



Free markets. Real solutions.

R STREET POLICY STUDY NO. 250
January 2022

TARGETED STRATEGIES TO REDUCE DISPARITIES IN JAIL POPULATIONS

By Christi M. Smith

EXECUTIVE SUMMARY

The fact that the United States incarcerates more of its population than the rest of the industrialized world—and that racial and ethnic minorities are overrepresented in inmate populations—is common knowledge. Yet why we continue to overincarcerate in light of a myriad of other strategies that appropriately respond to crime remains a mystery. Alternatives to incarceration are more cost-effective, efficient and provide better outcomes for accused law violators and communities. Alternatives also save precious law enforcement and judicial resources for more serious and violent offenders. The COVID-19 pandemic presented a unique opportunity for local jail administrators and their counterparts in the judicial process to pursue alternatives, as they were forced to critically analyze the need for pretrial confinement; reconsider length of stay upon conviction; and evaluate the appropriateness of returning to jail for bail, probation or parole violations. In conjunction with experience gained from the past 21 months of the pandemic, existing research demonstrates that it is time to reduce our overreliance on carceral strategies and address

CONTENTS

Executive Summary	1
Introduction	1
Jails and Prisons	2
Explanations for Racial Disparities in Jail Populations	3
Biased Legislation	4
Biased Enforcement, Prosecution and Adjudication	4
Front End Strategies to Reduce Jail Populations and Racial and Ethnic Disparities	5
Police Strategies to Reduce Jail Populations and Racial/Ethnic Disparities	6
Court Strategies to Reduce Jail Populations and Racial/Ethnic	6
Back End Strategies to Reduce Jail Populations and Racial and Ethnic Disparities	7
Corrections Strategies to Reduce Jail Populations and Racial/Ethnic Disparities	7
Conclusion	8
About the Author	8

the factors that contribute to crime and non-compliance with judicial interventions. These evidence-based strategies can substantially reduce jail populations and the racial and ethnic disparities therein.

Key Points:

1. COVID-19 disproportionately challenged local jail administrators who, compared to their state and federal prison counterparts, receive less physical, financial and medical support to manage a dynamic and constantly shifting inmate population that moves in and out of the community.
2. To mitigate viral spread inside of the jail and out into the community, criminal justice professionals worked quickly to reduce inmate populations using a variety of alternatives to incarceration for accused and convicted law violators. These alternatives disproportionately benefited white adults and highlighted the need for targeted strategies to reduce racial and ethnic disparities in the judicial process.
3. Crime rates did not increase during the time that alternatives to incarceration were used, thereby substantiating the benefits of utilizing various alternatives to incarceration to reduce jail populations, as well as racial and ethnic disparities in jail populations. Research indicates that these alternatives are more cost-effective, efficient and fairer than traditional judicial processing.

INTRODUCTION

COVID-19 presented unique challenges for the U.S. correctional system. Precautionary measures recommended by the Centers for Disease Control and Prevention (CDC) to mitigate the viral spread were difficult, if not impossible,

for administrators, staff and inmates to comply with.¹ Governors, judges and attorneys general adopted emergency rules and ordered jail and prison administrators to reduce inmate populations to slow the spread of the virus.² To safely but drastically reduce jail populations, administrators collaborated with local law enforcement, district attorneys, probation and parole departments, and judges to reduce the number of inmate admits and increase the number of inmate discharges. A thorough review of these front-end and back-end strategies to decarcerate, coupled with data showing no corresponding increase in general crime, demonstrates that we have the ability to deploy alternatives to incarceration without compromising public safety.³ These approaches are cost effective, efficient and fair, while still keeping the community safe and holding law violators accountable. The large-scale adoption of these policies can also reduce racial and ethnic disparities since minority individuals are over-represented in jail populations.⁴ A return to the status quo is counterproductive and costly to relevant stakeholders, including law-abiding citizens and taxpayers. Now, more than ever, we must expand upon pandemic-prompted initiatives to reduce jail populations and the racial and ethnic disparities therein as we prepare for a post-pandemic world.

Jails and Prisons

The burden of decreasing inmate populations uniquely impacted jail administrators. Compared to their state and federal prison counterparts who have additional physical, financial and medical resources, jails are more limited in their options for inmate management since the institution is not part of a larger correctional network. Local, county and municipal correctional institutions receive fewer funds than prisons, meaning basic supplies to reduce, assess and treat disease are in short supply. Jails have a more transient inmate population because they serve inmates who have been arrested but not convicted, while also housing misdemeanants serving shorter sentences, as well as probation and parole violators who are recommitted for shorter stays. There are millions of annual inmate admissions and discharges, with

dozens or even hundreds taking place each day.⁵

Jail populations are also more mobile than their prison counterparts because individuals are released to the community after posting bail and others are frequently transported to and from court to address criminal and civil matters. Jails that are over capacity also house inmates in other jurisdictions, necessitating additional inmate transports. Prisons, on the other hand, are for those already convicted of a crime who are generally serving a sentence of one year or more for felony offenses. Inmates can serve a sentence in different facilities across the state or country. Once classified and assigned to an institution, they often remain there for the duration of their sentence.

Because jails have less funding, fewer basic medical services and serve a constantly shifting population that moves in and out of the community, jail populations, pre-COVID, had higher rates of disease transmission than the general public.⁶ Black male inmates in particular face increased risks of infection and have poorer health outcomes because they have higher rates of chronic illness than their white counterparts.⁷ Black people are also incarcerated in jails at a rate that is 4 times higher than white Americans, with 465 incarcerations per 100,000 of the population in 2020; the highest rate of any ethnicity.⁸

Upon release from jail, disease is transmitted to the community. This, in conjunction with the CDC's acknowledgement that racial and ethnic minorities with chronic illnesses who live in congregate environments were disproportionately susceptible to COVID-19, prompted near immediate calls for jails and prisons to reduce their inmate populations at the onset of the pandemic.⁹ This effort was critical to reducing harmful outcomes for inmates, staff and the general public, and it provided an unprecedented opportunity for administrators to reevaluate the necessity of pretrial confinement, length of stay and return for probation or parole violation.

1. "Preventing the Spread of COVID-19 in a Variety of Settings throughout Your Community Guidance about Preventing COVID-19 Infections in Diverse Settings," Center for Disease Control and Prevention, June 29, 2020. <https://www.cdc.gov/coronavirus/2019-ncov/php/infection-control.html>.

2. "How Criminal Justice Systems are responding to COVID-19, Community Resources for Justice," The Crime and Justice Institute, last accessed Jan. 6, 2022. <https://www.cjinstitute.org/corona>.

3. The National Commission on COVID-19 and Criminal Justice, "Impact Report: COVID-19 and Crime," Council on Criminal Justice, May 21, 2021, p. 2. <https://covid19.counciloncj.org/2021/05/21/impact-report-covid-19-and-crime-4>.

4. "The Problem: America incarcerates more people than any other country, and the problem begins in local jails," The Safety and Justice Challenge, last accessed Jan. 6, 2022. <https://safetyandjusticechallenge.org/the-problem>.

5. "Jails: Inadvertent Health Care Providers. How county correctional facilities are playing a role in the safety net," The Pew Charitable Trusts, January 2018, p. 1. https://www.pewtrusts.org/-/media/assets/2018/01/sfh_jails_inadvertent_health_care_providers.pdf.

6. Martial L. Ndeffo-Mbah et al., "Dynamic Models of Infectious Disease Transmission in Prisons and the General Population," *Epidemiologic Reviews* 40:1 (June 2018), pp. 40-57. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5982711>.

7. Kathryn M. Nowotny et al., "Racial disparities in health conditions among prisoners compared with the general population," *SSM Population Health* 3 (December 2017), pp. 487-496. <https://doi.org/10.1016/j.ssmph.2017.05.011>.

8. Erin Duffin, "Jail Incarceration Rate U.S. 2020 by Race," Statista, Dec. 15, 2021. <https://www.statista.com/statistics/816699/local-jail-inmates-in-the-united-states-by-race>.

9. "People with Certain Medical Conditions," Center for Disease Control and Prevention, Dec. 14, 2021. <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>; Witold Walczak et al., "American Civil Liberties Union of Pennsylvania, email to Dr. Rachel Levine Secretary of Health, Commonwealth of Pennsylvania," ACLUA, March 20, 2020. https://aclupa.org/sites/default/files/aclu-pa_letter_to_secretary_levine_-_final.pdf.

To slow the spread of disease, departments of corrections, probation and parole agencies, and law enforcement quickly implemented new policies and practices to reduce inmate populations without compromising public safety.¹⁰ Crime rates declined significantly early in the pandemic and, with the exception of homicide, have remained down by 5 percent.¹¹ Less crime, coupled with policy changes to reduce jail admissions and increase discharges, resulted in a 23 percent decline in the inmate population by July of 2020.¹²

While efforts to reduce the overall jail population were initially successful, they exacerbated the pre-existing racial and ethnic disparities and widened the gap between the total number of white inmates and inmates of color. White inmate populations decreased by 28 percent, while the number of Black inmates declined by only 22 percent.¹³

As the pandemic wore on and states ended lockdowns, the newly adopted processes for reducing jail populations slowly shifted back toward business as usual. Criminal courts reopened, cases stalled by the temporary closures returned to the judicial docket, and police, courts and community corrections professionals slowly abandoned diversion efforts in lieu of traditional case management. Massive criminal case backlogs continue to plague U.S. courts.¹⁴

Nearly two years after the onset of the pandemic, the use of innovative strategies to reduce inmate populations has all but been abandoned, despite the need for expedient case management to reduce court backlogs and the unnecessary confinement of pre-trial detainees. Jail admissions have increased, on average by 10 percent, resulting in a mere 7 percent overall decline in the inmate population since March of 2020.¹⁵

Citing data from the Prison Policy Initiative, the Brennan Center alleges that “the country’s network of county jails

have failed to implement reductions that were promised months ago,” resulting in deadly consequences for inmates, many of whom are still awaiting trial.¹⁶ Currently, 62 percent of the jail population has not been convicted of any crime and 75 percent are there for a non-violent offense.¹⁷ For inmates that have been convicted or are serving temporary sentences for probation and parole violations, a misdemeanor sentence is effectively a potential death sentence.

If this sounds hyperbolic, it is not. In Philadelphia and other jurisdictions experiencing staffing shortages and increased jail populations, inmate death is on the rise. In response to the sudden death of Jerome Lyles, an African American father of three who was incarcerated in Philadelphia on a \$10,000 bail for writing bad checks, a family member remarks, “it’s like they put you in there and they don’t care about you. You go in there healthy, he was only in there a week, and they called and said he died. My daughter is devastated.”¹⁸

The return to ineffective policies and unnecessary pre-trial detention disproportionately impacts racial and ethnic minorities. It is imperative, therefore, that we amplify our efforts to reduce the overall jail population, while specifically targeting those policies and practices that produce the racial disparities in the inmate population. Not only is this a smarter approach for reducing disease transmission inside and out of the jail, but for persons of color, it could reduce the possibility of death resulting from short-term incarceration.

EXPLANATIONS FOR RACIAL DISPARITIES IN JAIL POPULATIONS

Criminologists and legal scholars argue that race is a factor at every phase of the legal process resulting in the overrepresentation of minorities in the criminal justice system, including jail and prison populations.¹⁹ According to this view, disparities exist because of the intersectionality of race in the development of law (legislation), the enforcement of laws (law enforcement), the adjudication of alleged law violations (courts) and in the punishment of convicted law violators (corrections). Within this context, racial and ethnic disparities in the correctional system are the result of decisions made much earlier in the judicial process, beginning with the legislative process.

10. The Brennan Center, “Reducing Jail and Prison Populations During the Covid-19 Pandemic,” March 27, 2020. <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

11. See, e.g., David S. Abrams, “Crime in the Time of COVID,” *Econofact*, March 30, 2021. <https://econofact.org/crime-in-the-time-of-covid>; Jeff Asher and Ben Horowitz, “It’s been ‘Such a Weird Year.’ That’s Also Reflected in Crime Statistics,” *The New York Times*, Sept. 27, 2021. <https://www.nytimes.com/2020/07/06/upshot/murders-rising-crime-coronavirus.html>.

12. Emily Widra, “With over 2,700 deaths behind bars and slow vaccine acceptance, prisons and jails must continue to decarcerate,” The Prison Policy Initiative, June 23, 2021. https://www.prisonpolicy.org/blog/2021/06/23/june2021_population.

13. Alexi Jones and Wendy Sawyer, “New data on jail populations: The good, the bad, and the ugly,” The Prison Policy Initiative, March 17, 2021. <https://www.prisonpolicy.org/blog/2021/03/17/jails>.

14. Patrick Smith, “As the Nation’s Courthouses Reopen, They Face Massive Backlogs In Criminal Cases,” *National Public Radio*, July 14, 2021. <https://www.npr.org/2021/07/13/1015526430/the-nations-courthouses-confront-massive-backlogs-in-criminal-cases>.

15. Emily Widra, “With over 2,700 deaths behind bars and slow vaccine acceptance, prisons and jails must continue to decarcerate,” The Prison Policy Initiative, June 23, 2021. https://www.prisonpolicy.org/blog/2021/06/23/june2021_population.

16. “Reducing Jail and Prison Populations During the Covid-19 Pandemic,” The Brennan Center, March 27, 2020. <https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic>.

17. “The Problem: America incarcerates more people than any other country, and the problem begins in local jails,” The Safety and Justice Challenge, last accessed Jan. 6, 2022. <https://safetyandjusticechallenge.org/the-problem>.

18. Samantha Melamed, “4 Philly prisoners died in two weeks, capping a tumultuous and deadly year,” *The Philadelphia Inquirer*, Dec. 27, 2021. https://www.inquirer.com/news/philadelphia-jail-deaths-lawsuit-prison-conditions-20211227.html?utm_medium=referral&utm_source=ios&utm_campaign=app_ios_article_share&utm_content=2PRPTVFDGVTFTN176AIK5FVOGU.

19. Angela Davis et al., *Policing the Black Man* (Penguin Random House, 2018), p. xiii.

Biased Legislation

A thorough review of historic race-based laws in the United States is well-articulated by a variety of scholars.²⁰ Similarly, the influence of bias is evident in our drug laws, welfare policies and criminal conspiracy/accomplice liability legislation.²¹ While there are some efforts to reform the laws most strongly associated with the overcriminalization of racial and ethnic minorities, it is more expedient and practical to change law enforcement; parole; and prosecutorial, judicial, probational and community corrections practices while new policies are being developed. Many of these changes were implemented at the onset of the pandemic and a return to such practices can reduce overall inmate populations while decreasing the racial and ethnic disparities in inmate populations.

Current reform efforts to reduce the proportion of ethnic minorities in local jails are focused on the role of implicit bias in police profiling and police arrest decisions, prosecutorial discretion, the racial impact of justice decisions and the failure of the U.S. Supreme Court to provide meaningful remedies to wrongful conduct from justice professionals.²²

Biased Enforcement, Prosecution and Adjudication

As technology advances, police are increasingly relying on predictive algorithms, rapid DNA devices, facial or biometric recognition software and unregulated databases to prevent, detect and respond to law violations.²³ Early analysis casts

doubt on the efficacy of these technologies and indicates that racial biases are present, culminating in an increased risk of arrest for minority group members.²⁴ Until these tools are more thoroughly vetted and processes for use and transparency are established, their use in determining the probable cause needed to search or arrest an individual should be curtailed.

Similarly, historically relied upon techniques for establishing probable cause and affecting arrest should also be rigorously re-evaluated to determine their efficacy and potential biases. Examples that have recently come under scrutiny include racial profiling, the use of polygraphs and stop and frisk policies.

Over the past two and one-half decades, lawmakers have consistently tried to introduce legislation (H.R. 118, the Traffic Stops Statistics Act of 1997) to track the use of racial profiling in police stops and searches, and to prevent the use of race, religion or discrimination for identifying suspects (End Racial and Religious Profiling Act [ERRPA], originally proposed in 2001).²⁵ Contrary to a common assertion among law enforcement professionals that racial profiling is necessary to prevent and respond to crime, the American Bar Association contends that:

We knew in 2000, and we know now, that racial profiling does not make us safer. In fact, it may make us less safe, as it misses its intended targets, blinds law enforcement, and serves as salt in the wounds that keep police departments and communities of color at odds and apart from each other.²⁶

This sentiment is reflected in current police academy training curricula that addresses implicit (unconscious) bias and the harmful outcomes of using racial profiling in policing.²⁷ Polygraph or lie detector tests are also used in criminal investigations. The device detects deception by measuring the physiological response of an interviewee. The results are not admissible in court due to scientific scrutiny, but can be used to identify a potential suspect. Drawing on a century of research, the National Academies of Science, Engineering and Medicine asserts that polygraphs are plagued by biases in selection and measurement that render them significant-

20. See, e.g., Richard Rothstein, *The color of law: A forgotten history of how our government segregated America*, (Liveright Publishing, 2017); Michelle Alexander, *The New Jim Crow Mass Incarceration in the Age of Colorblindness*, (New Press, 2020); Isabel Wilkerson, *Caste the Origins of our Discontents*, (Random House, 2020).

21. See, e.g., "Racial Double Standard in Drug Laws Persists Today," Equal Justice Initiative, Dec. 9, 2019. <https://eji.org/news/racial-double-standard-in-drug-laws-persists-today>; Iife Floyd et al., "TANF Policies Reflect Racist Legacy of Cash Assistance Reimagined Program Should Center Black Mothers," Center on Budget and Policy Priorities, Aug. 4, 2021, p. 1. <https://www.cbpp.org/sites/default/files/8-4-21tanf.pdf>; Rand Paul, "Conspiracy laws result in cruel prison sentences, particularly for Black Americans," Courier Journal, July 14, 2020. <https://www.courier-journal.com/story/opinion/2020/07/14/conspiracy-laws-result-cruel-prison-sentences-black-people/5427663002>.

22. See, e.g., Katherine B. Spencer et al., "Implicit Bias and Policing," *Social and Personality Psychology Compass* 10:1 (2016), pp. 50-63. <https://onlinelibrary.wiley.com/doi/abs/10.1111/spc3.12210>; Douglas A. Smith et al., "Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions," *Journal of Criminal Law and Criminology*, 75:1 (1984), pp. 234-249. <https://scholarlycommons.law.northwestern.edu/jclc/vol75/iss1/7>; Besiki Kutatedladze et al., "Race and Prosecution in Manhattan," Vera Institute of Justice Research Summary, (July 2014), pp. 1-10. https://www.vera.org/downloads/Publications/race-and-prosecution-in-manhattan/legacy_downloads/race-and-prosecution-manhattan-summary.pdf; Traci Schlesinger, "The cumulative effects of racial disparities in criminal processing," *The Journal of the Institute of Justice & International Studies* 7 (2007), p. 261. https://www.academia.edu/331321/The_Cumulative_Effects_of_Racial_Disparities_in_Criminal_Processing; Pamela S. Karlan, "Race, Rights, and Remedies in Criminal Adjudication," *Michigan Law Review* 96:7 (June 1998), p. 2001. <https://repository.law.umich.edu/mlr/vol96/iss7/2>.

23. See, e.g., William Douglas Heaven, "Predictive policing algorithms are racist. They need to be dismantled," *MIT Technology Review*, July 17, 2020. <https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice>; Denise Syndercombe Court, "Protecting against racial bias in DNA databasing," *National Computational Science* 1 (2021), p. 249-250. <https://www.nature.com/articles/s43588-021-00064-5?proof=t2019-5-29>; Alex Najibi, "Racial Discrimination in Face Recognition Technology," Harvard University Blog Science Policy: Science Policy and Social Justice, Oct. 24, 2020. <https://sitn.hms.harvard.edu/flash/2020/racial-discrimination-in-face-recognition-technology>.

24. Daniele Selby, "How bias contributes to wrongful conviction," The Sentencing Project, June 21, 2021. <https://innocenceproject.org/how-racial-bias-contributes-to-wrongful-conviction>.

25. "Traffic Stops Statistics Act of 1997," H.R. 118, 105th Congress; "End Racial and Religious Profiling Act (ERRPA)," S. 597, 117th Congress.

26. David A. Harris, "Racial Profiling: Past, Present, and Future?" American Bar Association, *Criminal Justice* 34:4 (Winter 2020). https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future.

27. Bailey Maryfield, "Implicit Racial Bias," Justice Research and Statistics Association, December 2018, p. 5. <https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-implicit-racial-bias.pdf>.

ly less effective than originally assumed.²⁸ To combat the implicit bias in the test, it is imperative that polygraphs are not used to make arrest and charging decisions.

Another police practice that disproportionately impacts racial and ethnic minorities and contributes to disparities in local jail populations includes the use of stop and frisk, a once-common tool for detecting criminal activity before the probable cause burden that is necessary for arrest. While a brief police stop and frisk based on reasonable suspicion is constitutional under the landmark decision in *Terry v. Ohio* racial bias, implicit or explicit, cannot be used to initiate the stop.²⁹ Evidence of racial bias resulted in the practice being declared unconstitutional in New York and has prompted calls for reform in Philadelphia and Boston.³⁰ Law enforcement officers and supporters regularly assert that these policies are needed to address increased crime rates among certain populations but this is not borne out by the research.³¹ Rather, crime reduction results primarily from saturating crime prone areas with police, whereas investigative stops produce a negligible impact on the reduction of crime.

All the aforementioned discretionary police practices are subject to implicit bias that can influence disparate arrest and incarceration rates, resulting in the overrepresentation of minorities in our correctional facilities. It is more troubling to consider the ways in which explicit bias and discrimination may play a role as practitioners are increasingly implicated in investigations of racist text messages and other communications from various police departments in California, Pennsylvania, New Jersey, Texas and Ohio, calling into question the legitimacy of hundreds of criminal cases.³² Simi-

larly, growing evidence of wrongful convictions and exonerations based on faulty police and prosecutorial practices are of concern since they disproportionately occur among minority group members. A national review of wrongful conviction and exoneration data found that although African Americans represent only 13 percent of the total U.S. population, they constitute 47 percent of exonerees and they comprised the great majority of group exonerations stemming from scandals wherein multiple police officers were involved in framing innocent defendants.³³ More than half of death row exonerees on record are Black Americans and while the exonerations and release usually follow a lengthy prison stay, the process begins with arrest and incarceration at a local jail.³⁴

Drawing on the work of criminologists, legal scholars, practitioners and media outlets, racial disparities in jail populations are best summarized as follows: “America’s racial/ethnic groups do appear to commit serious conventional crime at different rates; racial/ethnic bias by criminal justice professionals does appear to exist; and some criminal justice policies target, intentionally or not, some racial/ethnic groups more than others.”³⁵ Any meaningful conversation about reducing racial and ethnic disparities in jail populations must consider these contributing factors.

Within this context, safely reducing the jail population, while being mindful of the racial differences that contribute to incarceration, is an exceedingly difficult prospect. A multifocal approach that targets the impact of race at each touch point in the judicial process is critical in reducing disparities and overall inmate populations. Model policies and evidence-based strategies that decrease the number of jail admits and increase the number of jail discharges without jeopardizing the safety of the community must be rigorously pursued.

FRONT END STRATEGIES TO REDUCE JAIL POPULATIONS AND RACIAL AND ETHNIC DISPARITIES

Alternatives to incarceration exist at every point in the criminal justice process. Research supports their efficacy in addressing law violators while decreasing the collateral consequences of incarceration that negatively impact individuals and the communities they return to. These options are

28. National Research Council. *The Polygraph and Lie Detection*. National Academies Press, 2003.

29. *Terry v. Ohio*, 392, U.S. 1. <https://supreme.justia.com/cases/federal/us/392/1>.

30. Joseph Goldstein, “Judge Rejects New York’s Stop-and-Frisk Policy”, *New York Times*, Aug. 12, 2013, p. A1. <https://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html>; Samantha Melamed, “Philly police were flagged for hundreds of unjustified stops, frisks. Will reforms follow?” *The Philadelphia Inquirer*, Aug. 11, 2020. <https://www.inquirer.com/news/philadelphia-police-stop-and-frisk-bailey-racist-disparities-mayor-kenney-20200811.html#loaded>; Nusrat Choudhury, “Boston Police Have a Racially Biased Policing Problem, and a Golden Opportunity to Reform,” ACLU, Oct. 8, 2014. <https://www.aclu.org/blog/smart-justice/mass-incarceration/boston-police-have-racially-biased-policing-problem-and-golden>.

31. John MacDonald, “Does Stop and Frisk reduce crime?,” University of Pennsylvania, last accessed Jan. 6, 2022. <https://crim.sas.upenn.edu/fact-check/does-stop-and-frisk-reduce-crime>.

32. See, e.g., Alexandra Meeks et al., “Authorities in California dismissed 90 cases so far due to the involvement of Torrance officers under investigation for racist texts,” CNN, Dec. 9, 2021. <https://www.cnn.com/2021/12/09/us/torrance-police-california-investigation-racist-texts/index.html>; Editorial Board, “Cops’ racist texts require strong action,” *The Citizens’ Voice*, Nov. 12, 2020. https://www.citizensvoice.com/opinion/editorial/cops-racist-texts-require-strong-action/article_7368bad9-4dad-52ca-90bc-34e9f864714b.html; Brian Amaral, “Prosecutor: Edison cop who sent racist texts ‘not credible’ as witness,” NJ.com, Jan. 17, 2019. https://www.nj.com/middlesex/2015/07/prosecutor_cop_who_sent_racist_texts_not_credible.html; Hojun Choi, “Austin police officer fired over racist text message thread, memo says,” *Austin American-Statesman*, Nov. 25, 2020. <https://www.statesman.com/story/news/2020/11/26/austin-police-officer-fired-over-racist-text-message-thread-memo-says/115050510>; Adam Ferrise and Eric Heisig, “Cleveland police officers face discipline after Internal Affairs finds racist text messages,” *Cleveland.com*, Jan. 30, 2019. https://www.cleveland.com/crime/2018/04/cleveland_police_officers_face_1.html.

33. Samuel R. Gross et al., “Race and Wrongful Convictions in the United States,” University of Michigan Law School Scholarship Repository, The National Registry of Exonerations, 2017, pp. 1-38. <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1121&context=other>.

34. Daniele Selby, “8 Facts You Should Know About Racial Injustice in the Criminal Legal System,” The Innocence Project, Feb. 25, 2021, p. 12. <https://innocenceproject.org/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month>.

35. Steven E. Barkan, *Race, Crime and Justice* (Oxford University Press, 2019), p. 12.

more cost effective and they save resources, allowing officers to avoid the time spent in the processing of arrests, booking of offenders and transports to jail; this frees officers up to concentrate on more serious crime. Common examples for law enforcement include the use of citation authority and court summons, co-responder models and law enforcement assisted diversion.³⁶

Police Strategies to Reduce Jail Populations and Racial/Ethnic Disparities

Arrest is a common police practice but it is often unnecessary to initiate the judicial process. There are less intrusive means available to achieve this end without compromising public safety.³⁷ For instance, rather than taking an individual into custody or issuing an arrest warrant, citations and summonses can be used to order a person to answer to misdemeanor charges without the setting of bail when an official reasonably believes the individual will report to court.

A 2021 review of citation in lieu of arrest practices undertaken during the pandemic has already shown promise.³⁸ The Metropolitan Police Department in the District of Columbia expanded its use of citations to reduce processing time, intrusive citizen-officer interactions and jail populations in an effort to improve community relationships. They did so by citing research that indicated that 90 percent of those cited did not reoffend.³⁹ Cite and release procedures have also been used in Texas, Alabama and Oregon.⁴⁰

Handing out a citation in lieu of arrest is permitted in every state. The National Conference of State Legislatures (2018), offers state-by-state guidance on the legal justification and exemptions as well as how to use this alternative to arrest for

minor law violations.⁴¹ Given the broad discretion still available to police officers, the practice would be more widely embraced if additional data were available to support these assertions and specific guidelines to reduce racial disparities were implemented.

Police can also divert people from jail by referring them to behavioral health services like mental health or substance use/abuse treatment. Co-responder models, or partnerships between behavioral health specialists and police departments can be used to respond to individuals in crisis. A systematic review of the existing data indicates that this newer approach might reduce the number of people taken into custody, but evaluative data and information on outcomes is not yet available.⁴²

Law Enforcement Assisted Diversion (LEAD) programs are another approach which use a public policy framework to respond to crime stemming from poverty, homelessness, substance abuse and mental health issues. LEAD was established in 2011 in Seattle and in 2016 The LEAD National Support Bureau was created to provide strategic guidance for national expansion of the collaborative model.⁴³ At the discretion of police officers, law violators can be diverted into community-based resources that use trauma-informed practices, case management and a host of other support services to address unmet behavioral health needs. In 2015, an independent evaluation of the program found that LEAD participants were 58 percent less likely to be arrested after enrollment in the program compared to others who experienced “justice as usual.”⁴⁴

Court Strategies to Reduce Jail Populations and Racial/ Ethnic Disparities

In addition to police diversion, ethnic and racial disparities in jail populations can be reduced by reforming bail; decreasing pretrial detention for non-violent offenses; expanding deferred prosecution programs and alternative case dispositions; and curtailing the use of plea bargaining to resolve criminal cases.

Alternatives to cash bail are useful when the accused is not a danger to the public and the court is reasonably sure the

36. Center for Police Research and Policy, “Alternatives to Arrest,” International Association of Chiefs of Police, last accessed, Jan. 6, 2022. <https://www.theiacp.org/alternatives-to-arrest>.

37. Rachel A. Harmon, “Why arrest?” *Michigan Law Review* 115:3 (2016), p. 309. <https://repository.law.umich.edu/mlr/vol115/iss3/>.

38. Brooke Pemberton et al., “Citation in Lieu of Arrest,” D.C. Justice Lab, January 2021, pp. 1-8. <https://static1.squarespace.com/static/5edff6436067991288014c4c/t/6007104bf66a522424777aa1/1611075659671/Citation+in+Lieu+of+Arrest.pdf>.

39. Karl A. Racine, “Opinion: The District’s new racial justice future,” *The Washington Post*, June 1, 2020. <https://www.washingtonpost.com/opinions/2020/06/01/districts-new-racial-justice-future>.

40. See, e.g., Stacy Rickard, “San Marcos First Texas City with Cite-And-Release Law to Limit Low-Level Offense Arrests,” *Spectrum News* 1, June 5, 2020. <https://spectrumlocalnews.com/tx/san-antonio/news/2020/06/05/san-marcos-first-texas-city-with-cite-and-release-law-to-limit-low-level-offense-arrests>; Taylor Mitchell, “St. Clair commission OKs citation in lieu of arrest resolution,” *St. Claire Times*, April 9, 2020. https://www.annistonstar.com/the_st_clair_times/st-clair-commission-oks-citation-in-lieu-of-arrest-resolution/article_8c327344-7aaf-11ea-a87d-efa0dbc7d967.html; Tess Riski, “Portland Police Will Not Take Misdemeanor Arrests to Jail During the COVID-19 Outbreak, to Avoid Overcrowding,” *Willamette Week*, March 20, 2020. <https://www.week.com/news/2020/03/20/ppb-will-not-take-misdemeanor-arrests-to-jail-during-covid-19-outbreak-to-avoid-overcrowding>.

41. “Citation in Lieu of Arrest,” National Conference of State Legislators, October 2018, pp. 1-23. https://www.ncsl.org/Documents/Citation_in_Lieu_of_Arrest2018.pdf; “Citation in Lieu of Arrest. Examining Law Enforcement’s Use of Citation across the United States,” IACP, April 2016, p. 3. <https://www.theiacp.org/sites/default/files/all/IACP%20Citation%20Final%20Report%202016.pdf>.

42. Stephen Puntis et al., “A systematic review of co-responder models of police mental health ‘street’ triage,” *BMC Psychiatry* 18:256 (2018), pp. 1-11. <https://bmcp Psychiatry.biomedcentral.com/track/pdf/10.1186/s12888-018-1836-2.pdf>.

43. “Advancing Criminal Justice Reform in 2021,” The LEAD National Support Bureau, last accessed Jan. 6, 2022. <https://www.leadbureau.org>.

44. Ibid.

individual will return for future proceedings. Releasing individuals on their own recognizance, using a signature bond or imposing an unsecured bail can reduce inmate populations at the earliest point of incarceration. Existing research suggests that Black felony defendants and young adult Black men are more likely to be detained pretrial than their white counterparts and their bail amounts are nearly twice as high.⁴⁵

Expanding deferred prosecution programs like Accelerated Rehabilitative Disposition and problem-solving courts is another way to safely reduce jail populations and hold people accountable for law violations.⁴⁶ Therapeutic jurisprudence keeps communities safe while addressing the underlying contributions to criminal activity.⁴⁷ While there is a general consensus among researchers that well-designed, thoughtfully implemented drug court programs produce better outcomes than conventional criminal justice processing, other problem-solving courts are less studied and the examination of impact on racial disparities is mixed.⁴⁸

Following the preliminary hearing, a thorough review of the case merits should be used to determine the case trajectory. Over reliance on plea bargaining, which is used to resolve 97 percent of criminal cases, contributes to racial disparities in guilty pleas among individuals who are unable to post bail while awaiting trial and for those looking to expediently resolve their legal matters.⁴⁹ Implicit racial biases that have historical roots in the presumption of guilt for African American males taint the prosecutorial charging and negotiation processes, often resulting in harsher sentencing outcomes compared to white male defendants.

Correctional authorities can assist in the case review process and efforts to reduce jail populations by collaborating with prosecutors. Population Review Teams (PRTs) already demonstrate the promise of multi-agency review teams in reducing racial disparities in inmate populations. The process is

collaborative and case outcomes are determined by a consensus of review participants.⁵⁰

BACK-END STRATEGIES TO REDUCE JAIL POPULATIONS AND RACIAL AND ETHNIC DISPARITIES

The culmination of the preceding biases in the passage of laws, the enforcement of those laws, the adjudication of accused law violators and in the resolution of criminal cases by plea bargaining places a disproportionate burden on local jails, which are ill-equipped to deal with the dynamic needs of their populations. While jail administrators are forced to bear the burden of decisions initiated in other areas of the American legal process, they are still capable of adopting policies to manage inmate populations. These policies, in collaboration with those of other stakeholders, can reduce overall jail populations and the disproportionate presence of racial and ethnic minorities.

Corrections Strategies to Reduce Jail Populations and Racial/ Ethnic Disparities

Strategies to immediately decarcerate local jails at the beginning of the pandemic focused on reevaluating the necessity of confinement for the existing inmate population. Jurisdictions adopted a variety of methods for early inmate release including conditional release or temporary furlough to home confinement as modeled by the Federal Bureau of Prisons; the expansion of earned good time credits; simplified processes to expedite release; and early parole for those close to their release date.⁵¹

Individuals confined while awaiting trial were especially harmed by the closing of criminal courts and the delay of case proceedings. The pandemic necessitated a review of pretrial detainees. Revised release practices for pretrial detainees contributed to sharp declines in jail populations across the country without increasing crime or failures to appear for court.⁵² On the contrary, a review of preexisting and pandemic-induced bail reforms demonstrates the efficacy and safety

45. Wendy Sawyer, "How race impacts who is detained pretrial," The Prison Policy Initiative, Oct. 9, 2019. https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race.

46. See, e.g., PA Title 75, 3807. <https://www.legis.state.pa.us/cfdocs/legis/L1/con-check.cfm?txtType=HTML&ttl=75&div=0&chpt=38&sctn=7&subctn=0>; "Problem Solving Courts," National Institute of Justice, Feb. 20, 2020. <https://nij.ojp.gov/topics/articles/problem-solving-courts>.

47. Benjamin A. Barsky et al., "Expanding Therapeutic Jurisprudence Across the Federal Judiciary," *The Journal of the American Academy of Psychiatry and the Law* 49:1 (November 2020), pp. 1-11. <http://jaapl.org/content/jaapl/early/2020/11/24/JAAPL.200040-20.full.pdf>.

48. Michael M. O'Hear, "Problem-solving courts can produce better outcomes for participants, but do white defendants benefit more than black?" Marquette University Law School Faculty Blog, Aug. 2, 2021. <https://law.marquette.edu/facultyblog/2021/08/problem-solving-courts-can-produce-better-outcomes-for-participants-but-do-white-defendants-benefit-more-than-black>.

49. See, e.g., Elaine E. Greenberg, "Unshackling plea bargaining from racial bias," *The Journal of Criminal Law and Criminology* 111:1 (Spring 2021), pp. 93-144. <https://scholarlycommons.law.northwestern.edu/jclc/vol111/iss1/2>; "Research Finds Evidence of Racial Bias in Plea Deals," The Equal Justice Initiative, Oct. 26, 2017. <https://eji.org/news/research-finds-racial-disparities-in-plea-deals>.

50. Beth M. Huebner et al., "Systematic Case Review Strategies: An Application for Jail Population Reduction," *Justice Quarterly* 37:7 (Sept. 14, 2020), pp. 1261-1276. <https://www.tandfonline.com/doi/full/10.1080/07418825.2020.1819384>.

51. Memorandum opinion for the General Counsel, "Home Confinement of Federal Prisoners after the COVID-19 Emergency," Federal Bureau of Prisons, Jan. 15, 2021, pp. 1-15. <https://www.justice.gov/olc/file/1355886/download>; Dennis Schrantz et al., "Decarceration Strategies: How 5 States Achieved Substantial Prison Population Reductions," The Sentencing Project, Sept. 5, 2018. <https://www.sentencingproject.org/publications/decarceration-strategies-5-states-achieved-substantial-prison-population-reductions>; "Fifth emergency order extending early parole review and such possible release," Court of Common Pleas of Delaware County Pennsylvania, Jan. 22, 2021. <https://www.delcopa.gov/courts/pdf/emergencyjudicialorders/FifthEmergencyOrderExtendingEarlyParoleReviewAndSuchPossibleRelease.pdf>.

52. Linda So et al., "Special Report: As jails free thousands amid COVID-19, reform push takes root," Reuters, Oct. 28, 2020. <https://www.reuters.com/article/us-usa-jails-release-specialreport/special-report-as-jails-free-thousands-amid-covid-19-reform-push-takes-root-idUSKBN27DIRX>.

of such approaches, whether they occur at the time of the arrest or following a jail stay while awaiting trial.⁵³

Another way to reduce jail populations and ethnic disparities involves the presumption of alternatives to incarceration for pretrial and probation and parole violators. Graduated sanctions for technical (rule) violations and administrative methods for addressing misconduct should be pursued. Community-based sanctions are at least as effective as jail and they are more cost-effective and produce fewer collateral consequences.⁵⁴

CONCLUSION

Practitioners, scholars and the general public have pushed for criminal justice reform to reduce racial and ethnic disparities. Though incarceration research tends to focus on prison populations, the cumulative risk of a jail stay negatively impacts case outcomes, earnings and family life.⁵⁵ The concern that reform efforts could jeopardize public safety or offender accountability remains central to the opponent perspective, but such concern is unsubstantiated. Diversion strategies are well-established and supported by research. Using the lessons learned from the early pandemic policy shifts, we are well-positioned to promote a variety of alternatives to incarceration that do not compromise the safety of the public or harm the judicial process. The strategies examined in this paper can reduce crime, restore trust in the legal process and help justice-involved persons maintain the stability in the community that supports crime desistance. Rather than defaulting to traditional practices we should use the lived experience of the past twenty months to inform efforts to safely and equitably reduce existing jail populations and the racial and ethnic disparities therein.

ABOUT THE AUTHOR

Christi Smith, PhD, is a fellow for the R Street Institute's Criminal Justice and Civil Liberties Program, where she focuses on special offender populations, community corrections and reentry.

53. Holmes Lybrand and Tara Subramaniam, "Fact-checking claims bail reform is driving increase in violent crime," CNN, July 7, 2021. <https://www.cnn.com/2021/07/07/politics/bail-reform-violent-crime-fact-check/index.html>.

54. Pew Charitable Trusts, "To Safely Cut Incarceration, States Rethink Responses to Supervision Violations," July 16, 2019, p. 1-20. https://www.pewtrusts.org/-/media/assets/2019/07/pspp_states_target_technical_violations_v1.pdf.

55. Bruce Western, et al., "The cumulative risk of jail incarceration," *Proceedings of the National Academy of Sciences of the United States of America* 118:16 (Jan. 15, 2021), pp. 1-6. <https://www.pnas.org/content/118/16/e2023429118>.