

# **BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM**





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# EXECUTIVE SUMMARY

“Every time you see me, you want to mess with me,” Eric Garner told the group of approaching New York City police officers. As they wrestled him to the ground to arrest him for selling untaxed loose cigarettes, an officer placed Garner in a chokehold and maintained his grip despite Garner’s pleas for air. One hour later, Garner was pronounced dead. The unarmed black man’s death and the white officer’s non-indictment despite videotape evidence have heightened concerns about police practices and accountability. In the wake of the fatal police shooting of unarmed teenager Michael Brown in Ferguson, Missouri, and that officer’s non-indictment, a growing number of Americans are outraged and demanding change.

“Black lives matter” has become a rallying cry in light of evidence that the criminal justice system is failing to uphold this basic truth. Official data, although woefully inadequate,<sup>1</sup> show that over half of those killed by police in recent years have been black or Latino.<sup>2</sup> Officers involved in these killings are rarely indicted, much less convicted, for excessive use of force.<sup>3</sup> And official responses to recent protests have spurred further controversy: militarized police forces disrupted public assemblies in Ferguson,<sup>4</sup> and New York City’s police union blamed pro-reform politicians and nonviolent protesters for the killing of two officers by a mentally unstable man.<sup>5</sup>

The criminal justice system’s high volume of contact with people of color is a major cause of African Americans’ disproportionate rate of fatal police encounters, as well as of broader perceptions of injustice in many communities. This briefing paper identifies four key features of the justice system that contribute to its disparate racial impact, and presents recent best practices for targeting these inequities drawn from adult and juvenile justice systems around the country. In many cases, these practices have produced demonstrable results.

Policing is by no means the only stage of the justice system that produces racial disparity. Disadvantage accumulating at each step of the process contributes to blacks and Latinos comprising 56% of the incarcerated population, yet only 30% of the U.S. population.<sup>6</sup> The roots of this

disparity precede criminal justice contact: conditions of socioeconomic inequality contribute to higher rates of some violent and property crimes among people of color. But four features of the justice system exacerbate this underlying inequality, and jurisdictions around the country have addressed each one through recent reforms.

## 1. Many ostensibly race-neutral policies and laws have a disparate racial impact.

Police policies such as “broken windows” and stop, question, and frisk have disproportionately impacted young men of color. Prosecutorial policies, such as plea bargain guidelines that disadvantage blacks and Latinos compound these disparities, as do sentencing laws that dictate harsher punishments for crimes for which people of color are disproportionately arrested.

One reform to address this source of disparity in policing is the significant retrenchment of “stop and frisk” in New York City after a court ruled that the policy violated the constitutional rights of blacks and Latinos. Recent legislation reducing the sentencing disparity between the use and distribution of crack versus powder cocaine in California, Missouri, and at the federal level are examples of efforts to tackle sentencing inequalities.

## 2. Criminal justice practitioners' use of discretion is – often unintentionally – influenced by racial bias.

Racial disparities in traffic stops have diminished on a nationwide basis in recent years, but persist in many jurisdictions. Police officers are more likely to stop black and Hispanic drivers for investigative reasons. Once pulled over, people of color are more likely than whites to be searched, and blacks are more likely than whites to be arrested. In jurisdictions like Ferguson, these patterns hold even though police have a higher “contraband hit rate” when searching white versus black drivers. Prosecutors and judges also often treat blacks and Hispanics more harshly in their charging and sentencing decisions.

The Vera Institute of Justice’s work with prosecutors’ offices around the country is one initiative addressing bias in charging decisions by monitoring outcomes and increasing accountability. Similarly, judges in Dorchester, Massachusetts, have worked with police and prosecutors to develop guidelines to reduce racial disparities in charging enhancements for people arrested for drug crimes in a school zone.

## 3. Key segments of the criminal justice system are underfunded, putting blacks and Latinos – who are disproportionately low-income – at a disadvantage.

Most states inadequately fund their indigent defense programs. Pretrial release often requires money bond, which can be prohibitive to low-income individuals and increases the pressure on them to accept less favorable plea deals. Many parole and probation systems offer supervision with little support. Public drug treatment programs are also underfunded, thereby limiting treatment and sentencing alternatives for low-income individuals.

New Jersey’s recently overhauled bail laws, which will increase nonmonetary release options, is an effort to create a more even playing field for low-income individuals. In Illinois, the expansion of alternative community programs has helped to nearly halve reliance on secure detention for youth.

## 4. Criminal justice policies exacerbate socioeconomic inequalities by imposing collateral consequences on those with criminal records and by diverting public spending.

A criminal conviction creates a barrier to securing steady employment, and those with felony drug convictions are disqualified from public assistance and public housing in many areas. In addition, allocating public resources to punitive programs comes at the expense of investments in crime prevention and drug treatment programs. Because of their higher rates of incarceration and poverty, people of color are disproportionately affected by these policy choices.

A key development in this area is California’s reclassification of a number of low-level offenses from felonies to misdemeanors under Proposition 47 in 2014. This initiative is intended to reduce prison admissions and to spare many low-level offenders the collateral consequences of a felony conviction. The law also redirects a portion of state prison savings – estimated to be \$150-\$250 million annually – to crime prevention and drug treatment programs.

Recent high-profile killings by police officers demonstrate the need for better police practices and improved accountability. They also underscore the need for revising policies that place people of color under greater police scrutiny and that lead to their disadvantage throughout the criminal justice system. To address this crisis of confidence, especially among people of color, criminal justice practitioners and policymakers should seize this opportunity to adopt and expand upon existing best practices for promoting racial equity at all levels of the justice system.

This briefing paper is organized as follows: Section I examines racial disparities in policing in Ferguson, Missouri, and New York City. Section II compares these patterns with nationwide trends and relates them to disparate outcomes at later stages of the criminal justice process. Section III examines the causes of blacks’ and Latinos’ overrepresentation in the justice system,



# I. UNEVEN POLICING IN FERGUSON AND NEW YORK CITY

Black and white Americans experience different policing practices. They encounter the police at different rates and for different reasons, and they are treated differently during these encounters.

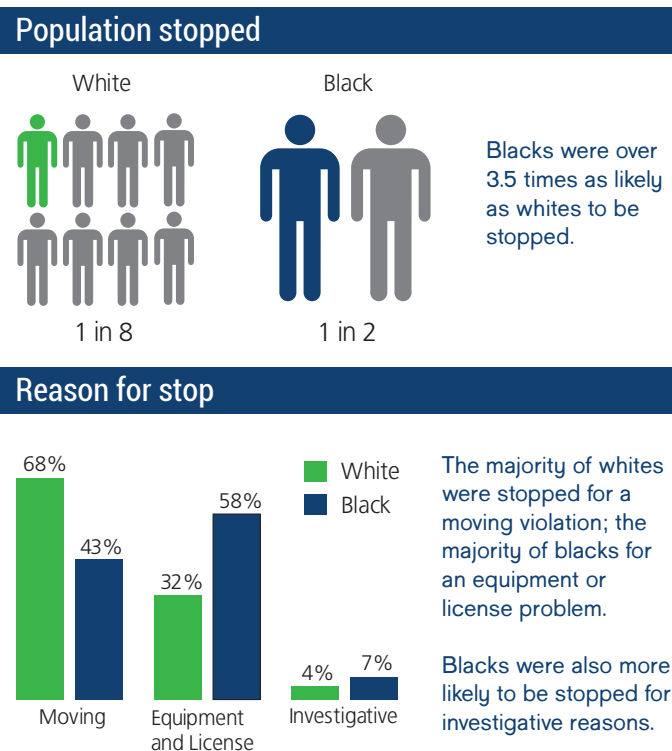
Officers' racially biased use of discretion – either intentional or unintentional – is one cause of racial disparities in police contact that are not explained by differences in crime rates. Another cause is formal police policies such as “stop and frisk” and “broken windows” policing. Designed to target minor violations with the rationale of circumventing serious crimes, these policies place people of color under greater scrutiny. Officer Darren Wilson stopped Michael Brown for jaywalking. Officer Daniel Pantaleo and his colleagues approached Eric Garner for selling untaxed cigarettes. Disproportionate police contact with people of color in these two very different jurisdictions set the context for these tragic deaths.

## FERGUSON, MISSOURI

A suburb of St. Louis, Missouri, Ferguson had a population of just over 21,000 in 2013. Though African Americans comprised 63% of the city's driving-age population in that year, they accounted for 86% of drivers stopped by Ferguson police.<sup>8</sup> That amounted to almost one stop for every two black adults in Ferguson, versus just over one stop for every eight white adults.

Ferguson police cited various reasons for stopping black and white drivers. The majority of white drivers (68%) were stopped for a moving violation while the majority of black drivers (57%) were stopped for a license or equipment problem (41% and 16%, respectively). Research has shown that although blacks are more

Figure 1. Ferguson traffic stops, 2013: Population stopped and reason for stop



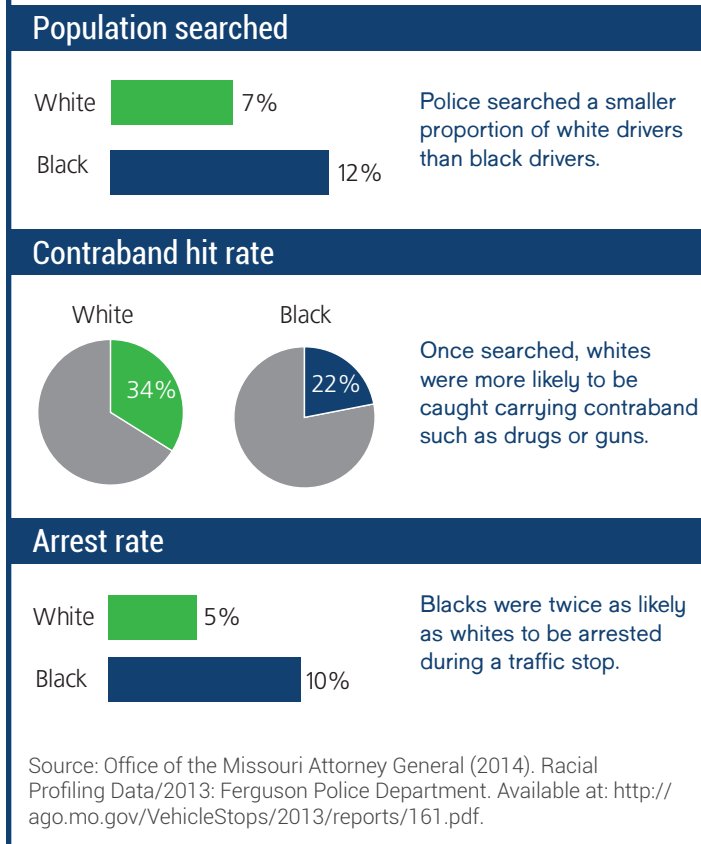
Source: Office of the Missouri Attorney General (2014). Racial Profiling Data/2013: Ferguson Police Department. Available at: <http://ago.mo.gov/VehicleStops/2013/reports/161.pdf>.

Note: Because data are based on stops and not drivers, drivers with multiple stops are counted multiple times. Reasons for stops exceed 100% because some stops were made for multiple reasons.

likely than whites to have vehicle code violations, this difference does not account for their disproportionate rates of stops for non-moving violations.<sup>9</sup> Investigative stops – one of the most discretionary reasons for traffic stops – accounted for 7% of stops among black drivers in Ferguson, compared to 4% of stops among white drivers.



**Figure 2. Ferguson traffic stops: Population searched, contraband hit rate, and arrest rate, 2013**



After making a stop, Ferguson police searched 12% of black drivers in contrast to 7% of white drivers. Despite – or as a result of – the high rate of stops and searches for black drivers, police had a lower “contraband hit rate” when searching black drivers compared to white drivers. They found contraband – primarily drugs and sometimes weapons – on 22% of black drivers who were searched and on 34% of white drivers who were searched.

Yet blacks were twice as likely as whites to be arrested during a traffic stop (10% versus 5%). Two factors account for this disparity. First, by searching such a high proportion of black drivers, officers found contraband on a similar share of black drivers as white drivers (but on a smaller proportion of black drivers that they searched). The more influential factor, though, was that black drivers were more likely to have arrest warrants

compared to their white counterparts. Black drivers were more likely to have these warrants in part because of unpaid fines related to their disproportionate exposure to traffic enforcement.

Municipalities such as Ferguson may have a fiscal incentive to focus law enforcement efforts on traffic violations and petty offenses. Court fines and fees have become a major source of revenue for certain municipal governments in St. Louis County – primarily those serving largely black populations with a high poverty rate.<sup>10</sup> Court fines and forfeitures accounted for 20% of Ferguson’s operating revenue in 2013.<sup>11</sup> To ensure collection of these court fines and fees, these municipalities have issued a high rate of arrest warrants. Ferguson outpaced all other cities in the region with more than 1,500 warrants per 1,000 people in 2013 – about four times the rate for the city of St. Louis.<sup>12</sup>

In the aftermath of protests in late summer 2014, the city of Ferguson announced reforms to cap the amount of revenue generated from such tickets.<sup>13</sup> But that promise was short-lived. In December 2014, Ferguson’s finance director announced plans to increase revenues from fines to fill a budget deficit from its most recent fiscal year.<sup>14</sup>

## NEW YORK CITY

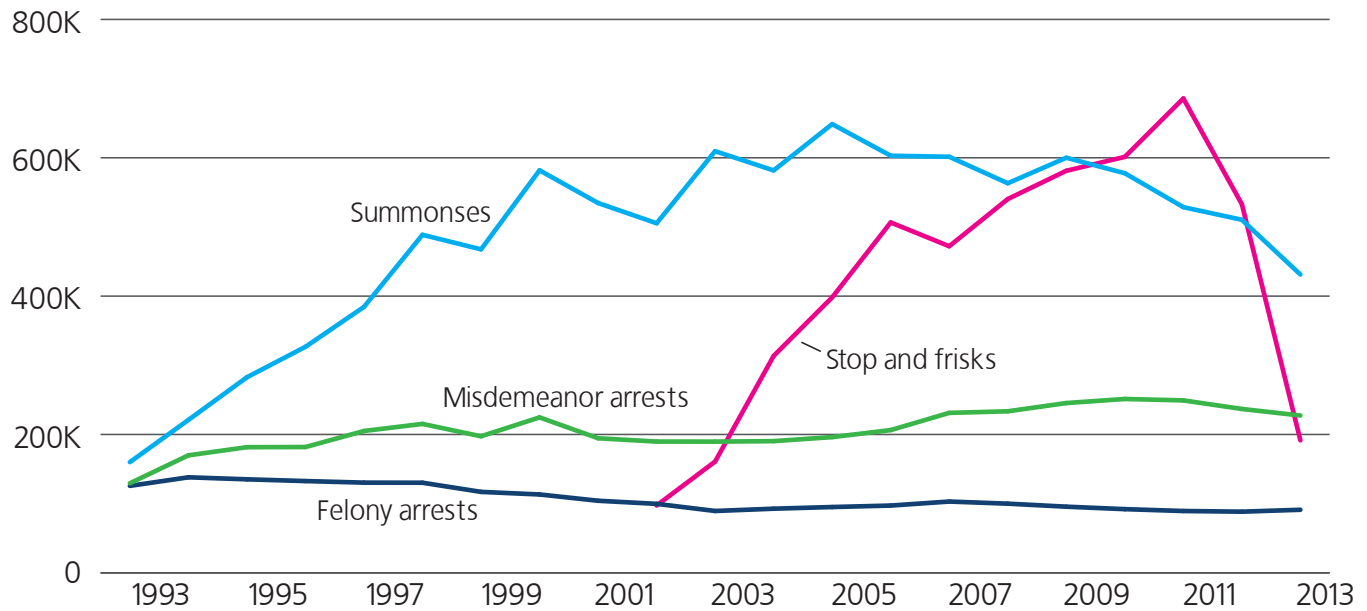
Policing in New York City took a dramatic turn in the 1990s under mayor Rudy Giuliani, with the launch of order-maintenance strategies known as “broken windows” and “quality of life” policing. These approaches seek to promote public safety by clamping down on petty offenses and neighborhood disorder.<sup>15</sup> With Michael

**Officer Darren Wilson stopped Michael Brown for jaywalking. Officer Daniel Pantaleo and his colleagues approached Eric Garner for selling untaxed cigarettes. Disproportionate police contact with people of color in these two very different jurisdictions set the context for these tragic deaths.**

Bloomberg as mayor (2002-2013) and Raymond Kelly as police commissioner, the police also embarked on a campaign to stop, question, and frisk primarily male residents of neighborhoods populated by low-income people of color – areas thought to have higher crime rates. Many of these “stop and frisk” encounters were initiated

with little legitimate rationale: officers noted “furtive movements” as the reason for 44% of stops between 2003 and 2013.<sup>16</sup> While deemphasizing felony arrests,<sup>17</sup> these policies dramatically increased the volume of arrests

**Figure 3. Summonses, misdemeanor arrests, stop and frisks, and felony arrests since 1993**



Source: Ryley, S., Bult, L., & Gregorian, D. (2014). Exclusive: Daily News Analysis Finds Racial Summons for Minor Violations in 'Broken Windows' Policing. *New York Daily News*. Available at: <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>.

Note: Stop and frisks are shown beginning in 2002, the year in which these data became readily available.

for misdemeanor offenses, of summonses for violations of the administrative code (such as public consumption of alcohol, disorderly conduct, and bicycling on the sidewalk), and of investigative police encounters with innocent people.

Men of color have borne the brunt of these policies. Men have been over four times as likely as women to be arrested for a misdemeanor in New York City since 1980.<sup>18</sup> Between 2001 and 2013, 51% of the city's population over age 16 was black or Hispanic. Yet during that period, 82% of those arrested for misdemeanors were black or Hispanic, as were 81% of those who received summonses.<sup>19</sup> The racial composition of stop and frisks was similar.<sup>20</sup>

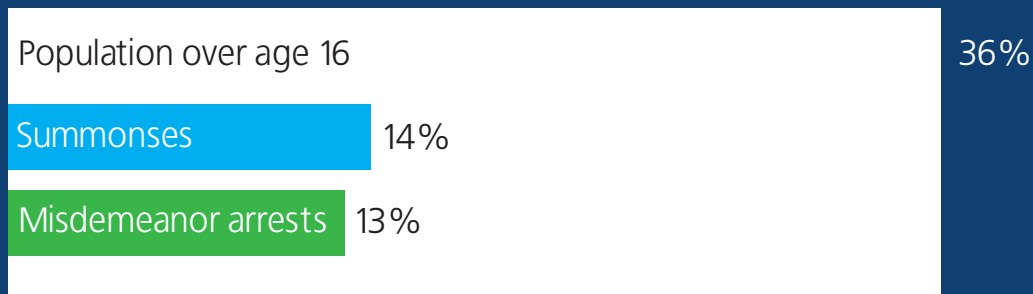
Commissioner William Bratton played a crucial role in implementing "broken windows" policies when he led the city's transit police in 1990 and during his first tenure as police commissioner under Mayor Rudy Giuliani, from 1994 to 1996. Now reappointed, Bratton and Mayor Bill de Blasio remain committed to this style of order-maintenance policing, with Bratton touting its efficacy and explaining that its racial disparities result from targeting communities and populations with higher violent crime rates.<sup>21</sup> In response to the outcry following Garner's

death, Bratton has announced plans to retrain officers on appropriate use of force during these encounters.

Yet research shows that order-maintenance strategies have had only a modest impact on serious crime rates. New York City experienced a dramatic crime drop during its period of rising misdemeanor arrests and summonses: the city's homicide rate declined by 73% between 1990 and 2000.<sup>22</sup> But this was not unique; other large cities including Seattle and San Diego have achieved similar reductions in crime since their crack-era crime peaks.<sup>23</sup> Although an early study found that New York City precincts with higher levels of misdemeanor arrests experienced greater drops in serious crimes,<sup>24</sup> a flawed research design makes this conclusion unreliable<sup>25</sup> and few other studies have reached the same conclusion.<sup>26</sup> More recent studies have found that high misdemeanor arrest volume,<sup>27</sup> high summons volume,<sup>28</sup> and other factors,<sup>29</sup> have had only a modest association or no association at all<sup>30</sup> with the city's violent crime drop. "Stop and frisk" activity has also been shown to have no impact on precincts' robbery and burglary rates.<sup>31</sup> Therefore, while order-maintenance policing demands a substantial share of public funds, there is limited evidence to support its efficacy and great cause for concern about its impact.<sup>32</sup>

Figure 4. Racial composition of New York City population, summonses, and misdemeanor arrests, 2001-2013

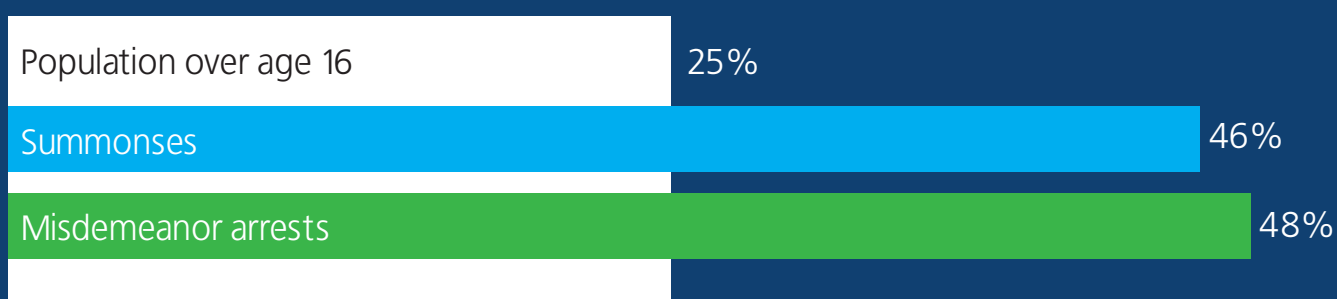
### White



### Latino



### Black



Source: Data retrieved from Chauhan, P., Fera, A. G., Welsh, M. B., Balazon, E. & Misshula, E. (2014). Trends in Misdemeanor Arrests in New York. New York, NY: John Jay College of Criminal Justice. Available at: [http://www.jjay.cuny.edu/web\\_images/10\\_28\\_14\\_TOCFINAL.pdf](http://www.jjay.cuny.edu/web_images/10_28_14_TOCFINAL.pdf) (pp. 25–7); Ryley, S., Bult, L., & Gregorian, D. (2014). Exclusive: Daily News Analysis Finds Racial Summonses for Minor Violations in 'Broken Windows' Policing. *New York Daily News*. Available at: <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567>.

Note: Summons and misdemeanor arrest data are based on incidents rather than individuals: individuals with multiple arrests and summonses are counted multiple times. Summons data did not include age breakdown and are drawn from approximately 30% of cases that provided race information.

## II. A CASCADE OF RACIAL DISPARITIES THROUGHOUT THE CRIMINAL JUSTICE SYSTEM

Compared to nationwide trends, Ferguson’s and New York’s racial disparities in policing are in some ways representative and in others anomalous.

In recent years, nearly equal proportions of blacks, whites, and Latinos in the United States have reported being stopped by the police while on foot or in their cars.<sup>33</sup> But the causes and outcomes of these stops still differ by race, and staggering racial disparities in rates of police stops persist in certain jurisdictions.<sup>34</sup> These disparities snowball as individuals traverse the criminal justice system.

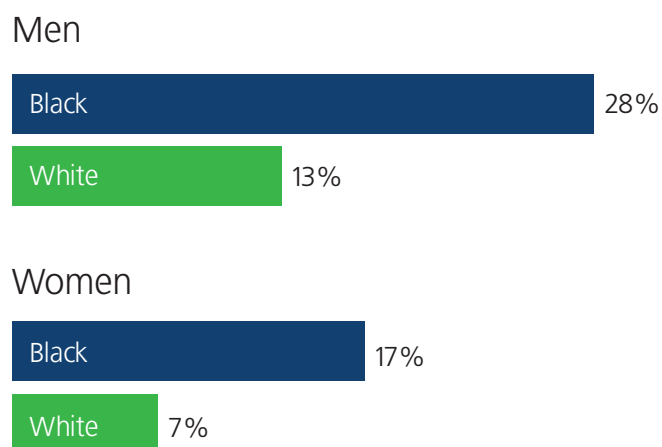
Blacks were 31% more likely and Hispanics were 6% more likely than whites to report a recent traffic stop in 2011, although in other recent years a similar proportion of blacks, Latinos, and whites have reported experiencing these stops.<sup>35</sup> Ferguson and New York are two of many jurisdictions where traffic and pedestrian stops still differ significantly by race. A recent investigation of the rates at which the Boston Police Department observed, stopped, interrogated, frisked, or searched individuals *without* making an arrest found that blacks comprised 63% of these police-civilian encounters between 2007 and 2010, although they made up 24% of the city’s population.<sup>36</sup> Similar trends have led approximately 20 cities across the country to enter into consent decrees or memoranda of understanding with the Department of Justice to reduce excessive force and/or protect the public’s civil rights, and several other cities are currently under investigation.<sup>37</sup>

A closer look at the causes of traffic stops reveals that police are more likely to stop black and Hispanic drivers for discretionary reasons. A study of police stops between 2003 and 2004 in Kansas City distinguished between

“traffic-safety stops” (reactive stops used to enforce traffic laws or vehicle codes) and “investigatory stops” (proactive stops used to investigate drivers deemed suspicious).<sup>38</sup> The authors found that rates of traffic-safety stops did not differ by the driver’s race, but rates of investigatory stops did, and did so significantly. While these differences persisted for all ages, they were sharpest among drivers under age 25: among these drivers, 28% of black men had experienced an investigatory traffic stop, as had 17% of black women, 13% of white men, and 7% of white women.

Class differences did not fully explain this racial disparity: black drivers under age 40 were over twice as likely as their

**Figure 5. Rates of investigatory traffic stops among Kansas City drivers under age 25, 2003-2004**



Source: Epp, C. R., Maynard-Moody, S., & Haider-Markel, D. P. (2014). *Pulled Over: How Police Stops Define Race and Citizenship*. Chicago, IL: The University of Chicago Press (p. 67).

white counterparts to experience investigatory stops for both the highest- and lowest-valued cars. Traffic-safety stops, the researchers concluded, are based on “how people drive,” whereas investigatory stops are based on “how they look.”

Nationwide surveys also reveal disparities in the outcomes of police stops. Once pulled over, black and Hispanic drivers were three times as likely as whites to be searched (6% and 7% versus 2%) and blacks were twice as likely as whites to be arrested during a traffic stop.<sup>39</sup> These patterns hold even though police officers generally have a lower “contraband hit rate” when they search black versus white drivers.<sup>40</sup>

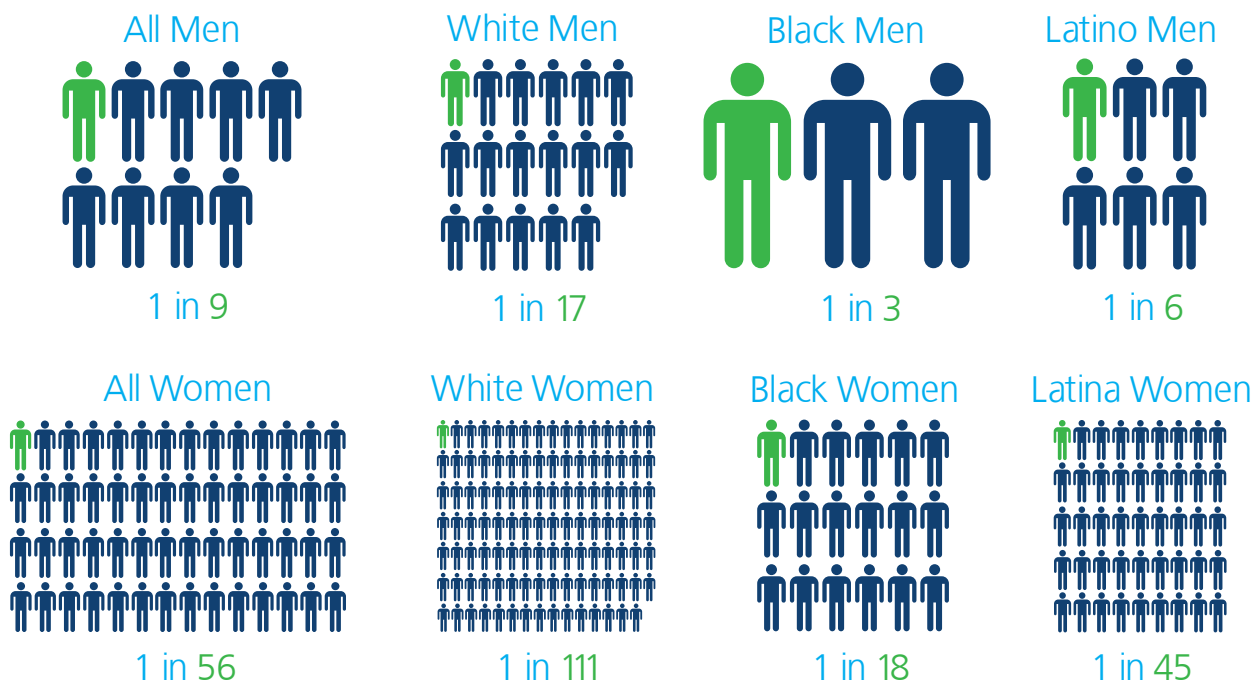
A recent investigation of all arrests – not just those resulting from traffic stops – in over 3,500 police departments across the country found that 95% of departments arrested black people at a higher rate than other racial groups.<sup>41</sup> The cumulative effect of these

policies is that 49% of African American men reported having been arrested by age 23, in contrast to 38% of their non-Hispanic white counterparts.<sup>42</sup> The next section of this briefing paper will examine how much of this disparity stems from differential crime rates.

The nature of police encounters also differs substantially for people of color compared to whites. Several surveys conducted between 2002 and 2008 have shown that Hispanics were up to twice as likely and blacks were up to three times as likely as whites to experience physical force or its threat during their most recent contact with the police.<sup>43</sup> More broadly, when a 1999 Gallup survey asked Americans about perceptions of police brutality in their neighborhoods, 58% of people of color said police brutality took place in their area, in contrast to only 35% of whites.<sup>44</sup> Police officers’ greater use of discretion when stopping people of color suggests that differences in drivers’ behavior alone are unlikely to account for disparities in use of force.

Once arrested, people of color are also likely to be charged more harshly than whites; once charged, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences – all after accounting for relevant legal differences such as crime severity and criminal history.

Figure 6. Lifetime likelihood of imprisonment for those born in 2001



Source: Bonczar, T. (2003). Prevalence of Imprisonment in the U.S. Population, 1974-2001. Bureau of Justice Statistics. Available at: <http://www.bjs.gov/content/pub/pdf/piusp01.pdf> (p. 1).

People of color are therefore more likely than whites to be arrested – in part due to differences in crime rates but also due to differences in police policies and use of discretion. Once arrested, people of color are also likely to be charged more harshly than whites; once charged, they are more likely to be convicted; and once convicted, they are more likely to face stiff sentences – all after accounting for relevant legal differences such as crime severity and criminal history.<sup>45</sup> A recent comprehensive scholarly review conducted by the National Research Council concluded that:

Blacks are more likely than whites to be confined awaiting trial (which increases the probability that an incarcerative sentence will be imposed), to receive incarcerative rather than community sentences, and to receive longer sentences. Racial differences found at each stage are typically modest, but their cumulative effect is significant.<sup>46</sup>

If recent trends continue, one of every three black teenage boys can expect to go to prison in his lifetime, as can one of every six Latino boys – compared to one of every seventeen white boys.<sup>47</sup> Smaller but still substantial racial and ethnic disparities also persist among women.

New York's and Ferguson's racial disparities in policing are therefore representative of many aspects of police-citizen encounters around the country. Moreover, policing is not the only stage of the justice system that produces unwarranted racial disparity. Disadvantage accumulates throughout the criminal justice process and contributes to the disproportionate presence of blacks and Latinos in prisons, jails, and under community supervision. The next section presents a closer examination of the causes of these racial disparities.

# III. CAUSES OF DISPARITIES

Like an avalanche, racial disparity grows cumulatively as people traverse the criminal justice system.

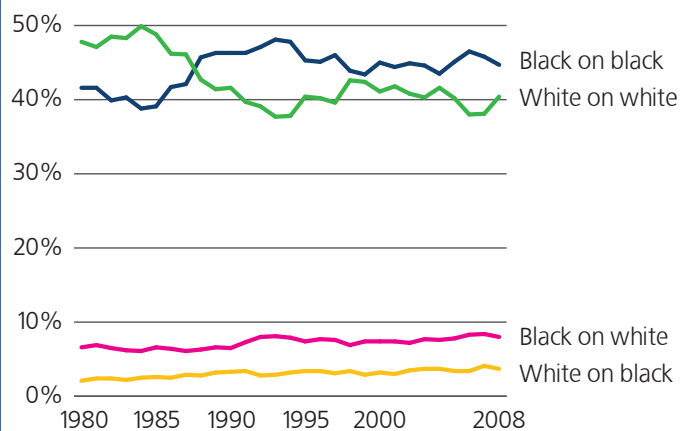
The roots of this disparity precede criminal justice contact: conditions of socioeconomic inequality contribute to higher rates of certain violent and property crimes among people of color. But four features of the justice system exacerbate this underlying disparity: First, a variety of **ostensibly race-neutral criminal justice policies** in fact have a disparate racial impact. Second, **implicit racial bias** leads criminal justice practitioners to punish people of color more severely than whites. Third, **resource allocation decisions** disadvantage low-income defendants, who are disproportionately people of color. Finally, **criminal justice policies exacerbate socioeconomic inequalities** by imposing collateral consequences on those with criminal records and by diverting public spending away from preventative measures. This section first examines the role of differential crime rates before discussing inequities created by the criminal justice system.

## DIFFERENTIAL CRIME RATES

People of color are more likely than whites to experience **economic disadvantage** that is compounded by **racial inequality**. These forces erode economic and social buffers against crime and contribute to higher rates of certain violent and property crimes – but not drug offenses – among people of color.

- Blacks and Latinos constituted half of the jail population in 2013.<sup>48</sup> In 2002, 44% of people in jail **lacked a high school degree**. In the month prior to their arrest, 29% were **unemployed**, and 59% reported **earning less than \$1000/month**.<sup>49</sup>

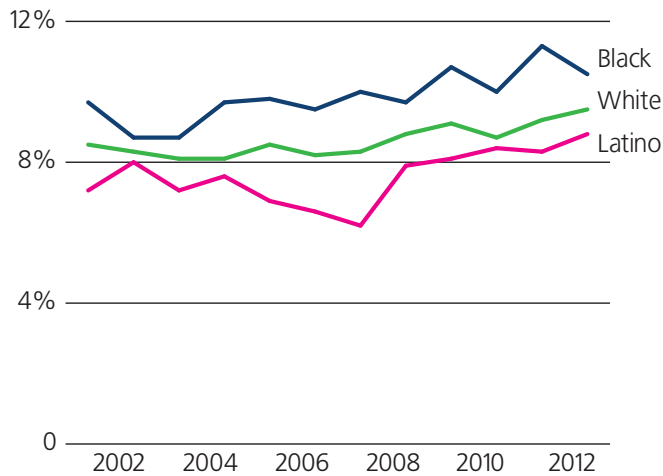
Figure 7. Homicides by race of offender and victim, 1980-2008



Source: Cooper, A. & Smith, E. L. Homicide Trends in the United States, 1980-2008. Bureau of Justice Statistics. Available at: <http://www.bjs.gov/content/pub/pdf/htus8008.pdf> (p. 13, Figure 19).

- Higher rates of geographically concentrated socioeconomic disadvantage contribute to higher rates of certain violent and property crimes among African Americans.<sup>50</sup> In 2012, African Americans represented 13% of the U.S. population. But African Americans comprised 39% of arrests for **violent crimes** (49% for murder and nonnegligent manslaughter) and 29% of arrests for **property crimes**. Information gathered from victimization surveys and self-reports of criminal offending suggest that, especially for certain violent crimes and to a lesser extent for property crimes, the race of those arrested resembles those of the people who have committed these crimes.<sup>51</sup> Blacks and Hispanics are also more likely than whites to be **victims** of property and violent crimes.<sup>52</sup> The overall homicide rate for blacks was 6.2 times higher than for whites in 2011.<sup>53</sup>

**Figure 8. Illicit drug use in past month among persons aged 12 or older, by race/ethnicity, 2002-2013**



Source: U.S. Department of Health and Human Services (2013). Results from the 2013 Survey on Drug Use and Health: Summary of National Findings. Available at: <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf> (Figure 2.12).

- **Drug offending** does not differ substantially by race. Surveys by federal agencies show that both recently and historically, whites, blacks, and Hispanics have used illicit drugs at roughly **similar rates**.<sup>54</sup> Many studies also suggest that drug users generally purchase drugs from people of the same race or ethnicity as them.<sup>55</sup> Socioeconomic inequality does lead people of color to disproportionately use and sell drugs outdoors, where they are more readily apprehended by police. But disparities in drug arrests are largely driven by the factors described later in this section.

How much of the racial disparity in the prison population stems from crime rates, and how much is produced by the criminal justice system? In recent decades, a number of leading scholars, including Alfred Blumstein and Michael Tonry, have sought to quantify these effects. Over various time periods, these studies concluded that between 61% and 80% of black overrepresentation in prison is explained by higher rates of arrest (as a proxy for involvement in crime).<sup>56</sup> The remainder might be caused by racial bias, as well as other factors like differing criminal histories.<sup>57</sup> Several important nuances, described next, help to interpret these results.

Estimates of the extent to which differential crime rates account for disparities in imprisonment rates vary significantly by offense type and geography. In comparing the demographics of the prison population with arrestees, these studies have shown that the least racial disparity exists for the most serious offenses and that the most exists for the least serious offenses (for which arrest rates are also poor proxies for criminal involvement). This is because criminal justice practitioners can exercise greater discretion with less serious crimes. Scholars have also noted that there is wide variation among states in the degree to which arrest disparities explain incarceration disparities.<sup>58</sup>

The overall conclusion of these studies is that racial differences in criminal offending explain a substantial, but incomplete, portion of the racial differences in the prison population for non-drug crimes. If racial differences in crime rates do not fully account for the high proportion of African Americans in prisons, what else is driving this disparity?



# FOUR KEY SOURCES OF UNWARRANTED RACIAL DISPARITIES IN CRIMINAL JUSTICE OUTCOMES

## 1) Disparate racial impact of ostensibly race-neutral policies and laws

Myriad criminal justice policies that appear to be race-neutral collide with broader socioeconomic patterns to create a **disparate racial impact**. **Policing policies** and **sentencing laws** are two key sources of racial inequality.

**Police policies** that cast a wide net in neighborhoods and on populations associated with high crime rates disproportionately affect people of color, as described in Sections I and II. Consequently, people of color are more likely to be arrested even for behavior that they do not engage in at higher rates than whites. This greater level of scrutiny also contributes to higher rates of recidivism among people of color.

- Almost 1 in 3 people arrested for **drug law violations** is black, although drug use rates do not differ by race and ethnicity.<sup>59</sup> An ACLU report found that blacks were 3.7 times more likely to be arrested for marijuana possession than whites in 2010.<sup>60</sup> This disparity expands at later stages of the criminal justice system so that 57% of people in state prisons for drug offenses are people of color, even though whites comprise over two-thirds of drug users, and are likely a similar proportion of sellers.<sup>61</sup>

Myriad criminal justice policies that appear to be race-neutral collide with broader socioeconomic patterns to create a disparate racial impact.

**Sentencing laws** that are designed to more harshly punish certain classes of offenses, or to carve out certain groups from harsh penalties, also often have a disparate impact on people of color. This occurs because of how sentencing laws interact with broader racial differences in our society and within the criminal justice system.

- **Drug-free school zone laws** mandate sentencing enhancements for people caught selling drugs near school zones. The expansive geographic range of

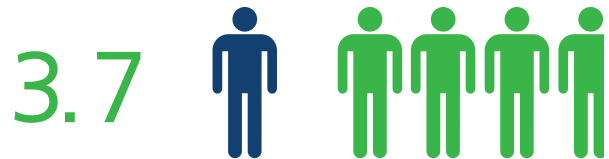
Figure 9. Racial disparities in marijuana use in past month and marijuana possession arrests, 2010

Usage rates



Blacks used marijuana at 1.3 times the rate of whites.

Arrest rates



Blacks were arrested for marijuana possession at 3.7 times the rate of whites.

Source: Edwards, E. Bunting, W. Garcia, L. (2013). The War on Marijuana in Black and White. New York, NY: American Civil Liberties Union. Available at: <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf> (p. 47); U.S. Department of Health and Human Services (2011). Results from the 2010 Survey on Drug Use and Health: Detailed Tables. Available at: <http://www.samhsa.gov/data/nsduh/2k10NSDUH/tabs/Sect1peTabs1to46.htm> (Tbl. 1.28B).

these zones coupled with high urban density has disproportionately affected residents of urban areas, and particularly those in high-poverty areas – who are largely people of color.<sup>62</sup> A study in New Jersey found that 96% of persons subject to these enhancements in that state were African American or Latino. All 50 states and the District of Columbia have some form of drug-free school zone law.

- **Diversion programs** and **alternative courts** disproportionately bar people of color from alternatives to incarceration because they frequently disqualify people with past convictions.<sup>63</sup>
- “**Three strikes and you’re out**” and other **habitual offender** laws disproportionately affect people of color who are more likely to have criminal records.

## 2) Racial bias among criminal justice professionals

While most white Americans no longer endorse overt and traditional forms of **prejudice** associated with the era of Jim Crow racism – such as beliefs about the biological inferiority of blacks and support for segregation and discrimination – a nontrivial proportion continue to express negative cultural stereotypes of blacks.<sup>64</sup> Even more common among most white Americans, and many people of color, is **implicit racial bias**: unintentional and unconscious racial biases that affect decisions and behaviors. Psychological experiments have shown that these biases are pervasive in our society, and are held even by people who disavow overt prejudice.<sup>65</sup> Implicit racial biases also permeate the work of criminal justice professionals and influence the deliberation of jurors.<sup>66</sup>

In **experimental research** such as video simulated shooter studies, subjects are asked to quickly identify and shoot armed suspects, or to press another button to not shoot unarmed suspects. Participants more quickly and accurately decided to shoot an armed target when that person was African American, but more quickly and accurately chose not to shoot if the unarmed target was white.<sup>67</sup> When researchers conducted this study with a predominantly white group of Denver-based **police officers**, they found that the officers were less likely than the general public to mistakenly shoot at black unarmed suspects.<sup>68</sup> However, officers more quickly shot at armed black suspects than at armed white suspects. The researchers concluded that while these officers exhibited bias in their speed to shoot, their experience and training reduced bias in their decision to shoot.<sup>69</sup>

Studies of **criminal justice outcomes** also reveal that implicit biases influence the decisions of criminal justice professionals. Researchers have analyzed the extent to which implicit bias affects the work of **police officers, prosecutors, judges, and other members** of the courtroom work group.

- **Police:** As described in Sections I and II, many jurisdictions continue to experience significant racial disparities in police stops. Police have been

more likely to pull over people of color for what researchers call **investigatory stops**. Once pulled over, blacks and Hispanics 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.

- **Prosecutors:** Prosecutors are more likely to charge people of color with crimes that carry heavier sentences than whites.<sup>70</sup> Federal prosecutors, for example, are twice as likely to charge African Americans with offenses that carry **mandatory minimum sentences** than otherwise-similar whites. State prosecutors are also more likely to charge black rather than similar white defendants under habitual offender laws.
- **Judges:** Judges are more likely to **sentence** people of color than whites to prison and jail and to give them **longer sentences**, even after accounting for differences in crime severity and criminal history.<sup>71</sup> In federal cases, the sentencing disparities between **noncitizens** and **citizens** are even larger than those between people of color and whites.<sup>72</sup> The race penalty, research from the 1990s revealed, is harshest for certain categories of people and offenses: it particularly affects men and the young, and is more pronounced for **less serious offenses**. In effect, young black men are perceived as being more dangerous because of their race and socioeconomic characteristics.
- **Other members of the courtroom work group:** Unconscious racial bias has been found in many other corners of the criminal justice system. A study in Washington state found that in narrative reports used for sentencing, **juvenile probation officers** attributed the problems of white youth to their social environments but those of black youth to their attitudes and personalities.<sup>73</sup> **Defense attorneys** may exhibit racial bias in how they triage their heavy caseloads.<sup>74</sup> Racially diverse **juries** deliberate longer and more thoroughly than all-white juries, and studies of capital trials have found that all-white juries are more likely than racially diverse juries to sentence individuals to death.<sup>75</sup> Studies of **mock jurors** have even shown that people exhibited skin-color bias in how they evaluated evidence: they were more likely to view

Studies of criminal justice outcomes also reveal that implicit biases influence the decisions of criminal justice professionals.

ambiguous evidence as indication of guilt for darker skinned suspects than for those who were lighter skinned.<sup>76</sup> Finally, an investigation of disparities in **school discipline** – including rates of out-of-school suspensions and police referrals – led the Departments of Education and Justice to declare that the substantial racial disparities in school discipline “are not explained by more frequent or more serious misbehavior by students of color,” but suggest racial discrimination.<sup>77</sup>

### 3) Resource allocation decisions that disadvantage low-income people

Key segments of the criminal justice system are **underfunded**, leading to worse outcomes for low-income defendants, who are disproportionately people of color. Moreover, many criminal justice policies and practices **disadvantage** people with **limited resources**.

- Over 60% of people in jail are being detained prior to trial.<sup>78</sup> **Pretrial detention** has been shown to increase the odds of conviction, and people who are detained awaiting trial are also more likely to accept less favorable plea deals, to be sentenced to prison, and to receive longer sentences. Seventy percent of pretrial releases require **money bond**, an especially high hurdle for low-income defendants, who are disproportionately people of color.<sup>79</sup> Blacks and Latinos are more likely than whites to be denied bail, to be set a higher money bond, and to be detained because they cannot pay their bond. They are often assessed to be higher safety and flight risks because they are more likely to experience socioeconomic disadvantage and to have criminal records. Implicit bias also contributes to people of color also faring worse than comparable whites in bail determinations.

Key segments of the criminal justice system are underfunded... Moreover, many criminal justice policies and practices disadvantage defendants with limited resources.

- Most states inadequately fund their indigent defense programs. While there are many high-quality **public defender** offices, in far too many cases indigent individuals are represented by public defenders with excessively **high caseloads**, or by **assigned counsel** with **limited experience** in criminal defense.
- Certain policies disadvantage **lower income individuals**, who are disproportionately people of color. Examples include **risk assessments** that give preference to employed people, or **probation or parole requirements** to report at locations where there is little public transportation.
  - Due to limitations in **publicly funded treatment options**, there are fewer sentencing alternatives available to low-income defendants, who cannot afford to pay for treatment programs as an alternative to confinement.
- **Community supervision** and **reentry** programs are underfunded, with too many parole and probation systems offering supervision with little support.

#### 4) Criminal justice policies that exacerbate socioeconomic inequalities

Because the criminal justice system is an institution that primarily reacts to – rather than prevents – crime, it is ill-equipped to address many of the underlying causes of crime. But mass incarceration's hold on vast **public resources and the obstacles** erected for people with criminal records further erode the economic and social buffers that prevent crime.

- Reentry is obstructed by the **collateral consequences** of a criminal conviction. A criminal record creates overwhelming odds against securing steady employment.<sup>80</sup> Moreover, those with felony drug convictions are disqualified from receiving federal cash assistance, food stamps, and publicly subsidized housing in many areas.<sup>81</sup> Combined with

heightened surveillance, these obstacles contribute to three of four people released from prison arrested within 5 years, and half being re-imprisoned.<sup>82</sup>

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Mass incarceration's hold on vast public resources and the obstacles erected for people with criminal records further erode the economic and social buffers that prevent crime.

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- Excessive spending on criminal justice programs limits public funds that can be allocated to **crime prevention** and **drug treatment**. Because of their higher rates of incarceration, victimization, and poverty, people of color are disproportionately affected by these shortcomings in policy.

These four features have created an unequal justice system. They contribute to blacks' and Latinos' high rates of contact with the police and disadvantage them throughout the criminal justice process. Excessive levels of control and punishment, particularly for people of color, are not advancing public safety goals and are damaging families and communities.<sup>83</sup> Consequently, although people of color experience more crime than whites, they are less supportive than whites of punitive crime control policies.<sup>84</sup>

The best practices described in the following section are drawn from the following sources, unless otherwise stated: The Sentencing Project (2008). Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers. Washington, D.C. Available at: [http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf) (pp. 11–57); Hoytt, E. H., Schiraldi, V., Smith, B. V., & Ziedenberg, J. (2001). Reducing Racial Disparities in Juvenile Detention (2001). Baltimore, MD: Annie E. Casey Foundation. Available at: <http://www.aecf.org/m/resourcedoc/aecf-Pathways8reducingracialdisparities-2001.pdf>; Shoenberg, D. (2012). Innovation Brief: Reducing Racial and Ethnic Disparities in Pennsylvania. Chicago, IL: MacArthur Foundation. Available at: <http://www.modelsforchange.net/publications/351>; National Association of Counties (2011). Juvenile Detention Reform: A Guide for County Officials, Second Edition. Available at: <http://www.aecf.org/m/resourcedoc/aecf-JuvDetentionReformForCountyOfficials-2011.pdf>; New York University Journal of Legislation and Public Policy (2013). 16(4). Available at: <http://www.nyujlpp.org/issues/volume-16-number-4/>.]

# IV. BEST PRACTICES FOR REDUCING RACIAL DISPARITIES

Jurisdictions around the country have implemented reforms to address these sources of inequality. This section showcases best practices from the adult and juvenile justice systems. In many cases, these reforms have produced demonstrable results.

## 1) REVISE POLICIES AND LAWS WITH DISPARATE RACIAL IMPACT

Through careful data collection and analysis of racial disparities at various points throughout the criminal justice system, police departments, prosecutor's offices, courts, and lawmakers have been able to identify and address sources of racial bias.

### Revise policies with disparate racial impact:

Seattle; New York City; Florida's Miami-Dade and Broward County Public Schools; Los Angeles Unified School District

- After criticism and lawsuits about racial disparities in its drug law enforcement, some precincts in and around Seattle have implemented a **pre-booking diversion strategy**: the **Law Enforcement Assisted Diversion program**.<sup>85</sup> The program gives police officers the option of transferring individuals arrested on drug and prostitution charges to social services rather than sending them deeper into the criminal justice system.
- Successful litigation and the election of a mayor with a reform agenda effectively curbed “**stop and frisk**” policing in New York City.<sup>86</sup> Mayor Bill de Blasio vowed that his administration would “not break the law to enforce the law” and significantly curbed a policy that was described by a federal judge as one of “indirect racial profiling.”<sup>87</sup> Thus far, the reform has not had an adverse impact on crime rates.<sup>88</sup> In a related effort to address disparities in enforcement, the New York City Police Department stated it would **no longer make arrests for possession of small amounts of marijuana** but would instead

treat these cases as non-criminal offenses subject to a fine rather than jail time.<sup>89</sup> Yet experts worry that this policy does not go far enough to remedy unfair policing practices and may still impose problematic consequences on those who are ticketed.<sup>90</sup>

- Several school districts have enacted **new school disciplinary policies** to reduce racial disparities in out-of-school-suspensions and police referrals. Reforms at Florida's Miami-Dade and Broward County Public Schools have cut school-based arrests by more than half in five years and significantly reduced suspensions.<sup>91</sup> In Los Angeles, the school district has nearly eliminated police-issued truancy tickets in the past four years and has enacted new disciplinary policies to reduce reliance on its school police department.<sup>92</sup> School officials will now deal directly with students who deface property, fight, or get caught with tobacco on school grounds. Several other school districts around the country have begun to implement similar reforms.

### Revise laws with disparate racial impact:

Federal; Indiana; Illinois; Washington, D.C.

- The Fair Sentencing Act (FSA) of 2010 reduced from 100:1 to 18:1 the weight disparity in the amount of **powder cocaine versus crack cocaine** that triggers federal mandatory minimum sentences. If passed, the Smarter Sentencing Act would apply these reforms retroactively to people sentenced under the old law. California recently eliminated the crack-cocaine sentencing disparity for certain offenses, and Missouri reduced its disparity. Thirteen states still impose different sentences for crack and cocaine offenses.<sup>93</sup>

- Indiana amended its **drug-free school zone sentencing laws** after the state's Supreme Court began reducing harsh sentences imposed under the law and a university study revealed its negative impact and limited effectiveness. The reform's components included reducing drug-free zones from 1,000 feet to 500 feet, eliminating them around public housing complexes and youth program centers, and adding a requirement that minors must be reasonably expected to be present when the underlying drug offense occurs. Connecticut, Delaware, Kentucky, Massachusetts, New Jersey, and South Carolina have also amended their laws.<sup>94</sup>
- Through persistent efforts, advocates in Illinois secured the repeal of a 20-year-old law that required the **automatic transfer** to adult court of 15- and 16-year-olds accused of certain drug offenses **within 1,000 feet of a school or public housing**. A broad coalition behind the reform emphasized that the law was unnecessary and racially biased, causing youth of color to comprise 99% of those automatically transferred.
- Following a campaign that emphasized disparate racial enforcement of the law, a ballot initiative in Washington, D.C. may **legalize possession of small amounts of marijuana** in the district.<sup>95</sup>
- Officials in Clayton County, Georgia reduced **school-based juvenile court referrals** by creating a system of graduated sanctions to **standardize** consequences for youth who committed low-level misdemeanor offenses, who comprised the majority of school referrals. The reforms resulted in a 46% reduction in school-based referrals of African American youth.

### Anticipate disparate impact of new policies: Iowa; Connecticut; Oregon; Minnesota

- Iowa, Connecticut, and Oregon have passed legislation requiring a **racial impact analysis** before codifying a new crime or modifying the criminal penalty for an existing crime. Minnesota's sentencing commission electively conducts this analysis. This proactive approach of **anticipating disparate racial impact** could be extended to local laws and incorporated into police policies.

### Revise risk assessment instruments: Multnomah County, OR; Minnesota's Fourth Judicial District

- Jurisdictions have been able to reduce racial disparities in confinement by documenting racial bias inherent in certain **risk assessment instruments (RAI)** used for criminal justice decision making. The development of a new RAI in Multnomah County, Oregon led to a greater than 50% reduction in the number of youth detained and a near complete elimination of racial disparity in the proportion of delinquency referrals resulting in detention. Officials examined each element of the RAI through the lens of race and **eliminated known sources of bias**, such as references to "gang affiliation" since youth of color were disproportionately characterized as gang affiliates often simply due to where they lived.
- Similarly, a review of the **RAI** used in consideration of pretrial release in Minnesota's Fourth Judicial District helped reduce sources of racial bias. Three of the nine indicators in the instrument were found to be **correlated with race**, but were **not significant predictors** of pretrial offending or failure to appear in court. As a result, these factors were removed from the instrument.

### Address upstream disparities:

#### New York City; Clayton County, GA

- The District Attorney of Brooklyn, New York informed the New York Police Department that he would **stop prosecuting minor marijuana arrests** so that "individuals, and especially young people of color, do not become unfairly burdened and stigmatized by involvement in the criminal justice system for engaging in non-violent conduct that poses no threat of harm to persons or property."<sup>96</sup>
- Following a two-year study conducted in partnership with the Vera Institute of Justice, Manhattan's District Attorney's office learned that its **plea guidelines** emphasizing **prior arrests** created racial disparities in plea offers. The office will conduct implicit bias training for its assistant prosecutors, and is being urged to revise its policy of tying plea offers to arrest histories.<sup>97</sup>

## 2) ADDRESS IMPLICIT RACIAL BIAS AMONG CRIMINAL JUSTICE PROFESSIONALS

In its comprehensive review of implicit racial bias research, the Kirwan Institute for the Study of Race and Ethnicity concludes that “education efforts aimed at raising awareness about implicit bias can help debias individuals.”<sup>98</sup> Their review describes a number of debiasing strategies shown to reduce implicit racial bias in both experimental and non-experimental settings. These include providing exposure to counter-stereotypic imagery, increasing inter-racial contact and diversity, and monitoring outcomes to increase accountability. This section examines recent proposals to reduce bias in policing, as well as how jurisdictions have mitigated the negative impact of implicit bias in later stages of the justice system by establishing objective guidelines to standardize decision making, ensuring that decision-makers have access to the most complete information possible, and providing training on racial bias.

### Address bias and excessive use of force among police officers:

Connecticut; Maryland; Wisconsin; Austin, TX

In addition to **reducing excessive police contact**, police departments must also improve the nature of this contact to **curb excessive use of force**. Because of their training and experience, police officers are less likely than the general public to mistakenly shoot at black unarmed suspects in experimental settings, and exhibit less bias in their response times.<sup>99</sup> But it is unclear how these lab-based outcomes translate to real-world scenarios. Simulation studies have underscored the challenges in using officer training – especially exposure to counter-stereotypic imagery – to reduce racial bias in police officers’ response times.<sup>100</sup> Research on many recently proposed reforms to reduce racial bias in policing has been limited and mixed:

- Many police departments have struggled to **recruit and retain persons of color** in their ranks. Underrepresentation of people of color presents a barrier to building relationships with the communities they are sworn to serve.<sup>101</sup> Survey data suggest that black officers may be more mindful than white officers of biased policing. A majority of black officers believe (and a majority of white
- officers disagree) that police treat whites better than people of color, and agree that police are more likely to use force against people of color than against whites.<sup>102</sup> Yet a diverse police force alone is unlikely to remedy community-police relations. Studies have reached **conflicting conclusions** about the relationship between the race of officers and their likelihood of having used force.<sup>103</sup>
- Some jurisdictions in the United States and abroad offer improved models for preventing excessive use of force, investigating claims, and ensuring police accountability. Connecticut, Maryland, and Wisconsin have passed laws requiring **special prosecutors** to handle cases of police misconduct in order to address the potential conflict of interest when local district attorneys prosecute the law enforcement officials with whom they work daily.<sup>104</sup> France and Spain have similar laws, requiring independent investigating magistrates for cases involving police use of deadly force.<sup>105</sup> Given the considerable leeway given to police on when to use force within the “objectively reasonable” standard set forth by the Supreme Court,<sup>106</sup> it is important to create clear guidelines that **curb excessive use of force**. Germany, for example, provides strict limitations on the use of force for petty offenses.<sup>107</sup> A case study of the Austin Police Department recommends a use of force policy that contains clear deadly force and less-lethal force guidelines, extensive police training in all force options, and an early warning system for identifying problem officers.<sup>108</sup> Once officers are deemed unqualified by their commanders, a process should be established to **remove problem officers and prevent those with a history of misconduct from transferring to other departments**.<sup>109</sup> In addition, an independent **civilian review board** with the power to discipline officers should be established to oversee complaints filed by the public.
- There is currently growing interest in the potential for **body cameras** worn by officers to reduce their excessive use of force and increase accountability. Following the fatal police shooting in Ferguson, Missouri, President Obama has pledged to allocate \$75 million to the purchase of 50,000 body cameras.<sup>110</sup> **Research** on the effectiveness of these cameras, however, is both **limited and mixed**.

There is some evidence that body cameras can reduce use of force by police, assaults on officers, and citizen complaints, by changing either police or citizen behavior.<sup>111</sup> Yet as the non-indictment of NYPD officer Daniel Pantaleo for Eric Garner's death suggests, video footage of excessive police force does not ensure accountability. Meanwhile, this technology has raised concerns that body cameras may intrude on citizen privacy and exacerbate trauma among victims of crimes and accidents. Yet a number of civil rights organizations, including the American Civil Liberties Union, have generally expressed support for the use of body cameras, provided that they are governed by strict privacy policies.<sup>112</sup> This year, Los Angeles will become the first major U.S. city to implement body camera technology widely.<sup>113</sup>

### Eliminate racial disparities in charging decisions:

Milwaukee County, WI; Mecklenburg County, NC; San Diego County, CA

- The Vera Institute of Justice's Prosecution and Racial Justice program has worked with various jurisdictions to reduce unwarranted racial and ethnic disparities caused by **prosecutorial decision making**. In Milwaukee, prosecutors previously filed drug paraphernalia charges against 73% of black suspects but only 59% of white suspects.<sup>114</sup> The prosecutor's office was able to eliminate these disparities by **reviewing data** on outcomes, **stressing diversion** to treatment or **dismissal**, and requiring attorneys to consult with supervisors prior to filing such charges.

### Establish objective criteria and guidelines for decision making:

Dorchester, MA; Multnomah County, OR; Saint Louis County, MN

- In Dorchester, 52% of people of color arrested in a school zone for a drug crime received an enhanced charge, while only 15% of whites received such a charge. Based on these findings, judicial leadership worked with police and prosecutors to develop **guidelines** to more fairly handle **school zone cases**.
- Similarly, Multnomah County instituted a **"sanctions grid"** for probation violations

that minimized **staff inconsistencies**, while encouraging youth sanctions other than secure detention. The changes resulted in an immediate reduction in the detention population and were part of a broader effort that largely eliminated the racial disparity in the proportion of referrals resulting in detention.

- When making bail determinations in Saint Louis County, Minnesota, judges did not **have access to a defendant's bail report**, which contained important personal background information, and relied exclusively on the name of the person arrested, the current charge, and the person's prior criminal history in the state. Local officials perceived the system to be biased against people of color, releasing whites on their own recognizance twice as often as other racial groups, and imposing money bond on African Americans more often and in a greater amount than on whites. Racial disparities remained even when controlling for offense severity level, number of felony charges, and the defendant's criminal history. Changes were made so that in all felony cases, judges only made bail determinations once a bail report had been provided. The judges also received training on best practices in making bail determinations.

### Address potential bias among jurors:

Northern District of Iowa; North Carolina

- U.S. District Court Judge Mark W. Bennett spends 25 minutes **discussing implicit bias** with the potential jurors in his court.<sup>115</sup> He shows video clips that demonstrate bias in hidden camera situations, gives specific instructions on avoiding bias, and asks jurors to sign a pledge. Although the impact of this approach has not been measured, mock jury studies have shown that *increasing* the salience of race and making jurors more conscious of their biases *reduces* biased decision making.<sup>116</sup>
- North Carolina's **Racial Justice Act** enabled commutation of death sentences based on statistical evidence that race had played a role in sentencing. Four death sentences were commuted to life without parole. But as a result of divisive state politics on the issue, the legislature subsequently repealed the law.



### 3) REALLOCATE RESOURCES TO CREATE A FAIR PLAYING FIELD

Investing in alternatives to incarceration and limiting the financial outlays required from defendants have helped to reduce the disadvantage of low-income people of color in the criminal justice system.

#### Increase pretrial release:

New Jersey; Cook County, IL

- In 2014, New Jersey reformed its bail system to **emphasize risk assessment over monetary bail** in pretrial release decisions. Previously, all defendants were detained based on their ability to post bail, regardless of their risk level. The new set of laws, which includes a constitutional amendment approved by voters, expands judicial discretion to set the terms of pretrial release and provides judges with **broader nonmonetary pretrial release options**. Judges may now release lower-risk indigent individuals who cannot afford bail and may deny pretrial release for high-risk individuals.<sup>117</sup> All defendants will undergo a risk assessment before their bail hearing and monetary bail may only be set if it is determined that no other conditions of release will assure their appearance in court. In addition, the legislation established time limits to ensure more speedy trials and guarantees defendants the right to counsel at their pretrial detention hearings.<sup>118</sup>

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In 2014, New Jersey reformed its bail system to emphasize risk assessment over monetary bail in pretrial release decisions.

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- Appointed counsel is under-resourced and often struggles to **gather information supporting pretrial release** to present at custody or bail hearings. The Cook County Public Defender's Office established the Detention Response Unit in 1996

to improve case outcomes for youth of color. The unit consisted of two paralegals who interviewed detained youth prior to their custody hearings. The paralegals helped add a larger social narrative to the court process by checking on community ties and stressing to families the importance of attending the custody hearing.

#### Establish alternatives to incarceration for low-income individuals:

Berks County, PA; Illinois; Rock County, WI; Union County, NC

- In Berks County, PA, officials were able to reduce the number of youth in secure detention – most of whom were youth of color – by 67% between 2007 and 2012 in part by **increasing reliance on alternatives**. These included non-secure shelters for youth who cannot safely return home but did not require locked detention, evening reporting centers, electronic monitoring, and expanded use of evidence-based treatment programs. Because many of these youth had committed technical violations of their probation terms, this broader range of alternatives made it possible to keep them out of detention without harming public safety.
- In 2004, Illinois **expanded alternative community programs** and decreased reliance on detention. By 2007, detentions had been reduced by 44% across the state's four pilot sites. The sites created a wide variety of programs, including Aggression Replacement Training, Functional Family Therapy, a community restorative board, teen court, and substance abuse treatment. For every \$1 spent on the programs, \$3.55 in incarceration costs were avoided.
- Other jurisdictions have reduced the proportion of youth of color in detention by **adopting graduated sanctions** for probation violations. In Rock County, WI, graduated sanctions and incentives for probation violators, such as Aggression Replacement Training and evening reporting, helped drop the percentage of youth of color in the total detention population from 71%

to 30%. Similarly, in Union County, NC, the use of graduated sanctions for youth who violated probation helped to decrease the representation of youth of color in the total detention population by 32%.

### Offer Spanish language resources: Maricopa County, AZ; Santa Cruz County, CA

- Maricopa County significantly improved outcomes in the Driving Under the Influence (DUI) Court, by creating a separate **Spanish-speaking court**. The court achieved an 88% graduation rate, higher than the 66% rate for participants in English-speaking

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In 2004, Illinois expanded alternative community programs and decreased reliance on detention.

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DUI court. Graduates of the DUI court have to complete at least 20 weeks of treatment, education, and counseling, reach 6 months of sobriety, and be attending school or employed.

- Santa Cruz County's probation department addressed difficulties of communicating with Latino families by increasing the number of Spanish-speaking staff to match the proportion of such youth at the detention center. The department also doubled the number of youth diversions by **creating programs** to meet the needs of Latino youth, designing programs to meet regional needs across the county, and **expanding bilingual staff** at a local community provider. Overall, these efforts helped lead to a 25% reduction in the average daily detention population, and a simultaneous 22% reduction in the Latino representation in the juvenile hall population.

## 4) REVISE POLICIES THAT EXACERBATE SOCIOECONOMIC INEQUALITIES AND REDIRECT PUBLIC SPENDING TOWARD CRIME PREVENTION AND DRUG TREATMENT

While the criminal justice system is not well-positioned to address the socioeconomic inequality that contributes to differential crime rates, it should not aggravate these conditions.<sup>119</sup> Advocates have had success in downsizing and redirecting criminal justice spending, increasing utilization of existing resources, and limiting the collateral consequences of criminal convictions.

### Expand and maximize utilization of available community resources:

California; Pima County, AZ

- California voters in November 2014 approved Proposition 47, which reclassifies a number of low-level offenses from felonies to misdemeanors.<sup>120</sup> This allows 10,000 incarcerated individuals to petition to have their sentences reduced. Moreover, a significant portion of projected state prison savings each year will be allocated to preventing crime from happening in the first place. This includes **investments in mental health and substance abuse treatment**, programs to reduce **school truancy** and **prevent dropouts**, and support for **victim services**.
- Officials and community groups in Pima County, AZ, helped to increase the utilization of community resources by creating geocoded maps to identify communities with high proportions of youth referred to detention and then developing **community asset maps** to find available program services for at-risk youth in those areas.

### Limit the collateral consequences of criminal convictions:

Numerous states and localities

- A criminal record is a strong **barrier to employment**, and therefore to successful reentry. In 2012, the **Equal Employment Opportunity Commission** warned employers that they may be liable under Title VII of the Civil Rights Act

of 1964 if they uniformly administer “a criminal background check that disproportionately excludes people of a particular race, national origin, or other protected characteristic” when it is not related to the job or necessary for the business.<sup>121</sup> To reduce barriers to employment for those with criminal records, many jurisdictions have passed laws or issued administrative orders to “**Ban the Box**” – or remove the question about conviction history from initial job applications and delay a background check until later in the hiring process.<sup>122</sup> Twelve states – including Maryland, Illinois, and California – and 60 cities – including Atlanta and New York City – have passed these reforms. More broadly, 41 states and the District of Columbia have enacted some form of legislation to reduce collateral consequences.<sup>123</sup>

- Advocates have been urging states to end denial of **federal cash assistance and food stamp benefits** for people convicted in state or federal courts of felony drug offenses. These bans primarily affect low-income women of color.<sup>124</sup> The 1996 Personal Responsibility and Work Opportunity Reconciliation Act that created the ban also permitted states to **opt out or modify** its terms. To date, 13 states have fully opted out of the cash assistance ban and nine from the food stamp ban. Others have opted out in part through smaller changes, such as making access dependent on type of drug offense or enrollment in treatment.
- In recent years, advocates have worked to address **housing insecurity** for persons with convictions. In 2011, the federal **Department of Housing and Urban Development** began urging public housing agencies to relax admission policies in an effort to help people released from prison reunite with their families.<sup>125</sup> Litigation underway in Kansas City and New York City strives to address exclusionary housing policies in the **private rental market**.<sup>126</sup>
- Since 1997, 23 states, including New Mexico, Rhode Island, and Virginia, have enacted reforms to expand **voter eligibility** for people with felony convictions.<sup>127</sup> Felony disenfranchisement policies have had a disproportionate impact on communities of color, with black adults four times more likely to lose their voting rights than the rest of the adult population.<sup>128</sup>

# V. IMPLEMENTATION STRATEGIES AND METRICS FOR SUCCESS

Policymakers and practitioners can draw on lessons from these reforms to develop successful implementation strategies and sound evaluation metrics.<sup>129</sup>

All key decision-makers and interested parties – policymakers, practitioners, community groups, and formerly incarcerated individuals – should be included in the development and implementation of reforms. This collective approach can identify sources of disparity, develop solutions and weigh their costs, carry out implementation, and establish monitoring and accountability practices. Institutionalizing reforms in this way can also ensure that they are sustainably funded and implemented. In addition, public education can expand demand and support for reforms.

Analyzing the impact of reforms to address racial disparity within the justice system requires not only access to comprehensive data, but also a framework for measuring success. A key question is whether an initiative should be designed to reduce the *total number* of people of color in the justice system (in absolute count or as a rate) or the *relative ratio of racial disparity* (a comparison of rates of contact with the justice system). These are

both laudable goals, but with potentially very different outcomes. Just as it is possible to reduce the absolute level of imprisonment without reducing racial disparity (for example, if both white and black incarceration rates were equally reduced), so is it possible to reduce racial disparities without affecting incarceration levels (for example, if the white incarceration rate rose while the black incarceration rate remained constant).

A recent study of the juvenile justice system illustrates these dynamics. The National Council on Crime and

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Delinquency analyzed data from five geographically diverse counties engaged in juvenile justice reform in the period 2002–2012, a period when the number of juveniles in residential placement nationally declined by about 40%. The study found that of the juveniles placed in

secure confinement during this period, the proportion who were youth of color increased from 12.4% in 2002 to 22.3% in 2012. While it is troubling that the racial disparity has increased, there are nonetheless far fewer African Americans (and whites) behind bars. From the perspective of reducing the consequences of criminal justice control over people of color, such a development has been constructive overall.

# VI. CONCLUSION

Despite substantial progress in achieving racial justice in American society over the past half century, racial disparities in the criminal justice system have persisted and worsened in many respects. Among African American men born just after World War II, 15% of those without a high school degree were imprisoned by their mid-30s.<sup>130</sup> For those born in the 1970s, 68% were imprisoned by their mid-30s.

The country has made progress on these issues in recent years. New York and other large states have significantly reduced their prison populations<sup>131</sup> and the juvenile justice system has reduced youth confinement and detention by over 40% since 2001.<sup>132</sup> The racial gap in incarceration rates has begun to narrow<sup>133</sup> and police departments in many cities are increasingly diverse.<sup>134</sup> The Garner case has sensitized many white Americans to problems in the justice system, with 47% of whites nationwide and half in New York City stating that the officer should have been indicted.<sup>135</sup> Finally, proper enforcement of the recently reauthorized Death in Custody Reporting Act can ensure accurate data on future police use of lethal force.<sup>136</sup>

But demonstrators have echoed Garner's final words – “I can't breathe” – and the message attributed to Brown – “hands up, don't shoot” – in public protests because there is much left to do.

As proven by the jurisdictions highlighted in this report, reforms can improve criminal justice outcomes by targeting the four key causes of racial disparity: disparate racial impact of laws and policies, racial bias in the discretion of criminal justice professionals, resource allocation decisions that disadvantage low-income people, and policies that exacerbate socioeconomic inequalities. We must now expand the scale and increase the speed of these efforts.

# ENDNOTES

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