hold federal or state inmates when prisons are overcrowded.¹⁶

Figure 1: General Population and Jail Demographics



Source: U.S. Census Bureau, Department of Justice, Bureau of Justice Statistics.¹⁹

African Americans and Hispanics are significantly overrepresented in jails. While together these groups represent 30 percent of the general population, they account for 51 percent of the jail population. In particular, African Americans are jailed at almost four times the rate of whites.¹⁷ Notably, national data suggests that Hispanics are not disproportionately represented in jails. However, much research indicates that Hispanics likely are, in fact, overrepresented in jails, but due to inaccurate and inconsistent data collection, this trend is not captured in national data.¹⁸

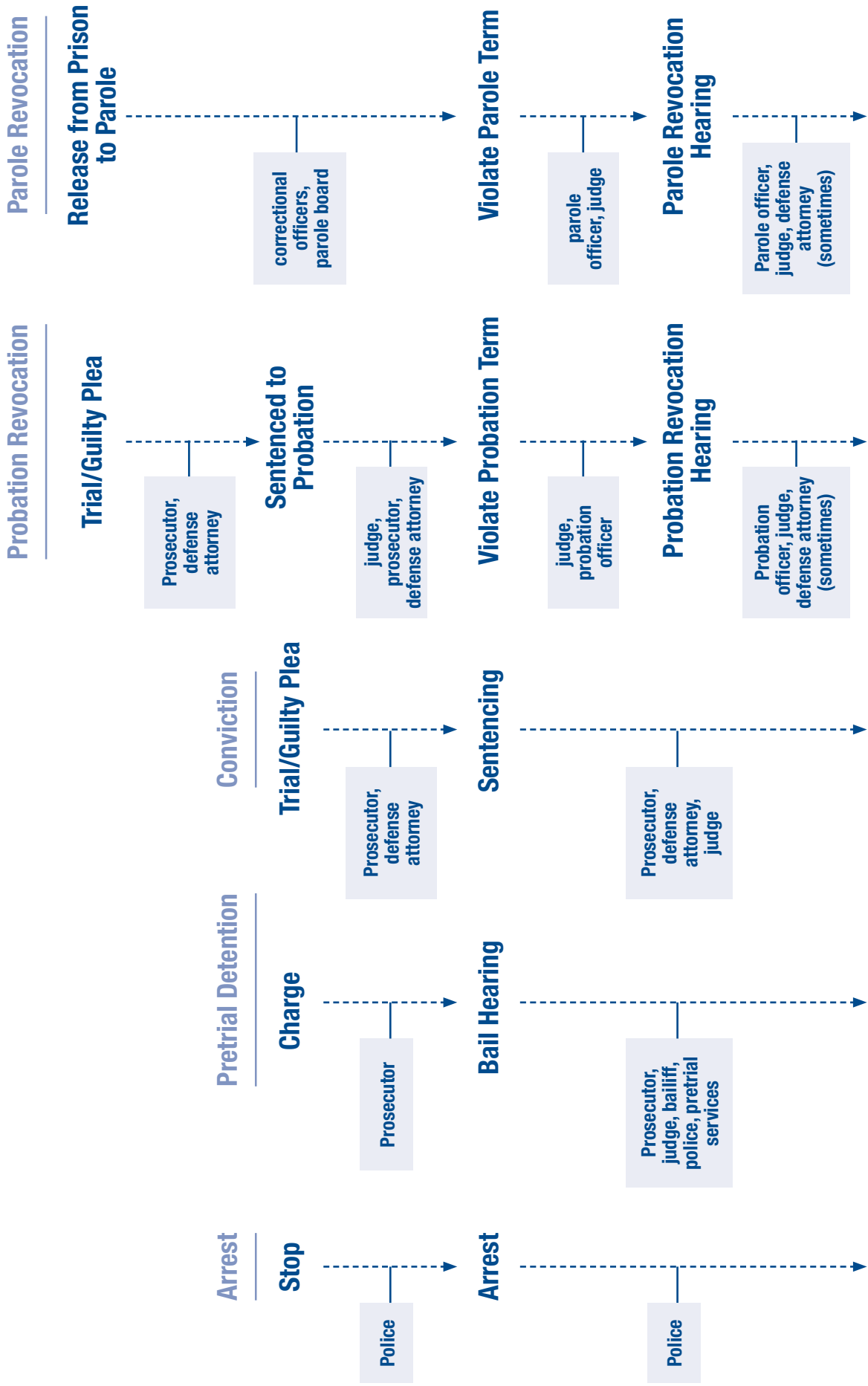
Why do these disparities exist and how are they created?

From police stops to arrests to prosecution to probation and parole revocation, people of color frequently experience harsher outcomes that lead to detention. At each of these decision points, various local criminal justice actors exercise discretion that can lead to a person of color going to jail when a similarly situated white person may not. Those collective decisions produce the racial and ethnic disparities reflected in our jails. They can include:

- *Stops and Arrests:* When police are confronted with possible criminal activity, they must decide what action to take. They can decide to do nothing, issue a summons or verbal warning, direct the person to social services or treatment, make an arrest, or take some other action.
- *Charging:* Once a person has been arrested, prosecutors must decide whether to bring formal criminal charges. If prosecutors accept a case, they exercise great discretion in what charges to file.
- *Pretrial Detention:* Once arrested, a person can be detained pretrial. Judges, bail commissioners, prosecutors, and sometimes police exercise discretion in whether to hold someone in jail or release them until the case ends.
- *Short-term Sentences:* Once a person is convicted of a crime — whether through a guilty plea or, less commonly, a trial — a judge exercises discretion to decide the type and length of punishment within the broad ranges set by local ordinance or statute. Prosecutors also have wide discretion in recommending sentences. Most criminal sentences of less than a year are served in jails.
- *Probation and Parole Revocations:* Judges, parole boards, probation departments, and correctional officers have discretion in establishing conditions when people are placed on probation or parole. They also exercise discretion in enforcing those conditions. A judge can decide to revoke supervision for violations. Many offenders serve time in jails, not prison, when their parole or probation is revoked.

This report recommends ways to reduce racial and ethnic disparities by changing decision making. As shorthand, this report refers to racial disparities “in jails” to refer to all these decision points.

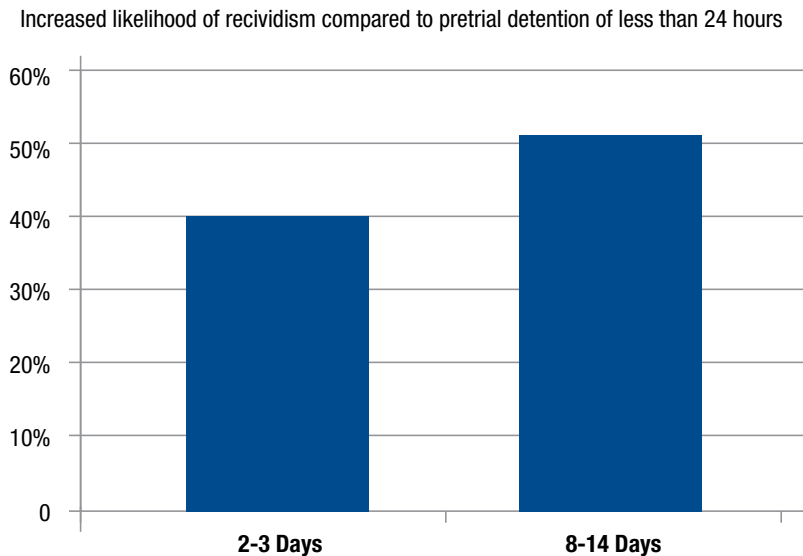
Decision Points Leading to Jail in Typical Jurisdiction



A few additional trends relating to jails:

- *Lack of Treatment:* Jails now serve as *de facto* mental health treatment centers. The most recent research shows that almost two-thirds (64 percent) of jail inmates had mental health problem and almost the same percent (68 percent) suffered from substance abuse problems.²⁰ Today, sixty percent of inmates admitted to Chicago’s Cook County jail are diagnosed with a mental illness. Forty percent of inmates in New York City’s Riker’s Island jail have a mental illness, nearly doubling since 2006.²¹ Inmates with mental illnesses stay in jail longer, too. In Orange County, Fla., jail inmates generally stay an average of 26 days, whereas mentally ill inmates stay 51 days. In New York’s Rikers Island jail, the average stay for all inmates is 42 days; mentally ill inmates, however, stay on average 215 days.²²
- *Increased Likelihood of Recidivism and Prison:* Exposure to jails can prolong an individual’s entanglement in the justice system more broadly. Research has found that pretrial detention in local jails for even two-three days increases the likelihood that a defendant will commit a new crime upon release.²³ Jail stays also increase the likelihood that defendants will be sentenced to incarceration after conviction, and that they will receive a harsher sentence. This may occur due to the destabilizing experience of being jailed, including loss of employment, loss of income, exposure to disease, and increased opportunity for association with people prone to criminal behavior.²⁴ As one Roundtable participant, a local prosecutor, observed, “The criminal justice system is the only public service that makes people worse off.”
- *Increased Fiscal Costs:* Today, local governments spend \$22.2 billion on jails — four times more than in 1983. The Vera Institute’s 2015 study found that this cost is driven by larger jail populations, which require larger correctional staff and other costs to run facilities.²⁵

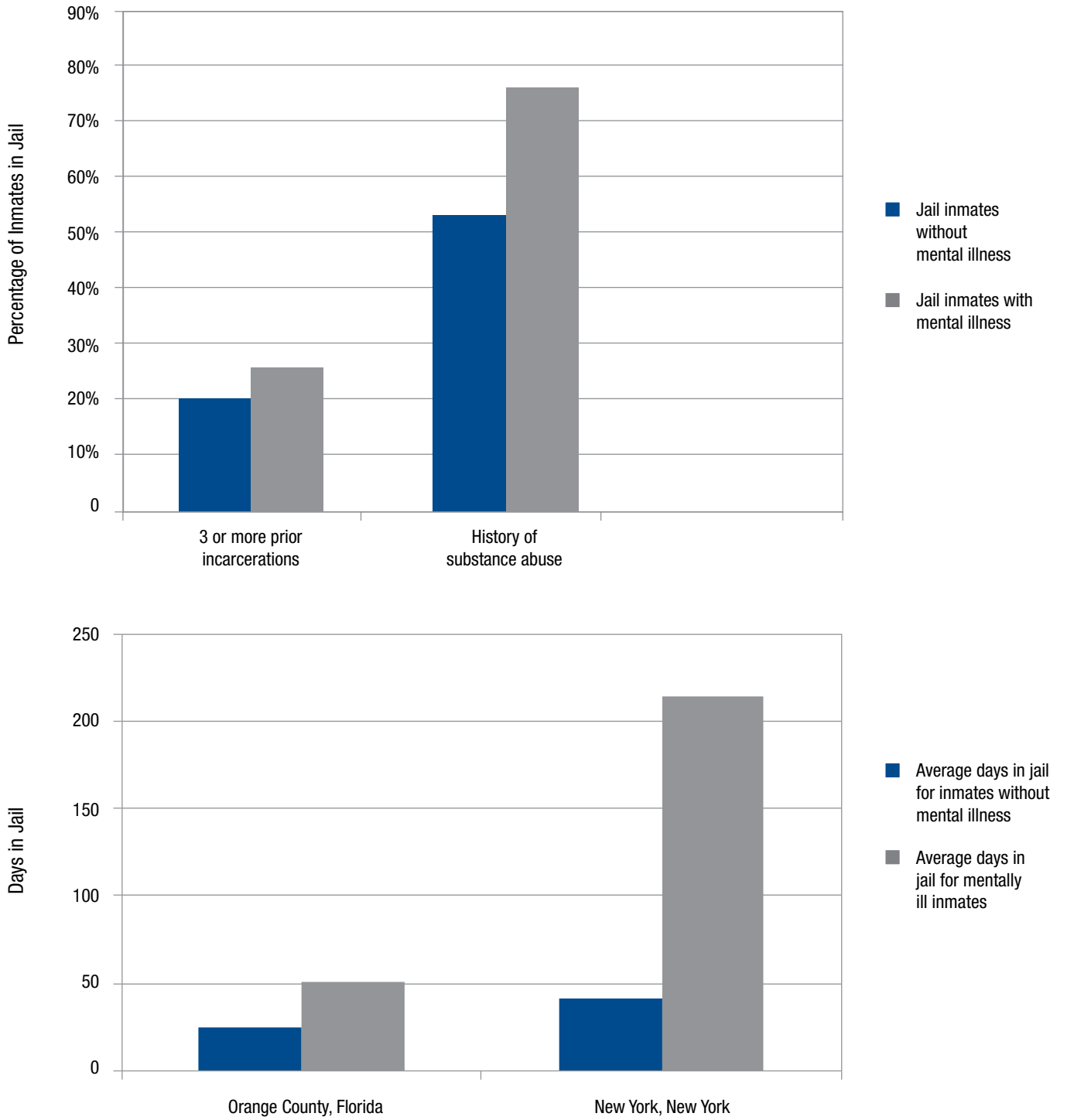
Figure 2: Risk of Recidivism & Pretrial Detention



Source: Lowenkamp, VanNostrand, and Holsinger (2013).²⁶

Figure 3: Mental Health and Length of Stay

Comparing jail inmates with and without mental health problems



Source: Treatment Advocacy Center.²⁷

B. Contributors to Racial Disparities in Jails

The Roundtable participants discussed five major factors they believed contribute to the racial and ethnic disparities reflected in the jail population.

1. Focus on Low-Level Offenses

Police patrol the streets, engage with community residents, and investigate and respond to criminal activity. Often, their response culminates in an arrest. In 2013 alone, police arrested more than 11 million people.²⁸ Seventy percent of these arrests are for low-level offenses, such as drug abuse violations, driving under the influence, disorderly contact, and drunkenness.²⁹

While data shows that African Americans and Hispanics do commit certain crimes at higher rates than whites, this does not account for the outsize representation of racial minorities in arrests overall. Roundtable participants offered a sampling of reasons for this disparity in arrests, including:

- *Increased Likelihood of Being Stopped:* A 2013 federal district court found that 83 percent of those stopped by the New York City Police Department were African American or Hispanic, even though these two groups were just 52 percent of the city's population.³⁰ Data presented in a federal district court in a Philadelphia case revealed that, of the more than 253,000 pedestrians stopped in 2009, more than 70 percent were African American or Hispanic.³¹ At the Roundtable, a civil rights advocate provided this perspective: "Race plays out in excessive stops. In urban America, Hispanics get stopped, detained, and questioned at rates that far surpass whites — not nearly as far as blacks, but definitely far surpass whites. In parts of the country where the suspicion of illegal presence is a predicate for the stop, it exacerbates this disparity."
- *Increased Likelihood of Arrest:* Evidence demonstrates that once stopped by a police officer, African Americans are arrested at a higher rate than other racial groups. A recent study of 3,528 police departments found that blacks are more likely to be arrested in almost every city for almost every type of crime. At least 70 police departments arrested black people at a rate ten times higher than non-black people. In a suburb of Dearborn, Mich., the disparity in arrest rates for blacks was a staggering 26 times the rate for other races.³²
- *Increased Likelihood of Drug Arrests:* African Americans are almost four times more likely to be arrested for selling drugs and more than twice as likely to be arrested for possessing drugs, even though whites are more likely to sell drugs and equally likely to consume them.³³ African Americans constitute 30 percent of arrests for drug violation offenses even though they make up only 13 percent of the total population.³⁴ One participant put it this way: "A white and black defendant — whether a drug offender, drug user, or drug peddler — receives obviously different treatment in the criminal justice system."
- *Increased Likelihood of Traffic Citations:* A 2012 study of Washington state police practices demonstrates that while minorities and whites are stopped at the same rate for driving violations, African Americans and Hispanics are more likely to receive citations. For each stop, whites

received on average 1.74 citations, while African Americans received 1.94 and Hispanics received 1.98.³⁵ A 2012 report for the state of Minnesota indicated that African Americans were 20 times more likely to be stopped for a traffic offense than whites.³⁶ These violations include such things as driving without insurance or driving on a suspended license.³⁷ Said one participant, “To address racial disparities, we need to think about how we use the traffic code to pull over motorists. So many consequences flow from the ability of the police to stop a car for a traffic infraction. Many people’s first contact with the justice system is based on a broken taillight or an expired license plate. Cities and counties may want to consider curbing minor traffic infraction stops.”

Roundtable participants discussed how police practices influence other decisions in the local justice system to increase racial disparities. A law enforcement leader observed, “Police are the first contact point — they usually make the first decisions about who gets pulled into the criminal justice system.” A member of the judiciary noted, “The numbers of misdemeanor and drug cases in our courts are driven by police practices. Often disparate policing practices end up producing more low-level cases in our courts particularly against minority defendants.” Several participants confirmed this point, noting that disparate enforcement results in disparate outcomes. An advocate explained as follows: “Reducing the jail population requires understanding the reality that communities face selective enforcement on a daily basis. You can change how the system reacts, but that’s not going to stop the faucet. The faucet here is the large number of people of color entering the system through arrests.”

Today, arrests are more likely to lead to punishment and jail time for defendants than in previous decades. A 2014 study by the National Bureau of Economic Research identified more punitive treatment after arrest as a driver of incarceration nationally.³⁸ As the Vera Institute recently noted, “[t]he likelihood that arrest will lead to a jail booking has increased steadily” in the last 30 years.³⁹ Racial disparities in arrests exacerbate racial disparities in incarceration.⁴⁰ A participant in law enforcement explained this sentiment, noting, “Once an arrest is made, it’s like turning on an engine that only knows how to do one thing: incarcerate.”

Research also demonstrates that minorities tend to be punished more severely than white counterparts for the low-level, misdemeanor drug and property offenses that lead to jail sentences.⁴¹ For example:

- A 2014 Vera Institute study of New York County found that 30 percent of African American defendants were sentenced to jail for misdemeanor offenses, compared to 20 percent of Hispanic defendants and 16 percent of white defendants. African Americans were 89 percent more likely to be jailed for misdemeanor “person offenses” (such as assault) and 85 percent more likely to be incarcerated for misdemeanor drug offenses compared to white defendants. Hispanic defendants were 32 percent more likely to be incarcerated for misdemeanor person offenses.⁴²
- A 2003 study of misdemeanor sentences in five Nebraska counties found that non-white defendants were sentenced to fines more than 40 percent higher than those imposed on white defendants for similar offenses. However, the study found that white defendants received 20 percent higher fines than non-white counterparts when charged with more serious misdemeanor offenses.⁴³

Roundtable participants spoke frequently about the increased probability that low-level arrests result in jail time for minorities. As one participant explained, “Misdemeanor convictions, not felony cases, really create the volume of jail inmates. They add up. Incarceration in our jails is mostly for low-level offenses — which can actually be dealt with in better ways.” Another explained, “We need to look at the entire process of what happens in misdemeanor courts. Most defendants don’t have lawyers, and most cases result in guilty pleas. To reduce disparities, we need to first look at the outcomes in misdemeanor cases.” An advocate added: “We need to look at alternative sentences for misdemeanors other than jail time. We really need to look at the top five drivers of county jails populations. These are crimes like public intoxication, driving with a suspended license, or not paying child support. We need to look at why we are incarcerating such a high volume of people for these crimes, and how we can safely change that.”

2. Unnecessary Use of Pretrial Detention

Once a person has been arrested, he or she may be held in jail while criminal charges are resolved. Most often, a judge, magistrate, or bail commissioner will decide whether or not to release a defendant before charges are resolved. There are three options at these hearings: release on bail, release without bail (commonly called “released on own recognizance”), or hold pretrial in jail. The decision is determined by a number of factors, including whether the person is a threat to public safety and the likelihood of appearing in court.

In most jurisdictions, setting a monetary bail amount is used as a proxy for this analysis. Money bail is intended to ensure that the person will show up to court appearances and will not engage in criminal activity. Nationally, 61 percent of defendants were required to post financial bail for their release.⁴⁴ Between 1992 and 2006, the use of money bail increased by 32 percent,⁴⁵ and the average bail amount increased by more than \$30,000.⁴⁶

Unnecessarily detaining defendants in jail before trial has a significant negative impact on the defendant, and often on public safety, including:

- *Harsher Punishment:* Research found that defendants detained for the entire period before trial were more than four times more likely to be sentenced to jail and more than three times more likely to be sentenced to prison compared to released defendants. Defendants jailed before trial also received jail sentences three times longer and prison sentences twice as long as those released.⁴⁷ Those detained before trial are also more likely to plead guilty.⁴⁸
- *Increased Likelihood of Recidivism:* Even short periods of pretrial detention for low-risk defendants can compromise public safety. Low-risk defendants are defined as “individuals who can be released with little or no supervisory conditions with reasonable assurances that they will appear in court and will not threaten community safety.”⁴⁹ A 2013 study — which examined 153,000 defendants jailed in Kentucky between 2009 and 2010 — found that low-risk defendants held for two-three days were almost 40 percent more likely to commit new crimes before trial compared to defendants released within 24 hours. When held for 8-14 days, defendants were 51 percent more likely to commit another crime compared to defendants released within 24 hours.⁵⁰
- *Socio-economic Consequences:* Studies have shown that jail detention between arrest and dismissal or conviction can lead to the loss of employment, housing, or even medical coverage.⁵¹

Research confirms that racial disparities exist in the use of pretrial detention. For example:

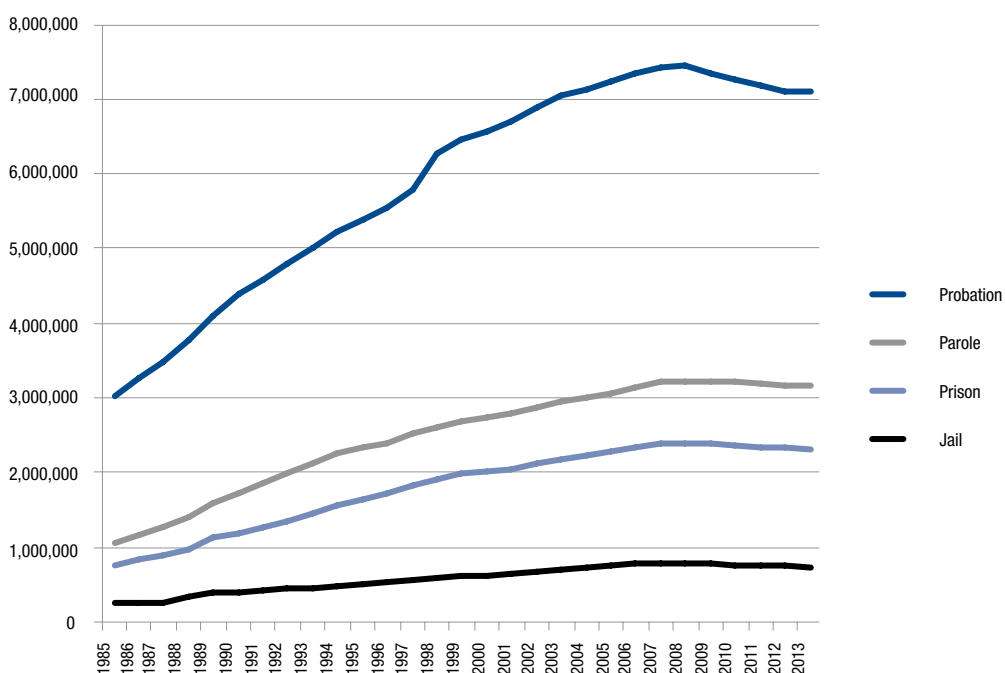
- A 2012 study found that African American and Hispanic defendants were more likely to be detained pending trial, less likely to be able to afford their bail (which was assessed at higher amounts), and less likely to be granted release in comparison to similarly situated white defendants.⁵²
- A 2013 study by the Vera Institute found race and ethnicity a predictive factor in determining whether defendants were detained or released at arraignment. These disparities were most extreme for misdemeanor offenses, where African Americans were 20 percent more likely than whites to be detained before trial.⁵³
- A study for the Bureau of Justice Statistics concluded that African American defendants were 66 percent more likely to be detained before trial and Hispanic defendants 91 percent more likely to be detained, in comparison to white defendants. Hispanics were also 39 percent more likely to be charged a bail amount in exchange for pretrial release — and were required to pay higher amounts.⁵⁴

Roundtable participants recognized that reducing reliance on pretrial detention can reduce racial disparities in local jails. Said one participant, “The impact of reducing pretrial detention is twofold: It reduces the number of people detained and it dramatically reduces the number of people of color detained since they typically constitute a very large portion of the detention population.” To the extent that pretrial detention hinges on an individual’s ability to pay bail — as opposed to assessing his or her threat to public safety — the brunt will be felt by poor people of color. A leading scholar on race and pretrial justice explained, “Thousands and thousands of people are in jail for relatively minor offenses solely because they cannot pay a fairly nominal bail amount.” Another participant in pretrial justice echoed the concern: “Communities of color are usually also the most economically depressed. So money — or lack thereof — plays a major role in creating racial disparities in our money-based pretrial system.”

3. Expansion in Parole and Probation

Over the past 30 years, the number of people held on parole or probation (referred to as “community supervision”) more than doubled.⁵⁵ The United States places individuals on probation and parole at a far higher rate than other democratic countries.⁵⁶ Today, about 1 in 51 adults — or 4.8 million people — are on probation or parole, far exceeding the number of people incarcerated in the country.⁵⁷

Figure 4: Correctional Populations in the United States (1985-2013)



Source: Bureau of Justice Statistics.⁵⁸

There are often many conditions placed upon individuals under supervision — some genuinely related to public safety and others not. Some are difficult to comply with, particularly for defendants living in poor urban centers or those battling substance abuse. Conditions may include: work or school attendance; medical or psychiatric treatment; payment of child support, court costs, or other fees; periodic reporting to an officer; remaining in the court’s jurisdiction; or house arrest or electronic monitoring.⁵⁹ While some conditions are necessary, other conditions can become overly burdensome to certain individuals, and may undermine successful reintegration into society. For example, requiring someone to pay fees when they do not have a job creates a situation where the person cannot meet their supervision conditions and is likely to violate them. Parole and probation officers and judges have discretion in how to respond to violations of conditions. Violation of conditions often results in revocation to jail or prison.⁶⁰

Data also reflect racial disparities in responses to probation and parole violations:

- A 2009 study conducted by the National Council on Crime & Delinquency found that African Americans are seven times more likely to be sent back to prison for parole violations and four times more likely to be sent to prison for probation violations in comparison to whites. Hispanics were almost three times as likely to be sent back to prison for parole violations.⁶¹
- In 2014, an Urban Institute study of four counties found African Americans had their probation revoked at higher rates than both white and Hispanic probationers. In Dallas County, Texas,

African American probationers were revoked to prison at a rate 55 percent higher than white probationers. In Multnomah County, Ore., the level of revocation was more than twice as high.⁶²

Roundtable participants repeatedly asserted that increases in the number of people on parole and probation contributes to the growth of local justice systems. A participant who was formerly incarcerated stated: “We’re trying to shrink the beast, right? In order to shrink jails, we should shrink the number of people on parole and probation, too. Those people easily find themselves in jail simply for failure to comply with the really restrictive conditions imposed on them.” A prosecutor agreed: “Particularly for misdemeanors, research shows that over-supervising people — getting overly involved in their lives — actually increases the likelihood of recidivism. Misdemeanants tend to have jobs. They are often law abiding people who made a mistake that caught the attention of the police. Once you kick the juggernaut of the criminal justice system into action for a misdemeanor, you are likely to get worse outcomes. We need to be more careful about who we place on parole and probation, and when we send them to jail for violations.”

4. Perverse Incentives that Increase Incarceration

In part, the criminal justice system has expanded due to perverse financial incentives to increase arrests, seizures, pretrial detentions, convictions, prison sentences, and revocations back to jail or prison. As one participant put it, “Expansion of the criminal justice system is partially a matter of economics. If you follow the financial incentives of the system, you can see exactly why and how it’s expanded so dramatically.”

In response to a crime epidemic in the 1970s and 1980s, policymakers implemented changes that led to an explosion in the number of people entering the criminal justice system.⁶³ With this growth came a flood in government spending. As explained in several recent Brennan Center reports, too often, the measurement for success in reducing crime became volume-dependent, focusing on the number of arrests, convictions, or prisoners.⁶⁴ States devised severe sentencing regimes, enticed in part by federal funding for prisons and other financial supplements. Government funding created incentives to pull more people into the pipeline toward incarceration, sometimes directly and sometimes inadvertently.

These financial incentives help shape criminal justice policy and increase the size of the system. Here are some examples of how they can play out at the local level:

- *Volume-Based Performance Measures:* The Justice Department’s March 2015 report on practices in Ferguson, Mo., highlights the impact of performance measures. The Ferguson Police Department measured its performance based on revenue collected through enforcement tactics. As the Justice Department reported, “Where [Ferguson Police Department] officers fail to meet productivity goals [of making arrests and issuing citations], supervisors have

been instructed to alter officer assignments or impose discipline.” Similarly, performance evaluations heavily emphasized “productivity,” with one specific evaluation measure as “[i]ncrease/consistent in productivity, the ability to maintain an average ticket [amount] of 28 per month.” As the report concludes, “the City goes so far as to direct [the Ferguson Police Department] to develop enforcement strategies and initiatives, not to better protect the public, but to raise more revenue.”⁶⁵ These and other types of volume-based performance measures are common throughout the criminal justice system. They incentivize a larger system — including more arrests and more people in jail — without necessarily promoting public safety.

- *Cost-shifting between Agencies:* Probation officers are often granted the authority to initiate proceedings to revoke a defendant to prison or jail for failure to comply with supervision conditions.⁶⁶ Notably, counties and cities pay for the cost of probation, but the state pays for the cost of incarceration in prison. When probation officers, who generally work for the county, revoke probationers to prison, they do not need to consider the fiscal costs of that decision.⁶⁷ Most of these revocations result in jail time.⁶⁸
- *Pressure to Generate Revenue:* Law enforcement agencies often generate revenue for their budgets by seizing the property of individuals suspected of criminal activity. In a survey of nearly 800 law enforcement agencies, nearly 40 percent reported that seizing the property of criminal suspects (a practice called civil asset forfeiture) was a “necessary” budget supplement.⁶⁹ A 2010 report found that asset forfeiture accounted for more than 14 percent of police budgets in Texas, with rural jurisdictions averaging 18 percent.⁷⁰ Making police budgets dependent in any way on seizing the property of suspects creates clear incentives to increase seizures — even if there is little public safety value in doing so. Along with increased seizures, usually comes an increase in arrests, charges, and pretrial detention. A 2007 study found that a one percent increase in forfeiture proceeds correlates with a .66 percent increase in the drug arrest rate.⁷¹ Conservatives, progressives, and some law enforcement officials have noted the problematic nature of this type of revenue generation.⁷²

Many participants — from prosecutors to defense attorneys — referenced the performance measures used to assess “success” of local agencies, and their potential to create perverse incentives. As a member of the defense bar explained, “An important question in this conversation is: What are the metrics of success in our justice system? If we fund agencies based on the number of cases they prosecute, the number of people they arrest or the number of clients they defend — and then punish them when those numbers go down by taking away resources — we perpetuate our problems. Then the system grows without a purpose.” Another participant, a prosecutor, put it this way: “We need to start thinking about what those metrics should be for each stage of the process. What should the metric be for good policing? What should the metric be for good prosecution? For good probation? We should create the financial incentives — the performance measures, the revenue generation, the costs — based on those goals.” One participant summed it up: “Money is a ‘stakeholder’ in the justice system. It contributes to the expansion of the system, including our jail population.”

5. Aggressive Collection of Criminal Justice Debt

Criminal defendants are frequently required to pay various expenses at different stages of their processing through the system. Unlike punitive fines or restitution to compensate the victims of crimes, these “user fees” are imposed solely to raise revenue. Cash-strapped states and local jurisdictions are increasingly imposing fees at every point in the system — from fees for public defender services to parole supervision charges.

Fees are often imposed without considering a defendant’s ability to pay.⁷³ If a defendant cannot pay the fees immediately, they multiply. Many states charge extra fees for entering into payment plans and impose unreasonable interest rates for such plans.⁷⁴ Coupled with aggressive collection practices — ranging from driver’s license suspensions to wage garnishments to arrest and re-incarceration — criminal justice debt can prolong entanglement with the criminal justice system even after a defendant has served his or her sentence.⁷⁵ This prevents their reintegration into law-abiding society.

Though the Supreme Court prohibited incarceration as a penalty for those too poor to pay court fees and fines, states still use aggressive debt collection practices that result in incarceration for nonpayment.⁷⁶ A 2010 Brennan Center study found that in the 15 states with the largest prison populations, re-incarcerating individuals for failing to pay debts is common. In all 15 states, payment of criminal justice debt was a condition of probation or parole. At least 11 states authorized incarceration for failing to pay criminal justice debt. Two states offered defendants the opportunity to “choose” jail as an alternative to paying debts. Additionally, counties in all 15 states arrested people for failing to pay criminal justice debt or appearing at debt-related hearings. These arrests led to jail stays.⁷⁷ More recently, the Justice Department report on Ferguson, Mo.’s criminal justice system identified the same problem, finding: “The municipal court routinely issued warrants for people to be arrested and incarcerated for failing to timely pay related fees and fines.”⁷⁸

Increased fees lead to an increased likelihood of returning to jail if unable to pay. Data, though limited, suggest that these fees are disproportionately imposed on racial and ethnic minorities:

- A 2004 Washington state study found that Hispanics generally received 4.8 percent higher fees for felony convictions compared to whites convicted of similar offenses.⁷⁹
- A Philadelphia study conducted between 1994 and 2000 found that user fees were significantly more likely to be imposed on African Americans, though whites received more punitive fines (such as restitution).⁸⁰
- An Illinois study found that, while white probationers received a higher number of separate fees, the size of the fees levied on minorities were larger by comparison.⁸¹

Criminal justice debt was discussed briefly at the Roundtable. As one participant stated, “Once people enter the justice system, money — or the lack of it — directly affects whether they enter jail. In reality, 98 percent of people who come through our system cannot afford \$50. Even though some fees seem nominal in theory, they are costly in application for people making minimum wage or below, and those living in poverty.” A conservative advocate agreed on the topic of fines, saying, “People should not be incarcerated

simply for being poor.” He pointed to this pattern in relation to outstanding warrants, specifically: “We ought to figure out a better way to address outstanding warrants than just sending people to jail. In Ferguson, each house had at least three warrants on average that led to jail stays. That seems excessive.”

Participants discussed at length the role of socioeconomic inequality in perpetuating racial disparities. As one participant explained, “I think much of the overreliance on incarceration today is related to increasing socioeconomic inequality in American society. For those left out of the growing middle class in the 1970s and 1980s, changes in the economy and society made their situations worse. That contributed to communities experiencing social disorder of various kinds — including increased crime and incarceration.” An academic noted, “Racial disparities are undergirded by socioeconomic inequality. These two factors mutually reinforce each other. In Washington state, data demonstrates no racial disparity when it comes to who police stop. But there is significant disparity in how many tickets police issue once they stop people. This affects who ends up in jail for not paying tickets. These are important intersections of race and class that need to be addressed.”

C. The Role of Implicit Bias

Racial disparities are not always the product of intentional biases. They are frequently the result of unconscious and unintentional biases that everyone — African American, white, Hispanic or other — learns and maintains culturally.

“Implicit bias” refers to the mental attitudes or stereotypes toward a person or group that unconsciously affect a person’s thoughts, actions, and decisions.⁸² This concept is grounded in sociological and psychological research demonstrating that human “thoughts, feelings, and actions are shaped by factors largely outside of our conscious awareness, control or intention.”⁸³ This dynamic is particularly strong with regard to racial perceptions in the criminal justice system. Stanford Prof. Jennifer Eberhardt’s groundbreaking research demonstrates that white men shown a fleeting image of a black male face were able to recognize the outline of a gun in subsequent photos more quickly than those people shown images of a white male face. The study implies an association with race and crime that Eberhardt argues can unintentionally infect decision makers in the criminal justice system.⁸⁴ A recent criminology study suggested that implicit bias could lead a police officer to “automatically perceive crime in the making” when seeing two young Hispanic males driving in an all-Caucasian neighborhood.⁸⁵ Another study assessing cognitive bias, found that 87 percent of judges more quickly associated white with “good” and black with “bad,” suggesting a preference toward white defendants that could play out in the courtroom.⁸⁶

Roundtable participants repeatedly emphasized how implicit bias contributes to racial disparities. They all agreed that implicit bias needs to be addressed head-on to help reduce disparities in treatment. A law enforcement representative explained, “We need to have conversations about implicit bias and how to break through these biases. We need to self-reflect and understand that — as a police officer, chief, policymaker, or judge — we carry these biases with us and they affect our decisions. The challenge is that actors often feel attacked when we talk about racial disparities. They think we are accusing them of being racist. But more often than not, these biases are unconscious. If we can engage law enforcement in particular to understand these biases, they can become a solution to the problem.” An advocate agreed, “It’s no secret that our system treats people of color and whites differently. Communities of

color, especially Latino communities, want answers for why this is happening because they are losing faith in the legitimacy of the justice system. We need to collectively understand why these disparities are occurring and how to prevent them.”

As another participant explained, “Sometimes when we are silent about race in our communications, subconscious fears and stereotypes win the day. If we don’t address implicit bias directly in conversations about reform, it will impede progress toward improving *any* aspect of the justice system, not just the racial equity component.” A local judge added, “When my jurisdiction decided to confront the influence of race or ethnicity in outcomes, we *said* it. It’s critical that we try to prevent the influence of unconscious bias in our justice system.”

II. RECOMMENDATIONS TO DECREASE INCARCERATION AND RACIAL DISPARITIES IN JAILS

This section proposes reforms to change local practices and policies that lead to the racial and ethnic disparities reflected in jails. These recommendations provide a sampling of the most powerful ideas expressed by Roundtable experts.

Participants emphasized that, to fully reduce racial disparities, jurisdictions must also focus on reducing their overreliance on jail detention. As one participant explained, “The easiest way to reduce disparities is just to arrest more white people, but obviously that does not further justice. It’s a fair assumption that if we reduce the size of the system and figure out ways to keep people out of it, we will improve the disparity problem.” Many agreed. One advocate, however, noted that cutting jail populations alone may not reduce racial disparities: “We would reduce the jail population by diverting some people out but the disparities in the system may remain if we don’t have a clear focus on reducing racial disparities.” A scholar agreed, stating, “I understand that a rising tide lifts all boats and that African Americans and Hispanics may disproportionately benefit from a reduction in jail use, but it is hard to ensure racially just outcomes through color blind mechanisms.” A director of a local correctional facility provided a real world example, explaining, “In the jurisdiction that I am from, the level of imprisonment is down by 26 percent, and very clearly the number of minorities incarcerated is down too. But the percentage of the population has not changed.”

Overall, participants agreed that both goals — a reduction in jail populations and a reduction in racial disparities — must be sought. While reforms to state and federal law are valuable and needed to meet these goals, participants focused on local policies and practices that could change without legislative interventions. These recommendations seek to provide solutions at each step of the justice system leading to jail — including arrests, pretrial detentions, prosecutions, court decisions, parole and probation revocations, and other key decisions — that will reduce racial disparities and jail populations.

1. Reduce Reliance on Pretrial Detention

Roundtable participants universally agreed that reducing pretrial detention is essential to reducing racial disparities. A recent report from the Vera Institute found that the average length of stay in jails increased from 14 days in 1983 to 23 days in 2013. The report concluded that “it is highly likely that the increase in the average length of stay is largely driven by longer stays in jails by people who are unconvicted of any crime.”⁸⁷ In other words, the practice of detaining defendants waiting for trial is a major contributor to jail populations.

A criminal justice policy expert at the Roundtable noted, “The amount of people we detain before trial drives up the jail population. Many of these people don’t need to be held in jail while waiting for trial. Many are unlikely to commit new crimes and could be safely released.” Participants emphasized that jail should prioritize housing dangerous defendants. They identified two specific interventions.

Introduce Pretrial Risk Assessment Tools

Participants recommended jurisdictions adopt validated risk assessment instruments (“RAIs”). RAIs measure the risk that a person will reoffend if and when released and identify needed treatments and intervention to reduce that risk. RAIs weigh a number of factors, usually including “static factors” (which cannot change, such as criminal history, age, and race) and certain “dynamic factors” (which can change, such as drug dependence, mental health, associating with antisocial peers, and employment).⁸⁸ A RAI is considered validated and acceptable for use when it is shown, through rigorous research and testing, to accurately predict risks and does not show biases toward defendants based on race, ethnicity, gender, or financial status.⁸⁹ When used pretrial, an RAI predicts the likelihood that a defendant may fail to appear for court hearings or be arrested on a new charge prior to the completion of their case.⁹⁰

Roundtable participants discussed RAIs’ effectiveness in reducing racial disparities. A law enforcement representative explained, “All jurisdictions should start using risk assessment tools so that they make pretrial decisions based on threat to public safety, not bias or guesses.” However, a criminal justice reform advocate noted, “We are really concerned that risk assessments may disproportionately benefit white defendants. Considering things like prior arrests can create disparities when people of color tend to live in neighborhoods with more police patrolling them, which leads to more contact with police and more arrests for low-level offenses. But the alternative to a risk assessment is a judge’s gut feeling. That may be worse.” An advocate provided additional detail: “Risk assessment tools would guide judges’ discretion. Data from some California jurisdictions does show that these tools reduce racial disparity even though race is baked into factors like a prior record and employment. The key is to reduce or eliminate elements of the tools that produce disparities, and then put them to use.”

Many participants stressed the value of risk assessment tools: They center pretrial decisions on threats to public safety and flight risk, whereas the current system, with its focus on a defendant’s ability to pay money bail, does not. One participant noted, “In the current bail system, we have a lot of discretion with no accountability. The bail official, who may or may not even be a lawyer, decides to release the defendant or sets a bail amount. Sometimes decisions are made on a predetermined schedule, but usually they are set by practice. No one is looking to see if there is a real basis for the bail amount. No one is looking to see whether the decision is tied to flight risk or community safety. We need a system that requires actors to justify their discretionary decisions.” Another participant concurred, “The use of risk assessments prevents decision makers from falling back on implicit biases that may cause them to assume that individuals of color are more dangerous and more in need of detention. Overall, they are a good tool to reduce racial disparities and jail detentions while preserving public safety.”

Some jurisdictions have successfully used RAIs to reduce incarceration and racial disparities:

- Mecklenburg County, N.C., developed a pretrial risk assessment tool in 2010. Their pretrial services agency uses it to make bail recommendations and determine appropriate levels of supervision for defendants waiting for trial. Within two years, the county reduced its daily jail population by 33 percent and decreased its average monetary bond amount by 30 percent.⁹¹ A scholar at the Roundtable explained the significance of such reform: “Considering flight risk and danger to the community instead of ability to pay a monetary bail amount has a huge impact on the racial composition of pretrial detainees, since socioeconomic status and race tend to overlap in the justice system.”

- Portland, Ore., similarly piloted an RAI to use in juvenile detention. It specifically sought to use race neutral factors, for example eliminating the use of “good family structure” as a factor because it had a racially disparate impact and replacing it with “engaging in productive activity” (which could include school, training, or part-time employment). Detention for juveniles dropped by 36 percent in five years after making this simple change. Within 12 years, the release rate for African Americans at initial screening rose from 44 to 51 percent and release at preliminary hearings increased from 24 to 33 percent.⁹² These numbers were more in line with the rates for white defendants before the RAI was implemented.

Bolster and Expand Pretrial Services Programs

Participants also recommended increasing resources for existing pretrial services programs. As one advocate explained, “We’ve known for 50 years that pretrial services would reduce incarceration, but some jurisdictions still don’t have pretrial services programs. We’ve got to get people to adopt the techniques that work.”

Examples of successful pretrial services programs abound:

- New York City’s Criminal Justice Agency provides defendants with pretrial services. It conducts pre-arraignment interviews, makes recommendations for pretrial release based on risk assessments, and notifies defendants about court appearances. The Agency monitors its performance and revises its services as necessary. In 2013, arraignment judges followed the Agency’s recommendation for pretrial release without bail in 92 percent of misdemeanor cases and 61 percent of felony cases reviewed by the Agency.⁹³
- Washington, D.C.’s Pretrial Services Agency provides defendants with services to reduce recidivism, including employment services and drug treatment. The agency conducts robust research to evaluate its results. It has met or exceeded most of its established targets, and is lauded as a national model. In 2014, 89 percent of released defendants remained arrest free.⁹⁴
- In 2012, Colorado introduced an RAI into their pretrial services program for those arrested and booked into jails. The tool helped standardize pretrial services recommendations.⁹⁵ Defendants assessed for risk and supervised pretrial were more than three times more likely to be released before trial compared to those who were not assessed. Participation in the pretrial services program — with use of the RAI — reduced the risk of incarceration by 34 percent. African American defendants who received pretrial services were more than 1.5 times as likely to have their cases dismissed compared to African American defendants not receiving those services.⁹⁶

2. Divert Low-Level Offenders from Jail

Most participants agreed that changes to law enforcement strategies could reduce racial disparities. Diversion programs — which divert individuals from the standard arrest-detention-incarceration cycle — are one effective reform. They enable offenders to access needed social services when appropriate instead of simply landing behind bars. They continue to protect public safety, as these social services often reduce recidivism, while also reducing the jail population and increasing life outcomes for individuals.

A law enforcement representative at the Roundtable noted, “We all need to focus on diversion. Both police and prosecutors need more programs and practices that encourage us to divert people when possible.” Participants recommended increasing diversion programs at two specific points.

Expand Pre-Arrest Diversion Programs

Several jurisdictions have developed programs to encourage police officers to divert individuals toward treatment in lieu of arrest.

- Seattle’s Law Enforcement Assisted Diversion (LEAD) is a prime example. LEAD allows and encourages police officers to direct people suspected of low-level crimes, particularly drug crimes and prostitution, into community-based treatment or services instead of arresting and jailing them. A 2015 University of Washington report found that participants were up to 60 percent less likely to be arrested for a new crime within the first six months of entering the program, and 58 percent less likely to be arrested in the future overall.⁹⁷
- In High Point, N.C., law enforcement worked with the community to institute an intervention program in 2004 to eliminate open air drug markets and reduce violence. Law enforcement first identifies gang members at high risk of selling drugs or engaging in violence. They then meet with these individuals, providing them the option of either: continuing their criminal activity and facing immediate arrest, or ending the offending activity. If the individual chooses the latter, no punitive action is taken. Instead, the agencies conduct an RAI and connect the individual with needed treatment or services. A 2012 National Institute of Justice study concluded that the High Point program reduced violence in target areas.⁹⁸ It also allows individuals to avoid arrest and further criminal justice processing.

Participants agreed that practices providing police with alternatives to arrest should be expanded. As a local prosecutor said, “Why don’t all police departments have diversion programs? We need to empower police to divert people at the earliest possible point to avoid clogging up the system with low-level cases.”

Increase Pre-Charge and Pretrial Diversion Programs

Participants also suggested increasing diversion programs in prosecutors’ offices. There are two types of prosecutorial diversion programs. In pre-charge programs, prosecutors have discretion to divert individuals to treatment or other services rather than prosecute. In pretrial programs, defendants are formally charged with a crime, but prosecutors agree to drop those charges upon completion of a program.

A few examples of successful programs:

- Hennepin County, Minn. has a successful pre-charge and pretrial diversion program. People with limited criminal histories are eligible for the pre-charge program. If they complete the program, they avoid new criminal charges.⁹⁹ The county also has two pretrial diversion programs: one for defendants facing felony property or drug offenses, and one for defendants facing misdemeanor offenses. In both, participants must attend meetings with case managers and meet supervision conditions, such as community service or random drug testing. If they complete the program, prosecutors dismiss the criminal charges.¹⁰⁰
- The prosecutor's office in Thurston County, Wash., set up a pre-charge diversion program in 2009. Anyone facing a misdemeanor offense can choose to enroll in the diversion program instead of being prosecuted for the offense. Approximately 70 percent of defendants complete the program, avoiding a new criminal charge. In the first year, cases filed decreased by 22 percent. As one prosecutor in the county stated, "Pre-charge diversion lets our prosecutors focus on the more serious crimes."¹⁰¹ Notably, both the Hennepin and Thurston County programs partnered with local nonprofits to provide participants with needed services.

Several participants expressed concern that the eligibility criteria for diversion programs can have racially disparate effects. For example, many diversion programs are limited to individuals who committed first-time and low-level offenses. But, as one participant explained, "Race is baked into whether or not someone has a prior record. If you live in an urban community of color, there are more police patrolling your streets than in a white upper-middle class suburb. So you are naturally more likely to be stopped or arrested."

Scholar Traci Schlesinger conducted a study, published in 2013, on pretrial diversion in felony cases in urban counties from 1990 to 2006. Schlesinger found that, even controlling for criminal history and offense severity, black defendants were 28 percent less likely and Hispanics about 13 percent less likely to receive pretrial diversion compared to similarly situated white defendants.¹⁰² A study of a diversion program in Travis County, Texas, also found disparities. African Americans, who make up 32 percent of felony arrestees, accounted for only 9 percent of the 131 defendants accepted into the pretrial diversion program. Applications were lower among African Americans — only 16 African-American defendants applied in that time period. Defense counsel and former local judges attributed the low number of applicants to a deterrent effect that played out more acutely for African Americans.¹⁰³

In response to this concern, participants emphasized that diversionary programs need to ensure equal treatment of different races. One member of law enforcement explained, "We need to make sure that our diversion programs do not contribute to the racial disparities. For example, rules that make people ineligible for these programs because of a previous record need to be reexamined when we know such a condition has a racially biased effect." Another researcher noted: "The key is collecting data on the results of diversion programs." It may also require expanding criteria to ensure they are not racially biased in any way. Conditions and program details should also be modified to eliminate any racial disparities observed in results. Some jurisdictions have taken steps in this direction by introducing RAIs as parts of the diversion programs.¹⁰⁴

3. Create Incentives and Success Measures to Reduce Racial Disparities

Reducing racial disparities while reducing jail populations requires clearly defined criteria and measurable goals. However, participants recognized that the political will and resources to address the drivers of racial disparities will vary among jurisdictions. Accordingly, they recommended that jurisdictions identify specific drivers of racial disparities and then create measures of success.

Identify Drivers

As a first step, jurisdictions should conduct a wholesale examination to pinpoint where disparities are the most pervasive. At the Roundtable, a leader of a criminal justice advocacy group stressed the importance of “targeting the actual drivers of disparities.” Reflecting on personal experience, he noted, “Sometimes we suspect that disparities derive from a particular practice and then focus on reforming that practice. But sometimes our guesses are incorrect. Focusing reform efforts on the wrong practice wastes effort and misses an opportunity to solve the real problem.”

For this reason, it is critical to assess, through data, how these disparities are created in each jurisdiction. This is an ideal task for a cross-departmental task force (a recommendation discussed below). One participant observed, “Each county needs to take an inventory to assess who is in their system. In my experience, taking an inward look at your own system is the first step to changing practices. County jails generally haven’t yet taken on these types of self-assessments.” Another participant with previous experience working with jurisdictions to reduce racial disparities agreed, “We avoided some of the political sensitivities involved in discussing racialized issues by going straight to collecting data in our jurisdiction. Every jurisdiction needs to have data to help identify where there is a problem.” A law enforcement official agreed: “Each jurisdiction needs to start with baseline data — whether it’s good, bad, or indifferent — to inform the work that they are going to do going forward.”

Collecting data to identify the specific practices that drive racial disparities is a critical first step.

Create Specific Goals and Success Measures

Participants agreed that any implemented policy or practice should be accompanied by clear, measurable goals that identify “success” toward reducing disparities. As it’s often said, “what gets measured, gets done.”¹⁰⁵ Many participants at the convening — from defense counsel to prosecutors to law enforcement officials to advocates — focused on the need for rigorous success measures. Goals could include decreasing racial disparities by a certain percentage within a certain time frame, or reforming practices identified as problematic within a specified time period.

One participant from the judiciary warned that “people will get frustrated if progress is not achieved.” Clear goals, with progress measured over time, are necessary to achieve change. They provide valuable feedback to government actors and the public about whether and to what extent a reform is addressing a problem. They also ensure common goals are achieved across different jurisdictions. As one participant said, “It is hard to mandate something across dozens of counties in a state. It’s easier to create a metric that you want all jurisdictions to meet, then let each jurisdiction come up with their unique ways to achieve that goal.”

When implementing measures to reduce racial disparities, jurisdictions should also work to eliminate harmful measures that focus on an increase in volume. Volume-based measures such as the number of tickets, citations, arrests, convictions, or probation or parole revocations — can incentivize government actors to increase these numbers, thereby increasing the number of people processed through the system. They can interfere with progress toward reducing jail populations and the racial disparities found within them.

Create Incentives

One of the most important effects of success measures: they create incentives that drive individual decision making toward common goals. If people know their performance is measured based on clear goals, they will drive toward those goals. Former Chairman of President George W. Bush’s Council of Economic Advisors and Harvard Prof. N. Gregory Mankiw articulates this fundamental tenet in *Principles of Economics*, one of the most widely used introductory economics textbooks. He says: “People respond to incentives. The rest is commentary.” Mankiw goes on to note that “[w]hen policymakers fail to consider how their policies affect incentives, they often end up with results they did not intend.” In the case of racial disparities in the criminal justice system, unintended consequences helped create them. Clarity about desired outcomes can help reduce them.

Roundtable participants echoed this approach throughout the two-day convening. A leading prosecutor said: “We need measures to create incentives.” A participant from law enforcement urged, “Using success measures that count volume are closely tied to the explosion in incarceration.” A criminal justice advocate put it this way: “The challenge is that we need data to measure the impact of initiatives. Without the data, we cannot measure success.” A member of the defense bar added, “We need to figure out the qualitative change we want to see. And then figure out a way to measure that to ensure agencies prioritize working toward this change.”

4. Create Cross-Departmental Task Forces to Reduce Racial Disparities

Participants agreed that cross-departmental task forces can be a valuable way to create change. Because so many different criminal justice actors play parts in producing the racial disparities reflected in jails, participants strongly believed that these actors need to communicate with one another and work toward common goals to achieve reform. As one participant stated, “It’s far too easy for a reform at stage one of the system to be undone at a later stage unless we’re all sitting around the table together deciding together what our goals should be and how we want to get there. Everyone needs to be on the same page with what we are trying to do.”

A cross-departmental task force can set goals for the jurisdiction, recommend and consider changes to practices of different departments, oversee the implementation of changes, and conduct periodic assessments.

Participants identified four pillars of an effective task force.

Recruit Varied Members

Roundtable participants were vocal about the need for a variety of criminal justice actors with “decision making authority” to sit on the task force. Suggestions for members included: senior and mid-level representatives of the prosecutor’s office, probation office, and local sheriff’s office; a local judge, public defender, community leader, and researcher or academic from a local institution. Other members could include school officials, elected officials, victim advocates, or advocates for the formerly incarcerated. A racial justice advocate emphasized, “The voices at the table need to be more than just perfunctory. Advocates for community members should be included so that other stakeholders can get a better understanding of how changes may affect the communities in question.”

Develop Outcome-Driven Strategies

The task force must clearly define its purpose and the outcomes sought. As a state advocate explained, “Members must come up with their own strategies, their own understanding of racial disparities, and their own ideas about solutions. By working together, they feel ownership over and buy into the goals.” One corrections official explained, “A coherent, empowered collaborative team of system partners with deliberate, guiding principles can identify particular practices that lead to racial disparities and work to reform them.”

Identify Specific Problematic Practices and Policies, and Recommend Reforms

The task force should conduct a comprehensive review of the local justice system to identify specific practices and policies that drive racial disparities. These may include: disparate enforcement of petty offenses, excessive stop-and-frisk tactics, revenue-driven enforcement of low-level offenses, or harsh bail bond schedules that disproportionately affect communities of color. Because a task force cuts across departments, it is well-suited to conduct the analysis of different policies.

One participant from law enforcement explained, “It is critical that jurisdictions have an explicit dialogue about what policies need to change to get to the outcomes desired. That should happen before implementation.” Another participant added, “Policy evaluation is important. A jurisdiction should know, for example, if they are using citations instead of arrests and whether there are racial disparities playing out in that practice. Conducting an evaluation of different policies facilitates that awareness.”

Once the task force identifies problematic policies, it should work with criminal justice agencies to introduce changes. The task force can also help develop innovations in policy changes, seek ideas from other jurisdictions, or consult national reform organizations or research groups.

Conduct Consistent, Periodic Assessments

Roundtable participants recommended that a task force meet periodically to assess whether recommended changes are advancing the defined goals. This includes reviewing policies through measurable evidence, which

holds the task force accountable. As one corrections official explained, “Successful collaboration requires consistent communication and follow-up between task force members. Perhaps this can happen semi-annually.” A participant who had served on a similar task force noted that assessments “keep people on task.”

Experience shows that coordination can help agencies achieve better outcomes than when they work independently.

- A Roundtable participant in law enforcement pointed to the success of Greenville, N.C., as an example. Police Chief Hassan Aden changed the culture of his department by inviting community members to attend and participate in strategic planning meetings. The jointly-devised plan helped reduce crime, increased community engagement, and increased economic development. The number of citizen complaints against police plummeted almost immediately.¹⁰⁶ The law enforcement participant observed: “Inviting the community to places that they haven’t been before creates an encouraging opportunity for change. What Greenville did can be replicated in other cities.”
- In Cincinnati, Ohio, the police department, police union, and community leaders came together to formulate and implement a Collaborative Agreement in 2002. Created in response to tension between police and communities of color, the agreement focused on “problem-oriented policing.” This strategy requires police and communities to jointly define the problems and determine how to resolve them. The new strategy reduced crime and improved community relations.¹⁰⁷

5. Require Training for All System Actors to Overcome Implicit Racial Bias

During the Roundtable, participants frequently emphasized the need for criminal justice actors to be aware of their own unintentional biases. One representative from law enforcement explained, “We need implicit bias training for all decision makers. This bias plays out at all decision points, and countering it can change practices at all decision points.” Another participant urged: “Anyone who exercises discretion in the justice system,” from police to prosecution to defense counsel, “should understand the nuanced causes of disparities in their locality and the role that implicit bias may unintentionally play to create or exacerbate those disparities.”

Implicit bias is a universal response by all people of all races.¹⁰⁸ Encouragingly, studies show that when people become aware of the potential for prejudice, they are usually willing to correct it.¹⁰⁹ Providing trainings to actors that explains implicit bias can help system actors become aware of their unconscious prejudices and help them avoid acting upon those biases.

Participants identified two critical components of effective implicit bias trainings: the right substance and the right people.

Rigorous Substance

Participants urged that implicit bias training include discussions of bias, decision making, and the intersection between race and the criminal justice system. As one law enforcement representative explained: “We need to have introductory conversations about race and the criminal justice system

before getting in the weeds about implicit bias. If we don't start with the recruits in the police academy or their supervisors who demand that officers make 16 arrests today, outcomes will not change." Another law enforcement official agreed: "Decision makers don't often get trained on how best to use discretion. We need to train police on how to fire their weapon and how to drive their car. We also need to train them to see how unconscious biases affect their own actions and thoughts and what steps to take in order to address that."

Participants across the board agreed that such trainings can help reduce the influence of racial bias at every decision point, including police enforcement of offenses, prosecutorial charging practices, probation and parole revocation proceedings, judicial sentencing determinations, and fees and fines collection.

The following jurisdictions were identified as successful models to consider:

- Mecklenburg County, N.C., has a two-day training called "Dismantling Racism." This intensive workshop is co-hosted by the county's collaborative leadership group on racial disparities in juvenile justice and the Racial Equity Institute. Participants include criminal justice actors, service providers, and community members including: educators, child welfare advocates, law enforcement, and judicial representatives. The workshop provides tools to "understand[] and eliminat[e] racial inequities, disparities and disproportionality within our society."¹¹⁰ As a local judge explained at the Roundtable, "The training addresses implicit bias, explains historical and individual oppression, and talks about the neighborhoods where most offenders come from and what pressures they face there. We then talked about how everybody in the room contributes to racial disparities together — individually and collectively. My training had five to ten police officers, five to ten school principals and administrators, five to ten court professionals, and five district attorneys. And it really helped us. It provided a critical framework and a space for us to understand racial bias without feeling attacked personally."
- Many jurisdictions, including Durham, N.C., Madison, Wisc., and Las Vegas, Nev., have participated in the Fair and Impartial Policing training program. The program "trains officers on the effect of implicit bias and gives them information and skills they need to reduce and manage their biases." It offers five separate curricula for different ranks of police — including academy recruits and patrol officers, first-line supervisors, mid-managers, command-level personnel, and law enforcement trainers — to better appreciate the nuances faced by each group. For example, the supervisor training provides guidance on how to identify biases in decision making and develop effective ways to speak about bias to the public and to the media.¹¹¹

Involvement of all Actors

Several participants emphasized the importance of bringing the right people into the conversation. A participant in law enforcement said, "Trainings are best led by someone who works within the criminal justice system, ideally in that same jurisdiction. Otherwise, attendees may find the sessions disconnected from their jurisdiction and their experiences, which may make them quicker to dismiss the value of the training."

Since implicit bias may be a factor at every stage of the criminal justice process, Roundtable participants recommended providing trainings to the full array of decision makers in the same session. There was broad agreement that police officers, police administration, court personnel, emergency response teams, probation officers, parole board members, prosecutors, defense attorneys, and correctional officers could all benefit. A participant from the judiciary observed, “Implicit bias training provides a base understanding and base language for actors to discuss race and racial disparities. It is amazing what has developed in my jurisdiction once we all developed a base language to speak about this. It was very helpful to have different actors in the same room talking about disparities to help us understand how biases played out at different stages.” He urged that trainings include more than just criminal justice actors. As he explained, “Incorporating the broadest scope of people possible ensures accountability across fields.” A law enforcement official agreed: “We have to look at the big picture to see if other things need to be addressed. That cannot happen unless and until all justice actors and the community gets involved.”

6. Encourage Prosecutors to Prioritize Serious and Violent Offenses

Petty offenses are the primary gateway to the criminal justice system. Each year, more than 10 million misdemeanor cases are filed, comprising almost 80 percent of state dockets.¹¹² These offenses represent the lion’s share of prosecutors’ and defenders’ caseloads, and half of probation officer cases.¹¹³ The almost unmanageable case dockets in misdemeanor courts have caused prosecutors, judges, and even defense attorneys to move defendants through the system with “almost like an assembly-line mentality.”¹¹⁴ This practice can easily transform minor offenses into formal criminalization and jail time.¹¹⁵

Prosecutors retain vast discretion. They decide whether to charge an individual with a crime, what charges to bring, and whether to negotiate a plea deal or continue to trial. That discretion can be used to refocus prosecutorial practices. As mentioned in Part I, Roundtable participants emphasized that a focus on enforcing low-level offenses helps fuel racial disparities while limiting the resources available to address serious crimes. As one criminal justice advocate explained, “When we talk about the policies and practices that are driving racial disparities in jail populations, it’s partly a question of decision making by practitioners in the system, and it’s partly a question of resources and priority setting.”

Participants agreed that refocusing prosecutorial attention on serious and violent crimes would reduce time in jail for those who may not need to be incarcerated. Many noted that the problem may be rooted, in part, in a culture that conflates “success” with the number of prosecutions and convictions. Participants urged a change to prosecutorial performance evaluations. As one local prosecutor explained, “Measures of success for prosecutors must change. My jurisdiction does not consider an 80 percent prosecution rate a good thing. We are proud of lower prosecution rates because it demonstrates that we are being thoughtful about who needs to be prosecuted.” By shifting priorities and related incentives — such as, for example, rewarding prosecutors for diverting low-level offenders from incarceration when appropriate — prosecutors can play a pivotal role in reducing jail populations.¹¹⁶

Prosecutors are starting to agree that they can and should prioritize reducing violent and serious crime, reducing incarceration, and reducing recidivism instead of focusing on increasing conviction rates and sentence lengths. In 2014, the Brennan Center convened a Blue Ribbon Panel of current and former federal prosecutors to devise new priorities for prosecutors.¹¹⁷ Though the Panel focused on how federal

prosecutors can change practices, its recommendations also apply to local offices. It recommended that prosecutor's offices institute new priorities, including the primary goal of reducing violent and serious crime. It also developed success measures to achieve these goals, including: changes in violent crime rates, percent of serious and violent crime cases on office dockets, and percent of community reporting feeling safe.¹¹⁸

Some local jurisdictions have experimented with shifting their office's priorities:

- The San Francisco District Attorney's Office created Neighborhood Courts and Neighborhood Prosecutors in 2011. Rather than face criminal prosecution, low-level misdemeanor defendants face a panel of community residents serving as voluntary adjudicators. Citizens determine the impact of a crime on the community and issue responses, such as community service or restitution. Between 2011 and 2013, drug cases in San Francisco declined by almost 50 percent and the jail population declined by almost 10 percent.¹¹⁹ The program contributed to this decline.
- In 1998, the District Attorney's Office in Brooklyn, N.Y., implemented Treatment Alternatives for Dually Diagnosed Defendants (TADD). The program originally targeted offenders with both mental health and substance abuse issues and later expanded to include those suffering from a serious mental illness. To enter TADD, defendants were required to plead guilty and participate in a rigorous treatment program.¹²⁰

By diverting low level offenders, these offices can prioritize their resources to prosecute violent and serious crimes. Applying this concept to local prosecutors' offices generally will help reduce the jail population and disparities while continuing to protect public safety.

7. Increase Indigent Representation in Misdemeanor Offenses

Participants emphasized the need for access to meaningful indigent representation, particularly in misdemeanor cases. Of the approximate 10 million misdemeanor cases filed annually, almost 25 percent of defendants go before a judge without a lawyer.¹²¹ Theoretically, public defenders are guaranteed for all cases where a criminal defendant faces a term of incarceration. Nevertheless, indigent counsel is often denied due to court practices, overwhelming caseloads, or a lack of adequate government resources for public defense.¹²²

Roundtable participants agreed that decreasing misdemeanor convictions can significantly reduce jail populations. Most defendants enter plea agreements for such low-level offenses. Access to counsel could play a role in reducing these convictions. As the National Association of Criminal Defense Lawyers (NACDL) explained in a 2011 report, even simple misdemeanor cases can present complex legal questions that can make a difference between innocence or guilt and incarceration or release. "Attentive defense counsel is particularly important in misdemeanor courts," the report noted, "because the volume of cases means that prosecutors and judges too often and too easily can overlook factual issues."¹²³ With more than 95 percent of cases resulting in plea agreements, securing representation before appearing in court is critical.¹²⁴ And yet, NACDL reported that in over three-quarters of counties defendants were appointed counsel in fewer than 20 percent of misdemeanor cases where jail time was an available punishment.¹²⁵

Legal scholar Alexandra Natapoff found that, without meaningful and adequate legal representation, vulnerable people — including people suffering from substance abuse, people lacking basic literacy and information processing skills, people with mental health problems, and the poor — are more likely to plead guilty, regardless of innocence or guilt.¹²⁶ Given these realities, the need for representation is critical.

Participants proposed three specific reforms to improve indigent defense in misdemeanor cases.

Provide Representation Earlier

Participants agreed that increasing access to indigent defense at the early stages of a case — such as at arraignments and bail hearings — would reduce pressures to plead guilty. As a member of the defense bar explained, “If you want to talk about disparity and its impact on society, you have to look at the impact of misdemeanor convictions on people without lawyers in today’s ‘meet-and-plead’ justice system. Whether someone should be released often comes up in plea bargaining — as in, if you plead guilty now you can go home, but if you don’t then you will be incarcerated for at least five days. Defense attorneys can combat the effect that this has on case disposition if they intervene at earlier stages.” A former local prosecutor agreed, noting, “Jurisdictions need to allocate resources to defense, too. It’s critical to ensure that we have just outcomes.”

Enforce Case Load Limits

Recent litigation and statewide reforms have set caseload limits for local public defense offices. While national standards limit felony cases to 150 a year per attorney, some public defense attorneys juggle caseloads ranging from 500 to 800 a year. Such high volume makes it extremely difficult to perform basic legal tasks to ensure clients receive quality representation.

One solution: caseload limitations. But Roundtable participants emphasized that these limits are not effective unless rigorously enforced. Some jurisdictions have devised methods to enforce standards:

- In Washington state, some counties implemented caseload guidelines and tied them to funding for defense services. Those defenders offices received additional funding when their total number of cases increased.¹²⁷
- In 2008 and 2009, the New Hampshire Public Defender entered into an agreement with the state’s Judicial Council. The agreement required attorneys to maintain a maximum case load of 55 open and active cases.¹²⁸ The Council provides accountability and an enforcement mechanism.

Collect Data and Allocate Resources

Roundtable participants cited a lack of data on how well public defenders achieved successful outcomes for their clients. Some noted it would be valuable, in particular, to know the percent of indigent defendants who have representation at early stages such as arraignment, and how that correlates to case outcomes.

Collecting relevant data and using it to inform resource allocation is key. As one local prosecutor explained, “If we want the defense bar to do things differently, we’ve got to pour additional resources

into it and change measurements. Defense counsel should not be measured based on how many cases they process. Rather, they should be measured based on case outcomes. Did their services reduce jail sentences? We need concrete data on this.”

Participants agreed that implementing reforms to indigent defense representation could reduce the effects of law enforcement focusing on low level offenses, reduce pretrial detention, and reduce length of sentences for low level offenses.

8. Develop “Bench Cards” for Judges to Combat Implicit Bias and Reduce Unnecessary Jail Usage

Bench cards are checklists that serve as reference guides for judges. Typically one-to-three pages long, they explain the legal obligation of a judge and provide a list of questions for judges to use when making decisions.

These documents include explicit, concrete criteria for decision-making, such as:

- *“Best Practices” Criteria:* These list necessary components for specific hearings. The card may list instances where defendants should have public defenders present, like a probation revocation hearing. The card may also include reminders about the general process for specific hearings, such as the circumstances necessary to accept waiver of counsel or hold someone in contempt of court.
- *Implicit Bias Questions:* These provide judges with questions to reduce the effect of implicit racial bias in decision making. For example, some checklists ask judges to “imagin[e] how one would evaluate the [defendant] if he or she belonged to a different, non-stigmatized group.” They also create strategies to control for implicit bias such as “if-then plans” to raise awareness of potential bias in thinking. The questions are designed to “prompt decision makers to more systematically reflect on and scrutinize the reasoning behind any decision for traces of possible bias.” Such questions, of course, only make sense in tandem with implicit bias training. Research suggests that judges who do not receive implicit bias training can actually increase biases in decision making if prompted by such questions without proper understanding.¹²⁹
- *List of Alternatives to Incarceration:* These forms provide judges with a list of alternative punishments other than incarceration for low-level offenses, like failure to pay court-imposed fees or contempt of court. For example, it may explain how judges can convert community service hours to account for unpaid court costs, or list impermissible methods of enforcement for debt collection.¹³⁰

Bench cards work well for judges who are susceptible to conditions in hearings that increase the likelihood of implicit bias influencing their decisions. These include ambiguity making many decisions in a short time, and distracting circumstances (including fatigue, backlogged or diverse caseloads) that create time pressure and force judges to make complex decisions quickly.¹³¹ These circumstances increase the likelihood that judges rely on stereotypes to make those decisions.

Roundtable participants enthusiastically endorsed instituting bench cards for judges. A prosecutor explained, “Checklists should inform, not replace, discretion. They help judges decide what to do through a more orderly and self-aware process.” According to a member of the judiciary who uses bench cards, “Specific research-based tools can mitigate implicit bias. Things like checklists, with their ‘check your bias at the door’ internal reflection questions, are one of those tools. Bench cards are extremely valuable for judges in court hearings.”

Participants pointed to several examples of successful bench card introduction:

- In the juvenile context, several jurisdictions have implemented version of the Courts Catalyzing Change Preliminary Protective Hearing Benchcard, including Los Angeles County, Omaha, Neb., Portland, Ore., and Mecklenburg County, N.C. The cards prompt judges to consider key questions regarding the appropriateness of foster care, factors that might prevent a child from being sent home, and direct questions of reflection to make judges aware of biases in their decision making process.
- Similarly, the National Council of Juvenile and Family Court Judges and Dependency Court implemented bench cards for judges to help mitigate implicit bias in decisions where children were placed in custody. Research shows that use of this card increased the likelihood that a judge would place a child with a parent or relative as opposed to placing them in foster care.¹³²
- Ohio recently created bench cards to inform judges of their options for alternatives to incarceration when a defendant does not pay court-imposed fees or fines.¹³³ These alternatives include community service, enforcement through civil judgment, and cancellation of debt. Since the introduction of bench cards, there have been fewer complaints about indigent defendants jailed because they could not afford to pay their debts.¹³⁴
- In DeKalb County, Ga., judges will start using bench cards to curb incarceration for failure to pay criminal justice debt. This practice was instituted as part of a settlement in a federal lawsuit that challenged the county’s debt collection practices. The cards specify the process that judge’s should take to determine whether a probationer has the ability to pay criminal justice debt. They also provide instructions for judges to preserve a defendant’s right to counsel during hearings for failure to pay court debts.¹³⁵

Roundtable participants proposed bench cards to address several issues highlighted in this report, including tackling implicit racial bias and reducing jail populations. As one participant explained: “Innovative reforms are sometimes as simple as implementing things we talked about or know work for years. Sometimes it’s about common sense application.”

Figure 5: Order Requiring Bench Cards in DeKalb County Recorder's Court.¹³⁶

DEKALB COUNTY COLLECTION OF FINES AND COURT FEES

All DeKalb County Recorder's Court judges adjudicating misdemeanor probation revocation proceedings shall abide by the described procedures:

<u>RIGHT TO COUNSEL</u>	<u>ENFORCING FINES BY IMPOSING JAIL</u>
<p>All probationers have a right to counsel (which may include a public defender or court-appointed attorney) in probation revocation proceedings.</p> <p>The court MAY NOT accept a <u>written</u> or <u>oral</u> waiver of the right to counsel without FIRST informing the probationer of the dangers of proceeding without counsel and ensuring that any waiver of the right to counsel is knowing, intelligent, and voluntary.</p> <p>If a probationer seeks to waive his right to counsel, the court must conduct a colloquy <u>on the record</u> to inform the probationer:</p> <ul style="list-style-type: none"> • That the probationer has a right to a court-appointed attorney or public defender at no cost, if he cannot afford to retain an attorney; • That the \$50 fee normally charged for representation by the DeKalb County Public Defender may be waived for those who cannot afford to pay; • Of the risks and dangers of proceeding without counsel; including the risk of incarceration and the <u>maximum jail time</u> that may be imposed if the probationer is determined to have violated probation; and • Of the benefits of representation by counsel, including assistance with asserting constitutional rights, preparing and presenting financial hardship documentation to the court, arguing in favor of alternatives to incarceration, and vigorous advocacy against the imposition of jail as punishment for probation violation. <p>If, after being so informed, a probationer states a desire to waive his right to counsel, the court <u>must engage in a colloquy</u> and <u>make a determination</u>, supported by findings of fact on the record and set forth in an order that waiver is <u>knowing, intelligent, and voluntary</u>.</p> <p>Written waiver of the right to counsel on a probation revocation petition or other document is NOT ACCEPTABLE without such a colloquy and findings of fact made on the record.</p>	<p>A probationer charged with failure to pay may be jailed only if (s)he has willfully failed to pay or failed to make reasonable efforts to acquire the resources to pay, AND no adequate alternative to incarceration exists.</p> <p>Prior to revoking probation and committing a probationer to jail for nonpayment of fines, <u>the court must conduct an economic ability-to-pay hearing</u>.</p> <p>To conduct such a bearing, the court shall</p> <ul style="list-style-type: none"> • Inquire and make a determination of probationer's ability to pay a fine, which shall address the probationer's ability to pay and the income, assets, debts, and financial responsibilities presented by the probationer; • Inquire and make a determination of the reasonableness of a probationer's efforts to acquire resources to pay a fine, which shall take into account efforts to secure employment and borrow money, as well as limitations to the probationer's ability to secure employment and borrow money; • Consider and make a determination of the adequacy of alternatives to incarceration, including a reduction or waiver of fines and fees, an extension of time to pay, and community services in the event that a probationer is determined to lack ability to pay despite having made reasonable efforts to acquire resources. <p>Each of the determinations shall be supported by findings of fact on the record and set forth in a written order.</p>

CONCLUSION

Though reducing racial disparities in local justice systems is a challenging task, it is not impossible. Roundtable participants universally shared a sense of optimism as they weighed a wide range of solutions.

The eight recommendations set forth in this report are only a starting point for jurisdictions seeking to meet the goals of reducing unnecessary incarceration and reducing racial and ethnic disparities. The first step is to recognize that racial disparities exist, but are not necessary. Crime, incarceration, and disparities can all be reduced together. The second step is action. Changes to state and federal laws are vital. Changing local practices and individual decision making in local jurisdictions is also key. This report seeks to provide a framework for local decision makers to achieve that goal.

ENDNOTES

- 1 African Americans were 482,400 out of the 1,552,432 people arrested for selling or possessing drugs in 2012 – or 31 percent. Data on Hispanics was not available. BUREAU OF JUSTICE STATISTICS, ARREST DATA ANALYSIS TOOL, <http://www.bjs.gov/index.cfm?ty=datool&surl=/arrests/index.cfm#>. See also SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26 (2014), available at <http://1.usa.gov/1rpXmxJ> (reporting that, among persons age 12 or older, almost 8.8 percent of Hispanics, 9.5 percent of whites and 10.5 percent of blacks used illicit drugs in 2013); Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST., Sept. 30, 2014, <http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/09/30-war-on-drugs-black-social-mobility-rothwell> (conducting independent analysis on 2012 SAMHSA study, found 6.6 percent of white adolescents and young adults sold drugs compared to just 5.0 percent of blacks, or, a 32 percent difference).
- 2 Compare LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/pbtss11.pdf> (reporting that 13% of black drivers compared to 10% of white and Hispanic drivers were pulled over for a traffic stop during most recent contact with police) with U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF FERGUSON POLICE DEPARTMENT 64 (2015), available at <http://1.usa.gov/1B26Xnu> (reporting that 85 percent of traffic stops from October 2012 to October 2014 in Ferguson, Mo., involved African Americans, even though only 67 percent of residents are black); CHRIS KOSTER, MISSOURI ATT'Y GENERAL, 2014 ANNUAL REPORT: MISSOURI VEHICLE STOPS 5-7 (2015), available at <https://www.ago.mo.gov/docs/default-source/public-safety/2014vehiclesstops-executivesummary.pdf?sfvrsn=2> (reporting that African Americans were 73 percent more likely, and Hispanics were 90 percent more likely, to be searched by police during a stop in comparison to whites; approximately 8 percent of stops resulted in arrest for African American and Hispanic drivers in 2014, as compared to only 4 percent of the stops of whites).
- 3 NAZGOL GHANDOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 10-11 (2015).
- 4 PREETI CHAUHAN, ET AL., JOHN JAY COLLEGE OF CRIMINAL JUSTICE, TRENDS IN MISDEMEANOR ARREST RATES IN NEW YORK 39-40 (2014).
- 5 This report focuses primarily on disparities between African Americans and whites for two reasons: 1) evidence of disparities between African Americans and whites is well-documented; and 2) disparities between African Americans and whites are more acute.
- 6 TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014-STATISTICAL TABLES 1, 2 tbl.1 (2015), available at <http://www.bjs.gov/content/pub/pdf/jim14.pdf> (noting that average daily population in jails during 2014 was 738,975 inmates, though 744,592 jail inmates were confined at midyear reporting); JAMES STEPHAN & GEORGETTE WALSH, BUREAU OF JUSTICE STATISTICS, CENSUS OF JAIL FACILITIES, 2006 1 (2011), available at www.bjs.gov/content/pub/pdf/cjf06.pdf.
- 7 RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 8-10 (2015).
- 8 The Associated Press, *Cost of Inmate in NYC Almost as Much as Ivy League Tuition*, N.Y. DAILY NEWS, Sept. 30, 2014, <http://www.nydailynews.com/new-york/cost-inmate-nyc-ivy-league-tuition-article-1.1471630>.
- 9 RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 6-7 (2015).
- 10 RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 22-23 (2015). In 1983 there were 51 admissions to jail for every 100 arrests. *Id.* at 22. By 2012, that number jumped to 95 admissions into jail per 100 arrests. *Id.* at 22. The Vera Report suggests, based on this data, that there is “a greater propensity to hold many who in earlier times would have been released.” *Id.* at 23.

- 11 TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014-STATISTICAL TABLES 4 tbl.3 (2015), *available at* <http://www.bjs.gov/content/pub/pdf/jim14.pdf> (reporting 62.8 percent of jail inmates were unconvicted in 2014). *See also* CHERISE FANNO BURDEEN, PRETRIAL JUSTICE INST., JAIL POPULATION MANAGEMENT: ELECTED COUNTY OFFICIALS GUIDE TO PRETRIAL SERVICES 2-6 (2009), *available at* <http://www.naco.org/newsroom/pubs/Documents/Health,%20Human%20Services%20and%20Justice/Jail%20Population%20Management%20Guide.pdf>.
- 12 NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), *available at* <http://www.courtstatistics.org/-/media/Microsites/Files/CSP/EWSC-2008-Online.ashx>.
- 13 RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 5 (2015).
- 14 RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 7 (2015); *see also* ROBINA INST., UNIV. OF MINN., PROFILES IN PROBATION REVOCATION: EXAMINING THE LEGAL FRAMEWORK IN 21 STATES 7 (2014), *available at* <http://www.robinainstitute.org/wp-content/uploads/Robina-Report-2015-WEB.pdf> (profiling types of conditions on probation in 21 states).
- 15 NEW YORK STATE DIV. OF CRIMINAL JUSTICE SERV., 2015-2016 NYS ANNUAL PROBATION STATE AID PLAN AND APPLICATION APPENDIX A: PROBATION ANALYSIS AND PLANNING FILE tbl.15 (2015), *available at* <http://on.ny.gov/1J0nfjo> (Madison County experienced a negative outcome in 61.8 percent of probation cases and Seneca County had 55.2 percent negative outcomes, while New York City experienced a negative outcome in 17.5 percent of probation cases).
- 16 *Local Jail Inmates and Jail Facilities*, BUREAU OF JUSTICE STATISTICS, <http://www.bjs.gov/index.cfm?ty=tp&tid=12>.
- 17 RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 11 (2015).
- 18 *See* NAT'L COUNCIL ON CRIME & DELINQUENCY, RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2 (2009), *available at* http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf ("Failing to separate ethnicity from race hides the true disparity among races, as Hispanics—a growing proportion of the system's population—are often combined with Whites, which as the effect of inflating White rates and deflating African American rates in comparison"); D'Vera Cohn, *Millions of Americans Changed their Racial or Ethnic Identity from One Census to the Next*, PEW RESEARCH CTR., May 5, 2014, *available at* <http://pewrsr.ch/RhJVFT/> (showing shifts in Hispanic origin data due to changes in census question format); MARC MAUER & NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, INCORPORATING RACIAL EQUITY INTO CRIMINAL JUSTICE REFORM 18 (2014) (noting that the rapid growth of Latinos in the population masks increases in incarceration: for example, the number of Hispanic females in state and federal prison rose by 75 percent between 2000 and 2009, but the rate of incarceration only rose by 23% because of growth in the overall population).
- 19 TODD MINTON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2013 – STATISTICAL TABLES, 7 tbl.3 (2014), *available at* www.bjs.gov/content/pub/pdf/jim13st.pdf (providing 2013 jail demographics); U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/00000.html> (providing 2013 general population demographics). Because the most updated U.S. Census demographic data is from 2013, we use the Bureau of Justice Statistics' 2013 jail data to compare demographics.
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- 21 Nicholas Kristof, *Inside a Mental Hospital Called Jail*, N.Y. TIMES, Feb. 8, 2014, at SR1 (Chicago); Michael Winerip & Michael Schwartz, *Rikers: Where Mental Illness Meets Brutality in Jail*, N.Y. TIMES, July 1, 2014, at A1 (Riker's Island).

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- 23 See CHRISTOPHER T. LOWENKAMP, ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 3 (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.
- 24 See RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 17 (2015); LAURA MARUSCHAK, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF JAIL INMATES I (2006), *available at* <http://www.bjs.gov/content/pub/pdf/mpji.pdf> (reporting that 53 percent of women and 35 percent of men in jail reported having a current medical problem).
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- 26 CHRISTOPHER T. LOWENKAMP, ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 3 (2013), *available at* http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-costs_FNL.pdf.
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- 30 Floyd, et al. v. City of New York, No. 08 Civ. 1034(SAS), 2013 WL 4046209 6-7 (S.D.N.Y. 2013).
- 31 Plaintiff's Third Report to Court and Monitor on Stop and Frisk Practices at 4, Bailey, et al. v. City of Philadelphia, et al., A. No. 10-5952 (2013).
- 32 See Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity,'* USA TODAY, Nov. 19, 2014, <http://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/>. Not all departments experienced racial disparities in arrest – 173 of the 3,528 departments studied arrested blacks at a rate equal to or less than other racial groups. *Id.*
- 33 Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST., Sept. 20, 2014, <http://www.brookings.edu/blogs/social-mobility-memos/posts/2014/09/30-war-on-drugs-black-social-mobility-rothwell>.
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- 42 BESIKI KUTATELADZE, ET AL., VERA INST. OF JUSTICE, *PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY* 199, 210 tbl.62 (2014), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>.
- 43 Ed Muñoz & Stephen Sapp, *Racial/Ethnic Misdemeanor Sentencing Disparities: Additional Evidence for Contextual Discrimination*, 2 J. ETHNICITY IN CRIMINAL JUSTICE 27, 38 (2003).
- 44 JUSTICE POL'Y INST., *BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL* 7 (2012), *available at* <http://www.pretrial.org/download/advocacy/Bail%20Fail%20-%20JPI%202012.pdf>; RAM SUBRAMANIAN, ET AL., VERA INST. OF JUSTICE, *INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA* 29 (2015).
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