



# TRANSFORMING THE SYSTEM

# TRANSFORMING THE SYSTEM

## Acknowledgments

This report was written by I. India Thusi, Associate Counsel & Robert L. Carter Fellow at The Opportunity Agenda. Special thanks to those who contributed to the analysis, review, and editing of the report, including Juhu Thukral, Director of Law and Advocacy at The Opportunity Agenda; Alan Jenkins, Executive Director of The Opportunity Agenda; Nahal Zamani, Advocacy Program Manager at the Center for Constitutional Rights; Nusrat Choudhury, Staff Attorney at the American Civil Liberties Union; Nicole Pittman, Vice President and Director of the Center on Youth Registration Reform at Impact Justice, and former Opportunity Agenda Communications Institute Fellow; Andi Gentile, Policy Strategist at the Center on Youth Registration Reform at Impact Justice; Justin Hansford, Associate Professor at Saint Louis University School of Law; Carlton Mayers II, Policing Reform Policy Counsel at the NAACP Legal Defense and Educational Fund; Diego Iniguez-Lopez, former Robert L. Carter Fellow at The Opportunity Agenda; Jessica Peñaranda, Special Project Coordinator at the Sex Workers Project at the Urban Justice Center; Melissa Moore, former Media Coordinator at The Opportunity Agenda; and Julie Fisher Rowe, Senior Framing and Messaging Coordinator at The Opportunity Agenda.

Additional thanks go to Jevhon Rivers, Harvard Law School class of 2018, and Tanvee Trehan, Brooklyn Law School class of 2018, for their research assistance. Further thanks to William Tevlin for his research support; and Dennis Parker, Director of the Racial Justice Program at the American Civil Liberties Union, and Sam Sinyangwe, of Campaign Zero, for their consultation. Special thanks to members of the National Council for Incarcerated and Formerly Incarcerated Women and Girls, particularly Founding Council Member Topeka K. Sam, for input on incorporating the voices and policy suggestions of those directly affected by the criminal justice system in the report by creating the National Symposium Real Women Real Voices “Where the People Meet the Policy”; and Peter M. Williams, of PW Consulting, for preliminary research.

This report was designed and produced by Lorissa Shepstone and Gordon Clemmons of Being Wicked. Its production was coordinated by Ross Mudrick of Ross Mudrick Without Associates. Alixa Garcia created the original artwork on the cover of the report and the accompanying website.

The Opportunity Agenda’s Criminal Justice initiative is funded with support from Annie E. Casey Foundation, Ford Foundation, Open Society Foundation, The Atlantic Philanthropies, The JPB Foundation, The Libra Foundation, Unbound Philanthropy, and W.K. Kellogg Foundation. The statements made and views expressed are solely those of The Opportunity Agenda.



# TRANSFORMING THE SYSTEM

## About The Opportunity Agenda

The Opportunity Agenda is a social justice communication lab dedicated to the idea that our nation should be one where everyone enjoys full and equal opportunity. We collaborate with social justice leaders to help tell more compelling stories that drive lasting policy and culture change. Through communication expertise and creative engagement, we amplify the inspirational voices of opportunity. To advance the impact of the social justice community, we shape narratives and messages; build the communication capacity of social justice leaders through training and resources; and engage with artists, creatives, and culture makers as powerful storytellers to shift the public discourse. We believe in the power of communication and collaboration. We work to move hearts, minds, and policy to expand opportunity for all.

# TRANSFORMING THE SYSTEM

## *Transforming the System*

As we stand on the crest of history, we look back to see that this wave of oppression has long been rising with the tumultuous spirit of those who drowned in the Atlantic,

Those who were lynched in the South and in the North, those who were whipped for running, for reading, for dancing, and for speaking;

So that the bedrock of an empire could be born debt-free.

As the criminalization of black and brown communities pushes this legacy of inequality forward, our collective cage multiplies.

From this incredible vantage point, we are afforded sight.

We can see further than we have ever been able to see before.

From this place, more and more people are committing themselves to transforming a system that no longer serves anyone under its rule, even the elite,

For a cage is a cage, no matter if made of iron or gold.

—ALIXA GARCIA



# TRANSFORMING THE SYSTEM

## Table of Contents

Executive Summary: The Roadmap to Transformation	9
--	---



Promote Community Safety through Alternatives to Incarceration	39
--	----

Committing to reducing incarceration	39
Ensuring racial equity in the criminal justice system	46
Incorporating restorative justice principles	48
Creating spaces for community healing	51



Create Fair and Effective Policing Practices	55
--	----

Adopting a human rights approach to policing	56
Adopting policing approaches that promote police legitimacy and community trust	61
Establish a national "use of force" guidelines	63
Ensuring that police union contracts promote fairness	66
Promoting accountability	67



Promote Justice in Pre-trial Services & Practices	77
---	----

Eliminating unnecessary pretrial detention	78
Encouraging early provision of defense counsel	82

# TRANSFORMING THE SYSTEM

Expanding diversion beyond first-time and less serious crimes 84



## Enhance Prosecutorial Integrity 87

Promoting effective prosecution 88

Encouraging transparency and accountability in prosecutorial decision 90

Reducing inequality in prosecution 91



## Ensure Fair Trials and Quality Indigent Defense 93

Requiring effective indigent defense 93

Promoting fair jury representation 95



## Encourage Equitable Sentencing 97

Creating equitable sentencing practices 97

Restoring transparency and accountability in sentencing 100



## Ensure Decent Detention Conditions 102

Respecting incarcerated people' right to healthcare 102

Respecting the dignity of incarcerated individuals 104

Banning private prisons and excessive fees 109



## Require Equitable Parole and Probation 112

# TRANSFORMING THE SYSTEM



## Foster Successful Reintegration

114

Encouraging policies that promote successful reentry  
and reduce recidivism

114



## Foster an Environment for Respecting Children's Rights

119

Raising the age of criminal responsibility

120

Eliminating unfair sex-related registries for youth

123

Preventing the overcriminalization of schoolchildren

124



## Eradicate the Criminalization of Sex, Gender, and Sexuality

130

Instituting gender-sensitive use of force guidelines

130

Protecting human trafficking survivors

132

Decriminalizing the sex trade

133

Training and sensitizing on gender, sex, and sexuality issues

136



## Eliminate the Criminalization of Poverty

138

Eliminating the criminalization of poverty

139

Eliminating the criminalization of aspects of homelessness

143

Adopting fair debt practices for fines and tariffs

144



## Eliminate the Criminalization of Public

147



# TRANSFORMING THE SYSTEM

## Health Issues

Eliminating the criminalization of disabilities	149
Reforming registries for sex-related conduct	152
Adopting sensible drug policy	154



## Promoting Fairness at the Intersection of Immigration and Criminal Justice

Renewing our commitment to international human rights norms	159
Protecting the human rights of child migrants and families	160
Fostering vibrant, safe, and stable border communities	165
Resolving the inconsistency between "conviction" and "aggravated felony" under immigration and criminal law	172
Ending collaboration between state criminal and federal immigration systems	174

## Conclusion

# TRANSFORMING THE SYSTEM

## Executive Summary<sup>1</sup>

---

“Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress.”

—Dr. Martin Luther King, Jr.

---

Our criminal justice system must keep all communities safe, foster prevention and rehabilitation, and ensure fair and equal justice. But in too many places, and in too many ways, our system is falling short of that mandate and with devastating consequences. The United States is saddled with an outdated, unfair, and bloated criminal justice system that drains resources and disrupts communities.

<sup>1</sup> The research cited in this document is current as of August 15, 2016. This document is intended as general guidance only. It is not intended to, and does not, constitute specific legal advice to lawyers in their capacity representing clients, prospective clients, or other individuals, nor is it intended to be, and does not constitute, specific legal advice to any other individuals. This document does not, and is not intended to, establish an attorney-client relationship. Prior to using this information to provide legal advice to any client, you should verify the information set forth herein, including the application of the information set forth herein to your client's particular circumstances and the applicability of the information set forth herein in the applicable jurisdiction. Individuals and groups seeking legal advice for themselves with respect to the matters referenced in this document should consult with counsel and should not rely on this document. This document is provided “as is” without warranty of any kind and The Opportunity Agenda assumes no liability for the use or interpretation of information set forth herein.

# TRANSFORMING THE SYSTEM

The U.S. prison population has swelled to unprecedented levels,<sup>2</sup> and unequal, unjustified treatment based on race and ethnicity is well documented.<sup>3</sup> People of color, particularly Native American, African American, and Latino people, have felt the impact of discrimination within the criminal justice system. As of 2012, there were 2.2 million people incarcerated in the United States, costing our nation \$80 billion—funds that could go to worthier options, such as education and community enrichment.<sup>4</sup> In addition, many immigrants experience mandatory detention, racial profiling, and due process violations because of laws and policies that violate their human rights—and the principles of equal justice, fair treatment, and proportionality under our criminal justice system.

The good news is that we as a nation are at a unique moment in which there is strong public, bipartisan support for criminal justice reform,<sup>5</sup> positive policy developments in many parts of the country, and mass action and social movements for change, including the Movement for Black Lives and Black Lives Matter. More is needed, however, to move from positive trends to transformative, lasting change. There is a lack of positive solutions and alternatives in public discourse, and inadequate coordination among pro-reform advocates and commentators. Several interviewees for The Opportunity Agenda's Criminal Justice Report, including leading criminal justice and civil rights activists, scholars, and government officials, noted that they often work in silos on their discrete issues with limited collaboration among sectors. They identified a need for a more coordinated and sophisticated effort that would consolidate the gains that have been made and support sustained reform efforts going forward. This is doubly true at the intersection of criminal justice and immigration. While grassroots movements are increasingly working across these sectors, the issues are often disconnected in public discourse.

2 "The sheer scale and acceleration of U.S. prison growth has no parallel in western societies. As David Garland put it, 'This is an unprecedented event in the history of the USA and, more generally, in the history of liberal democracy.'" Dorothy E. Roberts, "The Social and Moral Cost of Mass Incarceration in African American Communities," 56 *Stan. L. Rev.* 1271, 1271 (2004). The United States incarcerated population as of December 31, 2014 was 1,561,500. See E. Ann Carson, *Prisoners in 2014*, Department of Justice (Sept. 2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf>; Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, Prison Policy Initiative (Mar. 16, 2016), <http://www.prisonpolicy.org/reports/pie2016.html>.

3 Michael Rocque, *Racial Disparities in the Criminal Justice System and Perceptions of Legitimacy a Theoretical Linkage*, 1 *Race & Justice* 292, 298 (2011) (describing how studies have found that people of color experience "differential treatment" in the criminal justice system even when controlling for legal consideration such as the seriousness of the crime); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 *Prison J.* 875, 905 (2011) (noting that the racial disparity in mass incarceration "reflects disproportionate law enforcement and sentencing practices that adversely affect African Americans"). The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (Sept. 2008), <http://www.sentencingproject.org/publications/reducing-racial-disparity-in-the-criminal-justice-system-a-manual-for-practitioners-and-policymakers/> ("One scholar recently reviewed 32 state-level studies of the decision to incarcerate and length of sentence imposed, and concluded that there is ample evidence among these studies that, controlling for other relevant factors, African Americans and Latinos are more likely to be incarcerated than whites and, in some jurisdictions, receive longer sentences.").

4 Department of Justice (DOJ), *Smart on Crime: Reforming The Criminal Justice System for the 21st Century* (August 2013); Tanya Coke, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities In the Criminal Justice System*, National Association of Criminal Defense Attorneys (2013) 7.

5 See generally Jill Mizell & Loren Siegel, *An Overview of Public Opinion and Discourse on Criminal Justice Issues* (Aug. 2014), [https://opportunityagenda.org/files/field\\_file/2014.08.23-CriminalJusticeReport-FINAL\\_0.pdf](https://opportunityagenda.org/files/field_file/2014.08.23-CriminalJusticeReport-FINAL_0.pdf).



# TRANSFORMING THE SYSTEM

To address these deficits, this document identifies and explains pragmatic policy solutions for comprehensive criminal justice<sup>6</sup> reform, consolidating recommendations on a cross-section of issues, and is a tool for communicating about these solutions. It highlights practical solutions that are effective, fair, and efficient. The issues are examined in an inclusive and intersectional manner, considering the unique ways that race, gender, gender identity, sexual expression, and health status affect criminal justice administration. Nonetheless, this is a living document that will be updated periodically as good ideas continue to be developed by criminal justice practitioners, advocates, and scholars.

The solutions are intended, in part, to aid the promotion of criminal justice reforms and should be used in tandem with our communications tools to advance a shared narrative about transforming the criminal justice system. *We invite readers to share their ideas for proactive, commonsense solutions by submitting suggestions to The Opportunity Agenda Transforming the System [Google spreadsheet](#).*

<sup>6</sup> "Criminal justice forms part of the set of processes, bodies, and institutions that aim to secure or restore social control." Francis Pakes, *Comparative Criminal Justice*, 2014.

# TRANSFORMING THE SYSTEM

EXECUTIVE SUMMARY<sup>7</sup>:

## THE ROADMAP TO TRANSFORMATION



### Promote Community Safety through Alternatives to Incarceration

Our criminal justice system should ensure that all individuals feel safe and secure in their communities. The criminal justice system should be administered in a fair and just manner and should hold criminal justice actors who misuse their power accountable. However, our policies have been overly punitive and have created incentives that promote inefficiency, lack of transparency, racial disparities, and high levels of incarceration. To address these issues, our criminal justice policies should have a clearly defined mission of substantially reducing incarceration, taking a step toward transforming the system into one that reflects our nation's commitment to equal treatment, accountability, and fairness.

### Five Solutions & Actions for Transformation

1. The Administration should issue an Executive Order—based on the executive authority to set prosecutorial priorities and to manage the federal prisons system—directing federal law enforcement agencies to prioritize policies and practices that reduce incarceration and prioritize community investment over imprisonment as a tactic for ensuring public safety.
2. The U.S. Department of Justice (DOJ) should require that local and state grantees seeking federal funds relating to law enforcement activities provide information relating to specific demonstrable compliance with

<sup>7</sup> This section is a part of the Executive Summary. For additional details including citations and resources that support the proposed solutions, please visit the relevant section of the body of the report.

# TRANSFORMING THE SYSTEM

Title VI of the Civil Rights Act of 1964,<sup>8</sup> which prohibits discrimination, and prioritize grants to applicants that have demonstrated full and effective compliance with civil rights statutes and norms.

3. The DOJ Civil Rights Division and the DOJ Office of Community Oriented Policing Services (COPS) should create a taskforce to ensure that police departments that are currently under investigation, have outstanding cases regarding constitutional violations, or violate civil rights are not awarded grants to hire additional law enforcement agents.
4. Advocates, activists, cultural workers and artists, and civil society should allow for issues experienced by community members with intersectional identities, including women of color, formerly incarcerated individuals, black women, migrants, Muslim youth, Native American women and youth, LGBTQ people of color, transgender people of color, and others, to be included in the conversation to support a criminal justice narrative that is inclusive and intersectional in its approach.
5. Legislatures should prohibit performance measures for criminal justice actors that focus on the volume of individuals that they process through the criminal justice system (e.g., evaluating police based on volume of citations, or prosecutors on volume of prosecutions), and provide protection for whistle-blowers to report official or unofficial volume-based performance metrics and strict penalties for law enforcement agencies with such policies.

8 42 U.S.C. § 2000d.



# TRANSFORMING THE SYSTEM



## Create Fair and Effective Policing Practices

To work for all of us, policing practices should ensure equal justice and be supported by evidence. These practices should be rooted in human rights principles and recognize the importance of maintaining a good relationship between communities and police. To this end, there should be a clear commitment to human rights, the adoption of a national “use of force” code, and creation of greater accountability.

### Five Solutions & Actions for Transformation:

1. Congress and/or the Department of Justice should issue a National Use of Force Handbook, which outlines recommendations that are consistent with constitutional and statutory obligations and the **Police Executive Research Forum Use of Force Principles**. Applicants for federal funds should be required, or encouraged, to comply with these guidelines in order to receive funding, and police leadership should be encouraged to train police officers to view themselves as Guardians rather than as Warriors.
2. To promote accountability, local, state, and county legislatures should pass legislation that requires police departments to pay half the amount of civil judgments that stem from police misconduct lawsuits. Where insurance companies pay for the civil judgments from police misconduct lawsuits, legislatures should allow insurance claims to seek compensation from police departments that should have known that the police officer(s) in question would use excessive force. Furthermore, legislatures should provide a negligent hiring cause of action against police departments for employing an officer who the department should have known is likely to engage in excessive force.
3. State legislatures should pass legislation that “requires current and prospective police officers to undergo mandatory implicit racial bias testing, including testing for bias in shoot/don’t shoot decision-making, and develop a clear policy for considering an officer’s level of racial bias in law enforcement certification, the hiring process, performance evaluations, and decisions about whether an officer should be deployed

# TRANSFORMING THE SYSTEM

to communities of color.” Candidates for police officer positions should also be required to pass psychological testing that screens out candidates who display a proclivity for aggression and/or violence.

4. Police departments should rely upon collaborative approaches that respect the dignity of individuals within the community, focus on problem-solving, and are generally more community-centered and build community trust. Tactics might include relying upon the use of structural and environment strategies to reduce crimes, such as adding lighting in hot spot areas, securing abandoned buildings, and building partnerships with community members to address specific crimes. The widespread and systematic use of police-civilian encounters such as stop, frisk, and questioning, misdemeanor arrests, and the issuing of tickets and summonses for less serious offenses should be prohibited.
5. Police departments should create early warning systems for detecting patterns of behavior, such as complaints filed against officers, or personal hardships like divorce, which indicate potential vulnerabilities for the officer and the department. The primary purpose of such systems is not to punish but to provide counseling to officers so as to reduce their level of risk as well risk to residents and communities.

# TRANSFORMING THE SYSTEM



## Promote Justice in Pre-trial Services & Practices

At all stages of the criminal process,<sup>9</sup> there should be decisions that are fair and reasonable under the circumstances. However, our due process guarantees have often been tenuous in practice. Current pretrial practices have the effect of coercing low-income individuals into pleas even when they are innocent. To protect the presumption of innocence, pretrial detention should be used only in exceptional cases; courts should afford counsel to individuals accused of committing a crime before their first court appearance; and pre-arrest diversion programs that do not result in a criminal record should be expanded.

### Five Solutions & Actions for Transformation:

1. Legislatures should pass legislative measures that do the following: abolish cash bail requirements; encourage the use of warning and citations rather than arrests; prohibit for-profit pretrial agencies; require that defendants be provided with counsel prior to bail determinations; incentivize restorative justice programs, including community prosecution programs and community courts that do not result in a criminal conviction as alternatives to incarceration; and establish time limits to allow the expeditious processing of arrested individuals with real consequences for courts that fail to meet these limits.
2. The judiciary and judicial ethics committees and organizations should encourage bail determinations that ensure that individual defendants are not being incarcerated for poverty and are instead being assessed for actual risk; encourage the use of release on personal recognizance or alternative conditions of release to manage pretrial risk; educate judges on their role in contributing to the criminalization of poverty when improper bail determinations are made; and establish court-based risk-assessment programs where needed.

<sup>9</sup> While not discussed in this section, immigration-related detention is also referenced and strongly discouraged in the sections on prisons and immigration.



# TRANSFORMING THE SYSTEM

3. Prosecutors and prosecutor organizations should ensure that prosecutors are not employing pretrial detention as a coercive and potentially unethical trial strategy; and create metrics of success that do not rely on the number of prosecutions or rate of conviction.
4. Community members, advocates, and activists should partner with legal aid organizations and other indigent defense organizations to monitor prosecutorial practices and demand that prosecutors who frequently misuse bail to coerce guilty pleas be disciplined for ethics violations.
5. Legislatures should pass laws that create pre-arrest diversion programs that do not result in convictions, which can be used as an alternative to incarceration and conviction. However, these programs should not be used as a tool for the heightened policing of low-income communities. They should be viewed as an alternative where a criminal record would be the only other option.

# TRANSFORMING THE SYSTEM



## Enhance Prosecutorial Integrity

Prosecutors should be unbiased, fair, and committed to transparent administration of justice. Unfortunately, studies show that prosecutors frequently have implicit biases against low-income people and people of color, and there are currently inadequate systems in place to prevent discriminatory outcomes. There should be measures to promote accountability and transparency and incentives that encourage diversion and reduction of prosecutions.

### Five Solutions & Actions for Transformation:

1. The Department of Justice (DOJ) should publish district-level data concerning the U.S. Attorneys' compliance with the Smart on Crime Initiative, a DOJ initiative to conduct a "comprehensive review of the criminal justice system in order to identify reforms that would ensure federal laws are enforced more fairly and ... more efficiently"<sup>10</sup>; issue guidance on reducing the impact of implicit racial bias in prosecutorial decision-making process; and review case selection and charging practices to ensure that only the most serious offenses with a substantial federal interest are pursued.
2. Local governments, prosecutors' offices, state legislatures, and Congress should encourage effective prosecutorial practices including prioritizing the prosecution of more serious offenses; adopting diversion programs and restorative justice initiatives; creating performance review standards that reward diversion and the removal of racial inequities, and prioritizing the prosecution of serious and violent offenses; raising the charging standard by requiring that prosecutors consider the social costs of mass incarceration when determining whether it is in the "interests of justice" to charge for a case; and focusing on the monitoring and training of inexperienced prosecutors.
3. The American Bar Association should revise Standard 3-3.9, which provides guidelines for prosecutors to dispose of a pending matter, to affirmatively encourage prosecutors to exercise discretion not to prosecute less serious acts.

<sup>10</sup> *Smart on Crime*, U.S. Att'y's Off., E. Dist. of Tx. (Apr. 20, 2016), <http://www.justice.gov/usao-edtx/smart-crime>.

# TRANSFORMING THE SYSTEM

4. Local and state governments, prosecutors' offices, and the federal government should require independent reviews of the administration of prosecutors' offices to ensure that there is equity in prosecutorial decision-making; and data collection on prosecutorial decision-making, disaggregated by race, religion, sex, gender identity, age, sexual orientation, ethnicity, sexuality, and religious affiliation, on charging determinations, prosecutions, and diversion.
5. The DOJ, Congress, local and state legislatures, and prosecutors' offices should ensure that there is fairness in the prosecutorial decision-making process by requiring routine implicit bias training for prosecutors; routine review of data metrics to expose racial disparities with the aim of promptly addressing them; and the incorporation of a racial impact review in performance review for individual prosecutors.

# TRANSFORMING THE SYSTEM



## Ensure Fair Trials and Quality Defense

Every accused person is entitled to a fair trial. In fact, indigent defendants have a constitutional right to competent representation at trial. *Yet, there is a national indigent defense crisis.* Additional resources should be devoted to ensure that there is effective indigent defense and fair jury representation at trial, while also making the system easier to navigate for everyone.

### Five Solutions & Actions for Transformation:

1. Congress, and local and state legislatures should pass legislation that requires a universal cap on criminal defense counsel caseloads; provide additional resources to increase indigent representation for misdemeanor offenses to ensure compliance with constitutional obligation; and increase payments to attorneys on the indigent defense panel by increasing the attorney compensation rate, especially rate for time outside the courtroom, with regular increases tied to increase in payments to prosecutors, to create incentives for attorneys to allocate adequate time and preparation for these cases.
2. Local bar associations and law schools should form partnerships with each other, courts, and defender attorney organizations to expand indigent defense programs.
3. The Department of Justice and federal prosecutors should enforce 18 U.S.C. 243, which prohibits racially discriminatory jury selection, by prosecuting prosecutor offices that have a pattern or practice of racial discrimination in the jury selection process.
4. The judiciary and local and state legislators should promote jury selection practices that restore party-controlled *voir dire*, which allows attorneys for both sides in a criminal trial to thoroughly question jurors about their relevant life experiences to eliminate the use of race or gender as proxies for experience; and explore alternatives to voter-based juror rolls that ensure that community members who are not on the voter rolls can nonetheless participate in juries.

# TRANSFORMING THE SYSTEM

5. The judiciary should offer hardship accommodations to jurors, which include access to childcare, transportation passes, or mileage reimbursement, to ease the logistical and financial burden that low-income jurors face.

# TRANSFORMING THE SYSTEM



## Encourage Fair Sentences

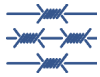
Overly punitive sentences, including mandatory sentences, result in long sentences that have increased the number of individuals who are incarcerated in the U.S. People convicted of crimes should receive fair sentences that reflect the severity of the crime that they have committed and be administered in a fair manner. Sentencing laws should be reformed to require transparency and mandate equitable practices that ensure that sentences are appropriate to the particular circumstances of an offense.

### Five Solutions & Actions for Transformation:

1. Congress, and state and local legislatures should repeal “truth-in-sentencing” laws, which limit both access to parole and decreases in the amount of time that a person convicted of an offense serves; prohibit the imposition of fines or jail time for failure to appear, which seek to punish rather than ensure appearance in court, to ensure that individuals are not incarcerated for missing a court date; shorten sentence lengths across the board; repeal mandatory minimum sentences; and adopt a goal of reducing incarceration in half by 2030 to encourage smarter sentences.
2. Legislatures should replace incarceration with community service and/or probation for less serious offenses.
3. The United States Sentencing Commission should revise the Sentencing Guidelines to allow for alternative to incarceration, especially for individuals who been convicted of less serious crimes. The Guidelines should require that judges review implicit bias bench cards to ensure that judges try to mitigate against their biases during sentencing.
4. Federal and state judges should place individuals in contempt of court for civil fees or fines only when the court has determined that the individual has the financial means to pay the fees or fines.
5. State governments, judicial ethics organizations, Congress, and state and local legislatures should require regular and routine training programs for judges on implicit bias and educate judges on their role in reducing mass incarceration. This training should include tools to reduce bias such as bench cards, which provide judges with short questions and guidelines to consider during judicial proceedings.



# TRANSFORMING THE SYSTEM



## Improve Conditions in Prisons

Decent, rehabilitative prisons are a basic human right<sup>11</sup> and crucial to the successful reintegration of formally incarcerated people. Yet the conditions in many prisons are so abysmal and abusive that incarcerated people leave the facilities in far worse physical and emotional shape than they entered. It is crucial that prison conditions do not violate the basic human rights of incarcerated individuals. Prisons must be focused on rehabilitation and should provide opportunities for individuals to further their education, learn skills, receive treatment for drug addiction, and counseling for mental health issues. People who are incarcerated should be able to maintain their social ties to the community by remaining in close contact with their families.

### Five Solutions & Actions for Transformation:

1. Prison officials and the Bureau of Prisons (BOP) should ensure that LGBTQ-inclusive healthcare is provided and make access to condoms and barriers freely available to incarcerated people, and transgender incarcerated people should be provided with any required therapies, including hormone therapy.
2. Independent commissions should inspect prison conditions and report on their compliance with human rights standards. These commissions should include formerly incarcerated people.
3. Congress and state governments should abolish the use of solitary confinement as a disciplinary measure for incarcerated people. It should further be completely banned for young people in all prisons and jails and for individuals with mental, psychiatric, and/or physical health issues and/or disabilities.
4. Prison officials and the BOP should eliminate prison practices that violate incarcerated people's human rights, including the shackling of pregnant incarcerated people and the shackling of women during childbirth.
5. The National Council for Incarcerated and Formerly Incarcerated Women has identified several policy initiatives that Congress and state

<sup>11</sup> Office of the United Nations High Commissioner for Human Rights, *Human Rights and Prisons*, <http://www.ohchr.org/Documents/Publications/training11Add3en.pdf>.

# TRANSFORMING THE SYSTEM

governments, and prison officials should take, such as including the voices of incarcerated and formerly incarcerated individuals in assessing policy initiatives that affect incarcerated people; requiring the provision of gender-specific and gender-sensitive medical care; providing education and care for women with HIV, AIDS, and Hepatitis C, including treatment for the curable Hepatitis C; providing prison educational programs that allow individuals to obtain a trade or vocation; and allowing access to appropriate feminine hygiene products including condoms and dental dams.

# TRANSFORMING THE SYSTEM



## Require Equitable Parole and Probation Practices

Parole and probation practices should be fair and consistent. They should be used as a tool to allow accused persons to safely remain in their communities. Instead, they are becoming tools for increased surveillance and to funnel people back into full custody. Parole and probation practices should be transparent and aimed at reducing racial disparities. Incarceration for technical violations should be avoided.

### Five Solutions & Actions for Transformation:

1. State and local governments should eliminate incarceration for parole and probation violations and instead use sanctions that are reflective of the violation, such as community service for missed meetings.
2. There should be community-based supervision where there are repeat violations of parole and/or parole restrictions.
3. Legislatures should prohibit long-term incarceration for minor parole violations.
4. Parole and probations officers should adopt an approach that focuses on an individual's risk of committing a crime a new crime and favors release over incarceration.
5. Legislatures should require the data collection, reporting, and publication of data disaggregated by race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin, and religious affiliation.

# TRANSFORMING THE SYSTEM



## Foster Successful Reintegration into the Community

Everyone is entitled to a second chance to become a productive member of society. However, recently released individuals face a series of obstacles to successful reintegration. Several states have instituted barriers to reentry including bans on voting, restrictions on accessing social services, and employment limitations. These barriers to reentry should be eliminated.

### Five Solutions & Actions for Transformation:

1. State, local, and federal governments should repeal post-conviction consequences that hamper successful reentry, including barriers to voting, employment, serving on juries, and social services; institute graduated reentry and vocational programs, which provide structured transitional services to individuals within a year of release, such as the Montgomery Pre-Release Center that focuses on securing a job prior to release; require that reentry programs be competent in providing support to LGBTQ individuals; prohibit the use of criminal background checks that are not specifically related to the job for employment purposes.
2. Legislatures should establish and fund incarceration and post-incarceration programs specifically devoted to educating incarcerated and previously incarcerated persons. These education programs should include vocational programs intended to provide job skills.
3. Congress should change the definition of homeless to incorporate people who have been incarcerated for more than 90 days for the purpose of expanding housing options available to formerly incarcerated individuals because “the McKinney Vento definition of homelessness that does not recognize individuals in jail or prison for longer than 90 days as in need of supportive housing for homeless individuals.”<sup>12</sup>

12 Fortune Society, Advocacy, Policy Recommendation, <http://fortunesociety.org/#advocacy>.

# TRANSFORMING THE SYSTEM

4. Legislatures and courts should not incarcerate individuals who can't afford to pay child support and should provide opportunities for imprisoned persons to maintain contact with family and other support networks by establishing an office tasked with maintaining family affairs and requiring that incarcerated people are sentenced to prisons near their support networks.
5. The National Council for Incarcerated and Formerly Incarcerated Women has identified several policy initiatives that Congress and state governments should take, which would encourage the collaboration of probate, family, and criminal courts prior to an individual's release: fund legal and counseling services to facilitate family unification; provide entrepreneurial and educational skills training opportunity; prohibit parole and probation policies that automatically prevent formerly incarcerated people from visiting prisons and jails; eliminate income deduction to halfway houses; require the inspection of halfway house living conditions by qualified specialists; fund community-based halfway houses and treatment over privatized entities; and hire formerly incarcerated individuals to staff halfway houses.

# TRANSFORMING THE SYSTEM



## Foster an Environment for Respecting Children's Rights

Children should not spend the rest of their lives paying for childhood mistakes. Nor should they be subjected to policing and introduced to the criminal justice system while in school. However, young people are increasingly exposed to the criminal justice system through over-policing in schools, criminalization for minor misconduct, and lifetime placement on sex-related registries. The juvenile justice system should be overhauled to protect young people's rights. Young people who are convicted of sex-related offenses should never be placed in registries. Schools should be safe environments where students do not worry about being policed or being subjected to harsh disciplinary measures.

### Five Solutions & Actions for Transformation:

1. Congress and the Department of Justice (DOJ) should de-incentivize ineffective programs, such as "Scared Straight" and boot camps, which adopt a punitive approach and scare tactics to discourage antisocial behaviors; and eliminate the automatic transfer of young people into adult courts.
2. Legislatures should abolish life without parole for offenses committed before the individual was 18 years of age and reward individuals and agencies in the criminal justice system that adopt policies that ensure that people who were sentenced to life without parole for crimes they committed when younger than 18 have their sentences reviewed.
3. Legislatures should raise the age of juvenile court jurisdiction to at least 21 years old with additional, gradually diminishing protections for young adults up to age 25 because young people are still developing.
4. Congress should strengthen the Juvenile Justice and Delinquency Prevention Act,<sup>13</sup> which focuses on the prevention and control of crime conducted by young people and improving the juvenile justice system,

13 Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 42 U.S.C. § 5601 et seq.



# TRANSFORMING THE SYSTEM

and support evidence-supported programs with technical support, incentive grants, and information sharing.<sup>14</sup>

5. Local government and school administrations should facilitate the repeal of overly punitive school discipline policies that push schoolchildren into the criminal justice system, such as automatic suspensions or referral to police departments; and instead adopt restorative justice practices.

<sup>14</sup> Mark Soler et al., *Juvenile Justice: Lessons for a New Era*, 16 Georgetown J. on Poverty L. & Pol'y 483, 538-41 (2009).

# TRANSFORMING THE SYSTEM



## Eradicate the Criminalization of Sex, Gender, and Sexuality

We all should have the freedom to live without fear of criminalization because of our expressed sex, gender, or sexuality. Nonetheless, women, women of color, LGBTQ people, and people suspected of engaging in sex work are often criminalized and profiled, often because of their expressed gender identities, especially as it intersects with race and poverty. Law enforcement agencies should adopt gender-sensitive use of force guidelines and training. Human trafficking survivors should not be arrested and should be able to vacate past convictions; and the sex trade should be decriminalized, or its enforcement should be de-prioritized.

### Five Solutions & Actions for Transformation:

1. Local and state legislatures should pass legislation that prohibits the use of force, including chokeholds, Tasers, and/or other forms of physical force on pregnant women or children in favor of de-escalation; and require police officers to respect stated and various genders, sexualities, and gender identities during all police interactions, including searches and placements in police custody.
2. Local law enforcement agencies, chiefs of police, and police administrators should enforce the laws that bar police officers from engaging in sexual harassment, sexual abuse, and sexual assault by disciplining and/or suspending officers who have engaged in such conduct and ensure that police and police management are thoroughly trained on the implementation of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement**.
3. Local and state legislatures should pass legislation that grants a *vacatur* (a remedy that completely sets aside a criminal conviction and treats the conviction as if it never existed) to survivors of human trafficking as well as people caught in the criminal justice system via the sex trade.
4. Local and state legislatures should pass legislation that decriminalizes prostitution or sex work. At a minimum, prostitution and related crimes should be de-prioritized. Also, eliminate the possession of condoms as

# TRANSFORMING THE SYSTEM

proof of intent to solicit or engage in prostitution or as evidence of a crime.

5. Criminal justice actors, including law enforcement agents, prosecutors, defense attorneys, judges, and parole and probation officers, should receive training on the implementation of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement** to sensitize them and enable them to respond to persons of varying expressed sexes, genders, gender identities, and sexualities.

# TRANSFORMING THE SYSTEM



## Eliminate the Criminalization of Poverty

Living in poverty should not mean that an individual should be subject to incarceration and heightened policing. However, instead of increasing opportunities to succeed, our laws too often criminalize the condition of living in poverty. Lawmakers should eliminate practices that require excessive justice-related fines and tariffs from indigent individuals, eliminate municipal ordinances that essentially criminalize aspects of being homeless, and prohibit debt collection practices that harass people after they have served their prison terms.

### Five Solutions & Actions for Transformation:

1. Local and state governments should prohibit law enforcement from profiling individuals on the basis of perceived housing status and invest in more comprehensive long-term and short-term housing options; ensure that housing placements respect individuals self-identified gender specifications; improve police training on interacting with homeless communities, including LGBTQ youth; and enact an enforceable Homeless Bill of Rights that ensures that homelessness is not treated as a crime.
2. Local and federal governments should set caps on criminal justice debt; provide a clear statutory right that allows the court to waive the fees and fines of low-income individuals related to their involvement in the justice system. Judges should not impose interest and additional fees on people who cannot afford to pay in full on sentencing day.
3. Legislatures should eliminate the use of probation administered by for-profit probation companies to collect payments toward fines and fees.
4. Courts should establish debt payment plans for the repayment of criminal justice debts.
5. Local and state governments should repeal legislation authorizing the imposition of user fees, including public defender fees; repeal legislation imposing mandatory “assessments” for both criminal and civil offenses; review municipal and state court procedures and rules

# TRANSFORMING THE SYSTEM

to ensure that fine and fee collection comports with constitutional protections for due process and equal protection of the law, so that people are not jailed for nonpayment of civil fines, fees, and/or penalties they cannot afford to pay; ensure that counsel is appointed at the sentencing and post-sentencing enforcement stage whenever a person faces incarceration for nonpayment of a fine or fee; and eliminate incarceration and jailing for civil penalties and fines including for child support that the person cannot afford to pay.

# TRANSFORMING THE SYSTEM



## Eliminate the Criminalization of Public Health Matters

The criminal justice system has too often been used to deal with issues that deserve a public health response. Instead, individuals of various physical ability levels and with mental health concerns should be given effective and appropriate treatment in community health centers, not policed and incarcerated; people who have been convicted of offenses for sex-related conduct should not be placed in overly broad and ineffective registries; and drug policy should be focused on harm reduction and treatment for addiction, rather than as a source for mass incarceration.

### Five Solutions & Actions for Transformation:

1. Legislatures should pass legislation that ensures that there are adequate resources and facilities for treating people with mental health issues and public education regarding mental health screenings and expanded services available through the Affordable Care Act.
2. Local governments and police departments should build diversion opportunities into all phases of the criminal justice system. In particular, they should include pre-booking diversion and specialized police responses, such as a Crisis Intervention Team, in which law enforcement partners with mental health systems to train dispatchers and officers to recognize and respond to a conflict involving mental health issues, de-escalating mental health crises when they occur, and diverting a person dealing with mental health issues to a treatment center.<sup>15</sup>
3. Local governments and police departments should ensure that police officers are trained on interacting with and assisting people with physical and mental health issues, fostering a culture of respect for

15 The first CIT program was created in 1988 in Memphis, TN, after a tragic incident in which police killed a man with mental health issues. *The New Asylums: Some Frequently Asked Questions*, frontline, <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/etc/faqs.html#5> (accessed 7 July 2016). The Memphis Police Department and the "Memphis Chapter of the Alliance for the Mentally Ill (AMI)" partnered to create a pre-booking diversionary approach to mental health crisis events that deescalated police encounters and provided treatment to people with mental health issues rather than incarceration, or violent altercation. The City of Memphis, *Crisis Intervention Team*, <http://www.memphistn.gov/Government/PoliceServices/CrisisInterventionTeam.aspx> (accessed 7 July 2016). It has become a model for thousands of similar programs throughout the country. Lesley Buchan, National Association of Counties, *Ending the Cycle of Recidivism: Best Practices for Diverting the Mentally Ill from County Jails* 14 (2003), <http://namimarin.org/wp-content/uploads/2013/09/jail-diversion-and-mentally-ill1.pdf>.



# TRANSFORMING THE SYSTEM

human dignity and encouraging respect for community members through de-escalation training, and trainings administered by individuals of different abilities. Within the department, there should be more intensive training and law enforcement agents who will serve as in-house experts and primary contact people when community members are coping with concerns relating to physical and mental health.

4. Congress, and local and state legislatures should ensure that registration for individuals convicted of sex-related offenses is limited to adults who pose a high risk of repeating their offenses; should limit access to registries to law enforcement officials and only on a need-to-know basis; and should support comprehensive sexual education programs.
5. Local and state legislators should adopt a harm reduction model for drug policy that focuses on treating the underlying issues of addiction over criminalization and encourages law enforcement to refer eligible arrestees to social services.<sup>16</sup>

<sup>16</sup> Responding to the epidemic of substance abuse in the region and the nation, the mayor of Ithaca, Svante Myrick, formed the Municipal Drug Policy Committee, which released their report, *The City of Ithaca's Plan: A Public Health and Safety Approach to Drugs and Drug Policy*, after a year-long study on the best approach to substance abuse in the municipality. The plan called for a multi-pronged strategy to respond to drug use that is rooted in harm reduction.

# TRANSFORMING THE SYSTEM



## Promote Fairness in Criminal Matters with Immigration Consequences

Our laws and practice should reflect our commitment to human rights as a nation. Yet some immigrants experience mandatory detention, racial profiling, and due process violations because of laws and policies that violate their human rights. Lawmakers should renew our commitment to human rights; eliminate collaborations between local law enforcement and immigration authorities; protect the human rights of families and children who migrate; eliminate the expansion of exclusion based on aggravated felonies; eliminate the use of detention for immigration-related matters; stop deportations; and provide individuals in immigration proceedings access to lawyers.

### Five Solutions & Actions for Transformation:

1. The Department of Homeland Security (DHS) should provide training and certification for local and federal agents on human rights and hold officials accountable when they violate domestic or international human rights principles.
2. To facilitate the protection of the human rights, the Administration should allow parents who have Temporary Protected Status (TPS), which provides temporary refuge to those already in the U.S. who cannot safely return home due to ongoing armed conflict, natural disasters, or other extraordinary circumstances, to apply for derivative TPS for their children; and expedite applications under the Central American Minors (CAM) Refugee/Parole Program, which seeks to provide certain minors with a legal, safe alternative to undertaking dangerous, unauthorized journeys to the United States by enabling minors affected by violence in Central America to legally reunite with their parents who are living lawfully in the United States.
3. The DHS should end the use of family detention and utilize a range of alternatives, including placing families in community-based case management services or licensed child welfare programs that support the least restrictive form of custody, safety, and access to legal services.

# TRANSFORMING THE SYSTEM

4. To restore due process in the immigration system, Congress should decriminalize the immigration system by **fixing the 1996 immigration laws**, Illegal Immigration Reform and Responsibility Act (IIRAIRA), and the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to limit aggravated felonies and end mandatory detention; restore discretion and due process for all individuals who come into contact with the criminal justice and immigration systems; eliminate bars to entry based on prostitution-related activities; revise bars based on moral character, especially as they relate to prostitution-related activities; and eliminate permanent deportation.
5. To further the policy objective of encouraging the cooperation of communities in maintaining public safety, the administration should terminate the Priority Enforcement Program. (PEP is a federal program that checks fingerprints taken by local law enforcement against immigration databases. All fingerprints taken by local law officers at arrest are shared with the FBI, and then passed to U.S. Immigration and Customs Enforcement (ICE)).

# TRANSFORMING THE SYSTEM

## CRIMINAL JUSTICE POLICY SOLUTIONS

 <p>PROMOTE COMMUNITY SAFETY THROUGH <b>Alternatives to Incarceration</b></p>	 <p>CREATE FAIR AND EFFECTIVE <b>Policing Practices</b></p>
 <p>PROMOTE JUSTICE IN <b>Pre-Trial Services &amp; Practices</b></p>	 <p>ENHANCE <b>Prosecutorial Integrity</b></p>
 <p>ENSURE FAIR TRIALS AND <b>Quality Indigent Defense</b></p>	 <p>ENCOURAGE <b>Equitable Sentencing</b></p>
 <p>ENSURE DECENT <b>Detention Conditions</b></p>	 <p>REQUIRE EQUITABLE <b>Parole and Probation</b></p>
 <p>FOSTER <b>Successful Reintegration</b></p>	 <p>FOSTER AN ENVIRONMENT FOR RESPECTING <b>Children's Rights</b></p>
 <p>ERADICATE THE CRIMINALIZATION OF <b>Sex, Gender, &amp; Sexuality</b></p>	 <p>ELIMINATE THE <b>Criminalization of Poverty</b></p>
 <p>ELIMINATE THE <b>Criminalization of Public Health Issues</b></p>	 <p>PROMOTE FAIRNESS AT THE INTERSECTION OF <b>Immigration and Criminal Justice</b></p>

# TRANSFORMING THE SYSTEM



PROMOTE COMMUNITY SAFETY THROUGH

## Alternatives to Incarceration

Our criminal justice system should ensure that all individuals feel safe and secure in their communities. The criminal justice system should be administered in a fair and just manner and should incorporate mechanisms to hold criminal justice actors who misuse their power accountable.

However, our policies have been overly punitive and have created incentives that promote inefficiency, lack of transparency, racial disparities, and high levels of incarceration. To address these issues, our criminal justice policies should have a clearly defined mission of substantially reducing incarceration, taking a step toward transforming the system into one that reflects our nation's commitment to equal treatment, accountability, and fairness. These policies should incentivize the reductions of the incarceration rate, work to eliminate unfair racial disparities, and aim to heal communities that have been harmed by the high rates of incarceration through the incorporation of restorative justice practices and the creation of community healing spaces.

## Committing to reducing incarceration

Criminal justice policies should seek to substantially reduce<sup>17</sup> incarceration, which are at unacceptable levels.<sup>18</sup> Criminal justice officials should be educated about the importance of carrying out this goal, fostering an environment for transformation.

<sup>17</sup> Ibid. See also Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, 2012.

<sup>18</sup> See generally Roberts, *supra* note 2.

# TRANSFORMING THE SYSTEM

For its part, the administration should:

- ▶ Draft an Executive Order—based on the executive authority to set prosecutorial priorities and to manage the federal prisons system—that states and federal law enforcement agencies should prioritize policies and practices that reduce the population of people who are imprisoned and prioritize community investment over imprisonment as a tactic for ensuring that the law is enforced;<sup>19</sup>
- ▶ Require local and state grantees of federal funds relating to law enforcement activities to provide information relating to specific demonstrable compliance with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which prohibits discrimination based on race, color, or national origin in their applications to the federal government;<sup>20</sup>
- ▶ Establish a National Taskforce or Commission on Justice “to review and evaluate all components of the criminal justice system for the purpose of making recommendations to the country on comprehensive criminal justice reform;”<sup>21</sup>
- ▶ Establish an interagency working group to develop a strategy for the elimination of racial and ethnic discrimination in the United States; and
- ▶ Take steps to ensure that pardons are used more extensively to address injustice in the criminal justice system, including providing additional resources to the Pardons Office.<sup>22</sup>

The Department of Justice (DOJ) should:

- ▶ De-prioritize the prosecution of less serious crimes and ensure that prosecutors have incentives to employ non-incarceration alternatives that do not result in criminal records by evaluating prosecutors on their use of non-incarceration alternatives;
- ▶ Ensure that the U.S. Department of Justice Civil Rights Division’s (CRD) standard for initiating investigations into law enforcement agencies with a pattern and practice of discrimination reflects all legal and constitutional obligations and allows for

19 *Heckler v. Chaney*, 470 U.S. 821 (1985); *Reno v. American-Arab Anti-Discrimination Committee* 525 U.S. 471 (2000).

20 Submission of The Opportunity Agenda to the President’s Task Force on 21st Century Policing, Feb. 12, 2016.

21 Final Report of the President’s Task Force on 21st Century Policing, President’s Task Force on 21st Century Policing (2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

22 Josh Gerstein, “Obama’s Drug-Sentencing Quagmire,” *Politico* (Jan. 5, 2015), <http://www.politico.com/story/2015/01/barack-obama-drug-sentencing-policy-113954?o=2>.

# TRANSFORMING THE SYSTEM

investigations of all police departments that have reportedly violated the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141;<sup>23</sup>

- ▶ Provide the CRD with additional capacity and resources to further meet the need to hold criminal justice officials accountable; and
- ▶ Coordinate the work of the CRD with that of other divisions within the DOJ, including the Office of Community Oriented Policing Services (COPS), to ensure that police departments that are currently under investigations or that have outstanding cases for constitutional violations, are not awarded grants to hire additional police officers.<sup>24</sup>

## Congress should pass legislation that:

- ▶ Aims to reduce the prison population, consistent with the Reverse Mass Incarceration Act, which is a proposal for comprehensive reform that has not been introduced yet.<sup>25</sup>

## Congress, and local and state legislatures, and the local, state, and federal executive branches should adopt legislation and/or policies that do the following:

- ▶ Require training for educators, school administrators, criminal justice actors, mental health professionals, and social service providers on the effects of mass incarceration and the promotion of alternate responses to misconduct that do not include criminalization;
- ▶ Review existing laws and consolidate and/or eliminate redundant criminal laws;<sup>26</sup>

23 The Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 states:

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

24 The Opportunity Agenda, *Solutions for Equal Justice and Safety Accountability in Federal Funding to Local Police Departments*, February 2016.

25 “The Reverse Mass Incarceration Act would contain four main components: (1) a new grant of \$20 billion in incentive funds over 10 years to states; (2) a requirement that in order to receive funds, states reduce prison populations by 7 percent every three years without increasing crime rates; (3) a clear methodology for the amounts states receive; and (4) a requirement that federal funds are used by states for evidence-based programs proven to reduce crime and incarceration.” Lauren Brooke-Eisen & Inimai Chettiar, Brennan Center for Justice, *Reverse Mass Incarceration Act 7* (2015).

26 *Overcriminalization*, Right on Crime, <http://rightoncrime.com/category/priority-issues/overcriminalization/>, (last visited 7 July 2016).



# TRANSFORMING THE SYSTEM

- ▶ Recommit to international human rights and domestic civil rights norms and principles by allowing for inspections of U.S. prisons by United Nations committees, complying with human rights standards for racial equity, and incorporating human rights into employee trainings, orientations, and handbooks for employees in institutions within the criminal justice system;
- ▶ Incorporate the voices of people who have been directly affected by the criminal justice system, including formerly incarcerated people, such as members of JustLeadership and the National Council for Incarcerated and Formerly Incarcerated Women, and survivors of police violence, in substantive decision-making processes;
- ▶ Establish local and state taskforces on justice “to review and evaluate all components of the criminal justice system for the purpose of making recommendations ... on comprehensive criminal justice reform” for that particular locality;<sup>27</sup>

The **U.S. Department of State** in collaboration with the **U.S. Department of Justice** should develop an outreach strategy to ensure that all law enforcement agencies comply with treaty obligations and human rights norms.

In addition to pressuring government officials to support the above actions, **advocates, activists, cultural workers and artists, and civil society** should:

- ▶ Continue to conduct widespread public education about the problems with mass incarceration, including the community harms, lack of fairness, inefficiencies, and costs;
- ▶ Adopt a framework that allows for issues experienced by community members with intersectional identities, including women of color, black women, Muslim youth, Native American women and youth, LGBTQ people of color, transgender people of color, et al., to remain central to the conversation. This may include ensuring that speakers at rallies represent diverse backgrounds, promoting diversity among spokespeople who advocate for transformation, and continuously engaging in self-reflection to ensure that voices are not being silenced within the movement for transformation;<sup>28</sup>
- ▶ “At protests, demonstrations, and other actions calling attention to state violence,

<sup>27</sup> Final Report, *supra* note 21, at 85.

# TRANSFORMING THE SYSTEM

include the faces, names, and stories of Black women alongside those of Black men,”<sup>29</sup> as well as others who have experienced state violence;

- ▶ Uplift stories that highlight how the criminal justice system has affected Native American people, whose stories have been absent in much of the mainstream media although they have incarceration and police killing rates comparable to that of African Americans;<sup>30</sup>
- ▶ Incorporate the voices of people who have been directly affected by the criminal justice system, including formerly incarcerated people and survivors of police violence;
- ▶ Adopt communications strategies that have been shown to effectively educate the public about the harms of mass incarceration and implement the messaging tools in the toolkits that accompany this report to ensure that an effective and consistent criminal justice narrative is adopted;<sup>31</sup> and
- ▶ Review the demands in this Report as well as the shortened demands in the accompanying fact sheets and devise demands that are specifically tailored to address local realities.

28 Kimberle Williams Crenshaw & Andrea J. Ritchie, African American Policy Forum, Center for Intersectionality and Social Policy Studies, *#SayHerName: Resisting Police Brutality Against Black Women*, (2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF\\_SMN\\_Brief\\_Full\\_singles-min.pdf](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf). Policy platforms should be developed using an intersectional gender and racial lens to ensure that comprehensive solutions to state violence are being built and that the myriad ways in which it affects the lives of all Black people are addressed.... Skills to talk about the multiplicity of ways in which state violence affects all Black women and girls should be continuously developed. In so doing, stakeholders can move beyond a frame that highlights only killing. All Black women—transgender, non-transgender, and gender-nonconforming—must be included in this reconceptualization.

29 Ibid.

30 See Lakota People's Law Project, *Native Lives Matter 1* (March 2015). Much of the rhetoric has been justifiably dedicated to African Americans in urban areas, who certainly suffer from disproportionate criminal justice outcomes. However, statistics uncovered and compiled by the Lakota People's Law Project demonstrate that American Indians, in fact, suffer the most adverse effects of a criminal justice system that consistently reifies itself as structurally unjust. Ibid.

31 See generally Jill Mizell & Loren Siegel, *An Overview of Public Opinion and Discourse on Criminal Justice Issues* (Aug. 2014).

# TRANSFORMING THE SYSTEM



## *Justice Based on Healing and Forgiveness:*

### SENTENCING IN A MURDER CASE<sup>32</sup>

In 2010, 19 year-old Conor McBride fatally shot his girlfriend, Ann Grosmaire, following a days-long dispute. He turned himself in to the local police. He faced the mandatory sentence of life in prison, with the possibility of the death penalty. There was no place in this system, however, to address the sudden and bewildering emptiness that her death caused her parents, Kate and Andy Grosmaire. The Grosmaires were unable to process that their daughter was killed by the man they had expected to be their son-in-law. Kate Grosmaire didn't initially want to see Conor but eventually felt compelled to speak with him "Before this happened, I loved Conor," she says. "If I defined Conor by that one moment—as a murderer—I was defining my daughter as a murder victim. And I could not allow that to happen." The Grosmaires reached out to restorative justice advocate and facilitator Sujatha Baliga and began the process to understand what happened to their daughter and how Colin could begin to atone.

Conor, the Grosmaires, the McBrides, a victim's advocate, and the state's attorney gathered as part of the pre-plea process. The Grosmaires had Conor answer their most detailed, intimate questions about their daughter's death, and let him know in heart-wrenching depth all that they had lost. Conor had the opportunity to confront what his actions had cost Ann's family, himself, and his family. "The Grosmaires said they didn't forgive Conor for his sake but for their own. 'Everything I feel, I can feel because we forgave Conor,' Kate said. 'Because we could forgive, people can say her name.... [W]hen people can't forgive, they're stuck... I don't have to stay stuck in that moment where this awful thing happened. Because if I do, I may never come out of it. Forgiveness for me was self-preservation.'" And yet their forgiveness provided Conor a path to redemption: "With the Grosmaires' forgiveness," he said, "I could accept the responsibility and not be condemned."

*"Forgiveness for me was self-preservation."*

Based in part on the recommendations of the pre-plea conference, Conor's sentence was shortened to 20 years instead of the death penalty or life in prison. As part of the agreement, he's agreed to learn about teen-dating violence, start Restorative Justice Programs inside his prison, and speak at teen-dating violence events. Because Ann loved animals, he also plans on volunteering at animal shelters after he gets out of prison, as part of Kate's request that he "do the good works of two people because Ann is not here to do hers."

32 Paul Tullis, "Can Forgiveness Play a Role in Criminal Justice?," *The New York Times Magazine* (Jan. 4, 2013), <http://www.nytimes.com/2013/01/06/magazine/can-forgiveness-play-a-role-in-criminal-justice.html>; *Transcript of Awakin Call with Sujatha Baliga*, *Daily Good* (Jan. 27, 2015), <http://www.dailygood.org/story/950/transcript-of-awakin-call-with-sujatha-baliga-awakin-org>. The Opportunity Agenda's 2015 Communications Institute Fellow sujatha bulaga was closely involved in developing a restorative justice process for this case.

# TRANSFORMING THE SYSTEM

## Creating smart incentives and requiring proper accountability

There are a multitude of perverse incentives that encourage the continuous reliance on incarceration.<sup>33</sup> Current performance measures, for example, often focus on the volume of prosecutions and incarcerations rather than decreases in crime or improvements in community safety.<sup>34</sup>

In order to promote efficient and effective law enforcement, performance measures should be modified to support evidence-based strategies that promote community safety. New strategies that deliberately incentivize reducing incarceration should be adopted.

To this end, the **Department of Justice** should:

- ▶ Create a Department of Justice Taskforce that would identify criminal justice grants for which smart incentives could be used to promote criminal justice reform and adopt the recommendations of the Taskforce;<sup>35</sup> and
- ▶ Encourage law enforcement actors to abandon volume-based metrics in performance evaluations by evaluating officers on levels of diversion to programs that do not require a criminal conviction; reduce racial disparities in civilian contacts and/or low levels of racial disparities; and solicit self-provided reports of instances where they opted to engage in problem-solving to diffuse a situation rather than detain individuals.

In addition, **Congress, and state, county, and local legislatures** should pass legislation that:

- ▶ Prohibits volume-based performance measures for criminal justice actors;<sup>36</sup>
- ▶ Provides protection for whistle-blowers to report unofficial volume-based performance

<sup>33</sup> See generally, Inimai Chettiar et al., Brennan Center for Justice, *Reforming Funding to Reduce Mass Incarceration*, (2015) which discusses existing incentives within the criminal justice system that promote high-volume incarceration rates and the need for success-oriented incentives.

<sup>34</sup> Ibid. at 30.

<sup>35</sup> See Nicole Fortier & Inimai Chettiar, Brennan Center for Justice, *Success-Oriented Funding: Reforming Federal Criminal Justice*, Grants18 (2014).

<sup>36</sup> Ibid.

# TRANSFORMING THE SYSTEM

metrics<sup>37</sup> and strict penalties for law enforcement agencies with such unofficial policies;<sup>38</sup>

- ▶ Creates incentives for law enforcement agencies that are able to reduce undue racial inequities by, for example, evaluating racial disparities in individual officers' contacts with the community, as compared to the community population; and evaluating police officers by the demographic information of those who have filed a complaint against that police officer;<sup>39</sup>
- ▶ Ensures that predictive policing programs, such as CompStat, are not inadvertently used to unnecessarily increase arrests, and officers are instructed that knowledge of "hot spots" does not provide a basis for searching and/or seizing individuals at the hot spot locations;<sup>40</sup>
- ▶ Promotes diversity among criminal justice system actors by requiring that criminal justice demographic profiles match that of the community within 10 percentage points;<sup>41</sup> and
- ▶ Requires transparency in law enforcement by making data publicly available.<sup>42</sup> This data should include comprehensive data disaggregated by incident and demographic information at various points in the criminal justice system.

37 There is some evidence that there should be additional protections for whistle-blowers. See J. David Goodman, "Officer Who Disclosed Police Misconduct Settles Suit," *The New York Times* (Sept. 29, 2015), [http://www.nytimes.com/2015/09/30/nyregion/officer-who-disclosed-police-misconduct-settles-suit.html?\\_r=0](http://www.nytimes.com/2015/09/30/nyregion/officer-who-disclosed-police-misconduct-settles-suit.html?_r=0). This discusses a federal suit that "included allegations of a quota system at the [New York] Police Department, rampant misconduct in the taking of crime reports and a culture of retaliation against whistle-blowers."

38 Ibid.

39 Jessica Eaglin & Danyelle Solomon, Brennan Center for Justice, *Reducing Racial and Ethnic Disparities In Jails: Recommendations for Local Practice* 30-32 (2015).

40 Aaron Cantu, "Algorithms and Future Crimes: Welcome to the Racial Profiling of the Future," *Alternet* (Feb. 28, 2014), <http://www.alternet.org/algorithms-and-future-crimes-welcome-racial-profiling-future>.

41 Ibid. 35-37.

42 See Chettiar et al., *supra* note 33, at 33.

# TRANSFORMING THE SYSTEM

## Ensuring racial equity in the criminal justice system

There is a growing consciousness about how discriminatory criminal justice practices have affected communities of color,<sup>43</sup> which in turn affects the perceived legitimacy of the criminal justice system.<sup>44</sup> The United Nations Human Rights Committee has indicated that the United States “should continue and step up its efforts to robustly address racial disparities in the criminal justice system, including by amending regulations and policies leading to racially disparate impact at the federal, state, and local levels.”<sup>45</sup>

Law enforcement agents are often rewarded for increasing volumes of incarcerated individuals and often racially profile in response to this incarceration incentive.<sup>46</sup> These perverse incentives encourage racial discrimination in the criminal justice system as police officers target marginalized communities to meet these expectations.<sup>47</sup>

To address this racial inequity, local, state, and federal legislatures, and the local, state and federal executive branches should:

- ▶ Expressly commit to the elimination of unwarranted racial disparities in the criminal justice system in legislation and/or resolution;<sup>48</sup>

43 See, e.g., Becky Pettit & Bruce Western, “Mass imprisonment and the Life Course: Race and Class Inequality in US Incarceration,” 69 *Am. Sociological Rev.* 151 (2004) (discussing inequality in the imprisonment of men of color); Alexander, *supra* note 17 (arguing that the mass imprisonment of people of color is a new form of Jim Crow); and Loic Wacquant, *From Slavery to Mass Incarceration* (2002) (discussing the use of the carceral state to imprison people of color).

44 See Jill Mizell & Loren Siegel, *An Overview of Public Opinion and Discourse on Criminal Justice Issues* 22 (2014): “A 2014 survey by The Opportunity Agenda found that 69 percent of Americans felt the criminal justice system needed major improvements (50 percent) or a complete redesign (19 percent).”

45 United Nations Human Rights Committee, *Concluding Observations on the Fourth Report of the United States of America* (2014), [http://www.ccrjustice.org/sites/default/files/assets/files/HRC\\_2014\\_ConcludingObservationsUSGvt.pdf](http://www.ccrjustice.org/sites/default/files/assets/files/HRC_2014_ConcludingObservationsUSGvt.pdf). For additional information about the United States’s compliance with human rights norms, see Center for Constitutional Rights, *UN Working Group of Experts on People of African Descent Fact-Finding Mission to the United States Statement of the Center for Constitutional Rights* (Jan. 2016), [http://www.ccrjustice.org/sites/default/files/attach/2016/01/CCR\\_UNWGEPAD\\_Submission-20160125.pdf](http://www.ccrjustice.org/sites/default/files/attach/2016/01/CCR_UNWGEPAD_Submission-20160125.pdf).

46 Ibid.

47 “I-Team: More NYPD Officers Say There’s Proof of Quota-Driven Arrests,” *NBC N.Y.* (April 1, 2016) [http://www.nbcnewyork.com/on-air/as-seen-on/I-Team\\_-More-NYPD-Officers-Say-There\\_s-Proof-of-Quota-Driven-Arrests\\_New-York-374227361.html](http://www.nbcnewyork.com/on-air/as-seen-on/I-Team_-More-NYPD-Officers-Say-There_s-Proof-of-Quota-Driven-Arrests_New-York-374227361.html).

48 Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (2008).

# TRANSFORMING THE SYSTEM

- ▶ Require racial impact statements prior to the implementation of criminal justice policies and in reviewing the enforcement of existing policies;<sup>49</sup>
- ▶ Mandate regular implicit bias training for all participants in the criminal justice system, including police officers, sheriffs, prosecutors, judges, probation and parole officers, and other criminal justice system officials;<sup>50</sup>
- ▶ Require disaggregated data collection on the race and ethnicity of individuals who come into contact with the criminal justice system;<sup>51</sup> and
- ▶ Incentivize the elimination of racial disparities in the criminal justice system by rewarding law enforcement agencies that successfully reduce racial disparities in their community encounters with additional funding and resources.<sup>52</sup>

## Incorporating restorative justice principles

Restorative justice practices provide a useful alternative to our traditional retributive justice model.<sup>53</sup> Traditionally, after a crime, our justice system asks three questions: (1) What law was broken? (2) Who broke it? (3) What punishment is warranted?<sup>54</sup> This “process of justice deepens societal wounds and conflicts rather than contributing to healing and peace,”<sup>55</sup> says criminologist Howard Zehr, a pioneer of the modern concept of restorative justice. Restorative justice asks an entirely different set of questions: (1) Who was harmed? (2) What are the needs and responsibilities of all affected? (3) How do all affected parties together address needs and repair harm?

In contrast to the conventional, retributive criminal justice process, restorative justice operates from the premise that committing a crime is not wrong because it breaks a rule, but because it

49 “Thorough legislative impact analyses such as legislatively mandated racial impact statements would identify probable disproportionate racial consequences and signal the need to seek alternative problem-solving strategies to eliminate or significantly reduce such effects.” The Sentencing Project, *Reducing Racial Disparity in the Criminal Justice System A Manual for Practitioners and Policymakers* 8 (2008).

50 L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 Ohio St. J. Crim. L. 115, 147 (2015) (examining the role of implicit bias on police violence).

51 Racial Disparity Manual, *supra* note 41.

52 The Opportunity Agenda, *Solutions for Equal Justice and Safety Accountability in Federal Funding to Local Police Departments* (2016).

53 Restorative justice programs have gained attention in recent years, as some communities have begun raising different questions about the costs and impact of crime and how to correct its damage. Restorative justice programs seek to repair the harm caused to victims and communities, while holding individuals responsible for restitution. These programs include practices such as family group conferences, victim-offender mediation, community decision-making, victim impact statements, and mechanisms for restitution. Restorative justice seeks to identify what harm has been caused, how it can be repaired, and who is to be held accountable, while finding a balance among the needs of the victim, the offender, and the community.

54 *What is Restorative Justice?* Restorative Justice for Oakland Youth, <http://rjoyoakland.org/restorative-justice> (accessed 7 July 2016).

55 Howard Zehr, *The Little Book Of Restorative Justice* 3 (2002).

# TRANSFORMING THE SYSTEM

causes harm, and that there is an obligation to understand and repair that harm. In doing so, restorative justice “strives to build a web of relationships”<sup>56</sup> and the crucial sense of rebuilding justice that the traditional American criminal justice system ignores in its haste to punish the accused.<sup>57</sup> It has been lauded as a more holistic and rehabilitative approach to criminal justice that empowers victims, addresses the needs of all parties, and holds responsible parties meaningfully accountable for their actions while fostering dialogue and understanding.

There are several models of restorative justice including mediation between the two parties involved in the incident, family or community group conferencing, and peacemaking or sentencing circles.<sup>58</sup> In all three, the victim, the person who caused harm, and often friends, family, and key supporters of those involved come together to participate in deciding the response to the crime, allowing those who committed the offense to understand the true impact of their actions while also offering them the opportunity to take responsibility for their crimes.

An important function of the conference is to allow both the person who caused harm and the harmed party to get access to social support to prevent recidivism or recover from the violation.<sup>59</sup> In a sentencing capacity, the victim, the person who caused harm, supporters, and the community, including judges and police, reach a consensus on an acceptable sentence.<sup>60</sup> In some cases, the group may find it appropriate for the individual who is accused of a crime to participate in community service or a violence prevention program, and show accountability to the victim directly (whether that is through a written apology, financial compensation, or even a mural).<sup>61</sup> In other cases, such as the high-profile case in which the restorative justice processes were used to facilitate sentencing in a voluntary manslaughter case, a defendant may receive a prison sentence within sentencing guidelines, informed by the restorative process.<sup>62</sup>

Restorative justice has been used to successfully derail the “school-to-prison pipeline”<sup>63</sup> in Oakland, where in 2005, the Oakland Unified School District began implementation of a comprehensive restorative justice system. Four years after implementation, reading levels had doubled, absenteeism had dropped by 24 percent, and graduation rates had risen by 60

56 Robert Koehler, “Restorative Justice and the Rebirth of Chicago,” *Huffington Post* (Nov. 13, 2014), [http://www.huffingtonpost.com/robert-koehler/restorative-justice-and-t\\_b\\_6155952.html](http://www.huffingtonpost.com/robert-koehler/restorative-justice-and-t_b_6155952.html).

57 Judy C. Tsui, “Breaking Free of the Prison Paradigm: Integrating Restorative Justice Techniques into Chicago’s Juvenile Justice System,” *J. Crim. L. & Criminology* 636, 638, (2014).

58 *Ibid.*

59 *Ibid.* at 639.

60 *Ibid.* at 640.

61 Amelia M. Wirts, “Tinker Bell or Prison Time? Paradigms of Criminal Law Part One,” *Boston College L. Impact* (Mar. 5, 2015), <http://bclawimpact.org/2015/03/05/tinker-bell-or-prison-time-part-one>.

62 Tullis, *supra* note 32.

63 See *infra*, *Fostering an environment for Respecting Children’s Rights*.



# TRANSFORMING THE SYSTEM

percent.<sup>64</sup> While restorative principles have often been focused on juveniles and less serious offenses, several programs are showing how it can be effective for adults who have committed serious offenses. In Brooklyn, the Vera Institute hosts Common Justice, “the first alternative-to-incarceration and victim service program in the United States that focuses on violent felonies such as assault and robbery, in the adult courts.”<sup>65</sup> Common Justice’s process includes an intensive violence prevention program.<sup>66</sup>

Restorative justice not only lives up to our ideals, it can be considerably more effective at creating safe communities in an efficient way. Restorative justice programs have been shown to reduce recidivism and have higher victim satisfaction rates than traditional criminal justice approaches.<sup>67</sup>

Studies show that individuals in restorative justice programs were more likely to complete their programs and less likely to reoffend; these programs were associated with reduced recidivism for both adults and youth; and participants had higher perceptions of fairness of these programs.<sup>68</sup> Center for Restorative Youth in Flathead County, MT, decreased the county’s youth recidivism rate to 13 percent compared to the state’s rate of 46 percent overall. “The numerical improvement is encouraging, but the folks . . . in Flathead County agree that the most important ‘measurements’ are the new relationships that are created: the strengthened community and the previously nonexistent bonds that were formed.”<sup>69</sup>

Moreover, it is an economically sound approach to criminal justice matters, especially considering the alternative. “A recent Pew Research study estimated that increased incarceration accounted for less than a third of the drop in crime in the United States since 1990. Yet states currently spend approximately \$51 billion per year on corrections. With a national recidivism rate of approximately 50 percent, it is clear that incarceration is a highly expensive yet highly ineffective means of handling crime.”<sup>70</sup> To benefit from restorative justice practices, the federal

64 Data in Action, LLC, *Restorative Justice in Oakland School: Implementation and Impacts*, OUSD 4 (Sept. 2014), <http://www.ousd.org/cms/lib07/CA01001176/Centricity/Domain/134/USD-RJ%20Report%20revised%20Final.pdf>.

65 *Common Justice*, Vera Institute, <http://www.vera.org/project/common-justice> (accessed 10 June 2016).

66 Ibid.

67 Adler School Institute on Public Safety and Social Justice and the Illinois Coalition for Immigrant and Refugee Rights, *Restorative Justice: A Primer and Exploration of Practice Across Two North American Cities* 4 (2012).

68 Ibid. at 10-11.

69 Maya Schenwar, *Locked Down, Locked Out: Why Prison Doesn't Work and How We Can Do Better* (Barrett Koehler 2014).

70 Ibid. at 9. See also Bruce Western & Becky Pettit, *Collateral Costs: Incarceration's Effect on Economic Mobility*, Pew Charitable Trusts (2010) (“[W]hile expanded incarceration contributed to the drop in violent crime in the United States during the 1990s, research shows that having more prisoners accounted for only about 25 percent of the reduction . . .”).

# TRANSFORMING THE SYSTEM

and state governments should provide funding and other incentives to support locally-implemented restorative justice programs.

**Local governments and the judiciary** should establish restorative justice programs that address community justice matters.

**School administrations** should adopt comprehensive restorative justice models within their schools for school disciplinary matters.

## Creating spaces for community healing

Healing and rebuilding communities that have been weakened by mass incarceration should be at the forefront of criminal justice reform. It is important to recognize that low-income communities of color have been disparately affected by mass incarceration; and there must be spaces that allow these communities to heal from the injuries that they have suffered. Affirmatively addressing community healing and rebuilding promotes an environment where recently released individuals can focus on reintegration rather than being funneled into dysfunctional spaces that foster resentment toward law enforcement officials. Strong communities ultimately promote overall safety.

Moreover, explicitly acknowledging past injustices is often the first step toward avoiding their repetition. Depending on the needs of the particular community, local commissions designed to promote truth and/or reconciliation may provide a forum for communal healing and a space for untold stories to be voiced.<sup>71</sup> These commissions should be viewed as a first step toward repairing strained relationships between communities and law enforcement agencies. They should assist in building community trust and acknowledging the community's role in promoting overall safety.

**The Department of Justice (DOJ)** should create incentives that promote healthy relationships between the community and law enforcement agencies by:

<sup>71</sup> See generally Fania E. Davis et al., *Restoring Racial Justice*, 2015, <http://internal.psychology.illinois.edu/~lyubansk/RRJ.pdf>.

# TRANSFORMING THE SYSTEM

- ▶ Prioritize law enforcement agencies that have a community forum strategy and/or other substantive community outreach strategy in all funding decisions, particularly for funding related to the Community Oriented Policing Services Program;<sup>72</sup>
- ▶ Require that law enforcement agencies specify their plans for community cooperation and community forums in all funding applications;<sup>73</sup> and
- ▶ Establish mechanisms for withholding funds from law enforcement agencies that exhibit a failure to maintain positive community relations.<sup>74</sup>

The **DOJ Community Relations Service**, which “works with all parties, including State and local units of government, private and public organizations, civil rights groups, and local community leaders, to uncover the underlying interests of all of those involved in the conflict and facilitates the development of viable, mutual understandings and solutions to the community’s challenges,”<sup>75</sup> should identify communities that require mediation and other restorative services stemming from discriminatory practices and act as a community resource.

**Local and state legislatures should pass legislation that supports the:**

- ▶ Creation of commissions for truth and/or reconciliation, where there is a history of past abuse and/or community mistrust of law enforcement. These commissions should be tasked with making recommendations based on their findings;<sup>76</sup>
- ▶ Creation of “Monuments, memorials and markers should be erected to facilitate this important public dialogue. Education must be accompanied by acts of reconciliation, which are needed to overcome acts of racial bigotry and legacies of injustice”;<sup>77</sup> and

72 The Opportunity Agenda, *Solutions for Equal Justice and Safety Accountability in Federal Funding to Local Police Departments* (2016).

73 Ibid.

74 Ibid.

75 Ibid.

76 See Davis, et al., *supra* note 71.

77 Statement to the Media by the United Nations’ Working Group of Experts on People of African Descent, on the Conclusion of its Official Visit to USA, 19–29 January 2016, <http://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17000&LangID=E#sthash.5HumIkWe.dpuf>.

# TRANSFORMING THE SYSTEM

- ▶ Development of community forums that create a space for communities and law enforcement to foster a cooperative relationship.<sup>78</sup>

**Local police departments and police chiefs should promote community cooperation and collaboration by taking the following actions:**

- ▶ Coordinate monthly community forums intended to promote understanding and ease tensions, where rank and file police officers interact with community members and local activists, and facilitate policing practices consistent with community values. The discussions and outcomes from these forums should be dispersed to all police department members and incorporated into internal police department meetings;
- ▶ Educate police recruits and other police officers about the role that positive community relations play in maintaining police legitimacy and officer safety;<sup>79</sup>
- ▶ Recruit police officers from within the communities that the police serve; and
- ▶ Where appropriate, issue a formal apology to the community for past misconduct.<sup>80</sup>



*For additional background on the issue of mass incarceration, the importance of a comprehensive commitment to ending the phenomenon, and alternatives, such as restorative justice, check out:*

Michelle Alexander's 2010 book, ***The New Jim Crow***, which describes the ascension of mass incarceration as a contemporary system of racial control;

Robynn J.A. Cox's 2015 report ***Where Do We Go from Here? Mass Incarceration and the Struggle for Civil Rights***, which describes the rise of mass incarceration and highlights policy solutions;

The Obama Administration's ***President's Memorandum on the Economic Costs of Mass Incarceration***, which acknowledges the importance of "holistic"

<sup>78</sup> See, e.g., Black Community Crusade for Children & PolicyLink, *A Protest to Proposal: A Police-Community Relations Forum* (June 26, 2001), <http://www.policylink.org/sites/default/files/Report.FromProtesttoProposal-CincinnatiPolice-CommunityForum.pdf> (summarizing the proceedings of a community forum intended to improve the relationship between the community and the Cincinnati Police Department).

<sup>79</sup> Weber has described the state as "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." Max Weber, from *Max Weber: Essays in Sociology* 78 (1946).

<sup>80</sup> *Final Report of the President's Task Force on 21st Century Policing* 85 (May 2015).

# TRANSFORMING THE SYSTEM

criminal justice transformation;

The Center for Constitutional Rights (CCR), which is “dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights” and has issued several calls to ensure that the criminal justice system is aligned with human rights norms, including its ***Submission to the UN Working Group of Experts on People of African Descent***. (Our former Communications Institute Fellow, Vince Warren, is the Executive Director of CCR.)

Kimberle Williams Crenshaw and Andrea J. Ritchie’s report, ***Say Her Name: Resisting Police Brutality Against Black Women***, which highlights the importance of intersectionality in criminal justice reform and a racial justice movement;

The **Movement for Black Lives** has outlined a comprehensive policy platform for upholding black dignity and black humanity.

The American Civil Liberties Union and Sentencing Project report, ***Ending Mass Incarceration: Charting a New Justice Reinvestment***;

Howard Zehr, the grandfather of the restorative justice movement, who outlines its principles and practice in ***The Little Book of Restorative Justice***; and

**Impact Justice**, an innovation and research center committed to “fostering a more humane, responsive, and restorative system of justice in our nation” that creates resources and provides training to implement restorative justice.

# TRANSFORMING THE SYSTEM



CREATE FAIR AND EFFECTIVE

## Policing Practices

To work for all of us, policing practices should ensure equal justice and be supported by evidence. Nonetheless, some police departments have a history of policing in inequitable ways that frequently alienate and actively harm low-income communities and communities of color, relying upon practices that have questionable effectiveness at decreasing crime<sup>81</sup> and proven effectiveness at alienating communities. The rise of the Movement for Black Lives and Black Lives Matter and the spate of police-involved shootings demonstrate that the need for police reforms that foster positive community and police relations is critical.

Police officers should strive to reduce and prevent crime, while respecting the rights of the communities they aim to serve.<sup>82</sup> This is what increases community safety. Fair and effective policing practices also promote officer safety by fostering positive relationships with the community and allowing for a collaborative approach to policing.<sup>83</sup> An approach that encourages positive community relations should be a priority.

Federal and local governments should take affirmative steps to ensure that police adhere to practices that are data-driven, fair, and effective, eliminate racial disparities and profiling in policing, incentivize data-supported methods, and encourage officer accountability.

Evidence-backed policing practices that promote safe communities should be rewarded and incentivized. Currently, many police departments evaluate police officers with volume-based measures, which encourage police officers to meet informal or formal arrest quotas.<sup>84</sup> These

81 See Anthony A. Braga & Brenda J. Bond, *Policing crime and disorder hot spots: A randomized controlled trial*, 46 *Criminology* 577, 579 (2008) (“[G]iven the strong influence of broken windows on the policing field, remarkably little solid research evidence is found on the crime-control benefits of policing disorder.”).

82 See *Talking About Policing Issues*, The Opportunity Agenda (Jan. 2016), [https://opportunityagenda.org/files/field\\_file/2016.02.03%20-%20Talking%20Policing%20Issues%20-%20FINAL.pdf](https://opportunityagenda.org/files/field_file/2016.02.03%20-%20Talking%20Policing%20Issues%20-%20FINAL.pdf) (accessed 25 July 2016); *Talking About Policing Issues: Border Communities*, The Opportunity Agenda (Feb. 2016), [https://opportunityagenda.org/files/field\\_file/2016%20Policing%20and%20Border%20Communities.pdf](https://opportunityagenda.org/files/field_file/2016%20Policing%20and%20Border%20Communities.pdf)

83 This approach is frequently described as “community policing.” Gary Cordner, *Community Policing*, *The Oxford Handbook of Police and Policing* 148 (2014) (acknowledging that community policing has a very fluid definition and has been interpreted very differently across jurisdictions). To the extent that it is a form of policing committed to improving community relationships and promoting democracy, it may be consistent with promoting fair policing practices.

84 See Coke, *supra* note 4, at 21.

# TRANSFORMING THE SYSTEM

quotas promote criminalization for minor misconduct when alternative diversion<sup>85</sup> programs may be more suitable.<sup>86</sup>

Policing practices should instead incentivize transparency and focus on diversion and alternative forms of policing that de-emphasize criminalization in line with a federal and local commitment to eliminate mass incarceration.<sup>87</sup>

## Adopting a human rights approach to policing

Policing should be fair and consistent with human rights values.<sup>88</sup> Police departments should strive for positive community relationships. Images of militarized police fueled community outrage about abusive police practices and encouraged the perception that police considered the community its “enemy” during public protests. This perception is unhealthy, and police should aim to eliminate the harms of an unnecessarily militarized police force. Police departments should eliminate militarized tactics that decrease their legitimacy in the communities they serve.<sup>89</sup>

Furthermore, police practices should explicitly seek to eliminate racial bias and disparate treatment of individuals and communities.<sup>90</sup> There has been substantial research demonstrating that implicit bias infuses all parts of our everyday interactions.<sup>91</sup> Consequently, it is important to critically examine our biases and reduce their impact on our ordinary interactions. This is especially the case for police officers because they maintain close community relationships, and for their own safety and the safety of the community must ensure that these relationships are positive. There should be regular, thorough training to sensitize police to implicit biases as well as explicit bans on racial profiling in police department policies and manuals.

85 See Center for Health & Justice at TASC, *A National Survey of Criminal Justice Diversion Programs and Initiatives* 4 (Dec. 2013) [hereinafter CHJ], at 6.

86 See Coke, *supra* note 4, at 21; and CHJ, *supra* note 84, at 6.

87 See generally CHJ, *supra* note 85.

88 See Chandra Bhatnagar, American Civil Liberties Union & Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination*, (August 2009) (discussing racial profiling in the United States and the nation's failure to fully comply with the International Convention on the Elimination of All Forms of Racial Discrimination).

89 Zoe Mentel, U.S. Department of Justice, Office of Community Oriented Policing Services, *Racial Reconciliation, Truth-Telling, and Police Legitimacy* (2012).

90 See generally The Center for Popular Democracy, *Building Momentum from the Group Up: A Toolkit for Promoting Justice in Policing* 5 (June 2015) [hereinafter CPD] (“Police and prisons have become the government’s answer to nearly every social problem in low income communities of color. The criminalization of poverty, mental illness, perceived anti-social behavior, and drug addiction has led to mass incarceration.”).

91 A large body of research explores the nature of “implicit bias,” unconscious attitudes that are presumably shaped in part by media consumption. Experiment after experiment demonstrates that white Americans tend to have unconscious biases against African Americans. For instance, whites tend to more easily associate negative words such as terrible, failure, horrible, evil, agony, nasty, and awful with unknown black faces, as opposed to white faces. To a lesser degree blacks too tend to show this bias against unknown faces of their own race.

# TRANSFORMING THE SYSTEM

The Congress, and state and local legislatures, should pass legislation that:

- ▶ Prohibits profiling practices, which include the profiling of individuals due to race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin,<sup>92</sup> and religious affiliation;<sup>93</sup>
- ▶ Requires officer trainings on the best practices and principles of engaging with community members of different genders,<sup>94</sup> sexualities, and races;
- ▶ Requires officer trainings on implicit bias and the value of incorporating human rights practices into policing;<sup>95</sup>
- ▶ “Requires current and prospective police officers to undergo mandatory implicit racial bias testing, including **testing for bias in shoot/don’t shoot decision-making**, and develop a clear policy for considering an officer’s level of racial bias in:
  - ▶ law enforcement certification
  - ▶ the hiring process
  - ▶ performance evaluations
  - ▶ decisions about whether an officer should be deployed to communities of color”;<sup>96</sup>
- ▶ Prohibits the local policing of immigration matters;<sup>97</sup>

92 See CPD, *supra* note 90, at 20. See also Coke, *supra* note 4, at 21.

93 For more information concerning the impact of programs that call for the blanket profiling of the Muslim community, see Muslim American Civil Liberties Coalition: CUNY’s Creating Law Enforcement Accountability & Responsibility; Asian American Legal Defense and Education Fund; *Mapping Muslims: NYPD Spying and Its Impact on Muslim Americans 4* (2013). (“[S]urveillance of Muslims’ quotidian activities has created a pervasive climate of fear and suspicion, encroaching upon every aspect of individual and community life. Surveillance has chilled constitutionally protected rights—curtailing religious practice, censoring speech, and stunting political organizing.”)

94 National Coalition of Anti-violence Programs (NCAVP), *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-infected Hate Violence in 2012* (2013). (“Transgender people were 3.32 times as likely to experience police violence compared to cisgender survivors and victims. Transgender people were 2.46 times as likely to experience physical violence when interacting with the police compared to cisgender survivors and victims. Transgender communities’ experience of discriminatory and violent policing can be a barrier to accessing emergency support in the aftermath of violence, placing transgender people at greater risk when they do experience violence.”)

95 See e.g., *Training*, Campaign Zero, <http://www.joincampaignzero.org/solutions/#train> (accessed 7 July 2016); Coke, *supra* note 4, at 21.

96 *Training*, Campaign Zero, <http://www.joincampaignzero.org/train> (accessed 27 June 2016).

97 See Annie J. Wang and Juhu Thukral, Opportunity Agenda, *Focus on Opportunity: Immigration Policy Solutions*, 5 (May 2012).



# TRANSFORMING THE SYSTEM

- ▶ Adopts performance metrics that evaluate police officers based on data that documents demographic information and evaluates officers' tendency for profiling practices.
- ▶ Our Communications Institute Fellow Philip Atiba Goff has written extensively on implicit bias trainings and working with police department to effectuate reforms.<sup>98</sup>

## The Department of Justice should:

- ▶ Require that law enforcement agencies provide disaggregated demographic data on police interactions with individuals and communities in all funding applications, including data on searches, stops, frisks, searches, summonses, tickets, arrests, and complaints;<sup>99</sup>
- ▶ Require that law enforcement agencies seeking funding have policies that explicitly ban biased policing and profiling and provide trainings on reducing officer reliance on profiling;<sup>100</sup> and
- ▶ Implement the recommendations of the Law Enforcement Equipment Working Group, including recalling federally funded military weapons from local police departments.<sup>101</sup>

## Congress should:

- ▶ Severely limit the transfer and use of military equipment to local law enforcement;

98 See e.g., Philip Atiba Goff & M. C. Jackson, "Ain't I A Woman: Towards An Intersectional Approach To Person Perception And Group-Based Harms," 59 *Sex Roles* 392 (2008); Philip Atiba Goff, et al., "Not Yet Human: Implicit Knowledge, Historical Dehumanization, And Contemporary Consequences," 94 *J. of Personality and Social Psych.* 292 (2008); Philip Atiba Goff, et al., "The Space Between Us: Stereotype Threat And Distance In Interracial Contexts," 94 *J. of Personality and Social Psych.* 91 (2008); Philip Atiba Goff, et al., "Concern for the In-Group and Opposition to Affirmative Action," 90 *J. of Personality and Social Psych.* 961 (2006);.

99 See generally, Tanya E. Coke, National Association of Criminal Defense Attorneys, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System* 30 (2013), [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2013\\_racial\\_disparity\\_report.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2013_racial_disparity_report.pdf); and *Training*, Campaign Zero, <http://www.joincampaignzero.org/train> (accessed 27 June 2016).

100 See End Racial Profiling Act of 2015, H.R. 1933, 114th Cong. (2015); see also Chandra Bhatnagar, American Civil Liberties Union & Rights Working Group, *The Persistence of Racial and Ethnic Profiling in the United States: A Follow-Up Report to the U.N. Committee on the Elimination of Racial Discrimination* (August 2009) (discussing racial profiling in the United States and the nation's failure to fully comply with the International Convention on the Elimination of All Forms of Racial Discrimination).

101 Law Enforcement Equipment Working Group, Recommendations Pursuant to Executive Order 13688, Federal Support for Local Law Enforcement Equipment Acquisition, [https://www.whitehouse.gov/sites/default/files/docs/le\\_equipment\\_wg\\_final\\_report\\_final.pdf](https://www.whitehouse.gov/sites/default/files/docs/le_equipment_wg_final_report_final.pdf), (accessed 7 July 2017); and Implementation of Recommendations, Federal Support for Local Law Enforcement Acquisition (October 1, 2015), <https://www.bja.gov/programs/LEEWG-Implementation-Plan.pdf>. See also *Training*, Campaign Zero, <http://www.joincampaignzero.org/train> (accessed 27 June 2016). ("The events in Ferguson have introduced the nation to the ways that local police departments can misuse military weaponry to intimidate and repress communities. Last year alone, militarized SWAT teams killed at least 38 people."), <http://www.joincampaignzero.org/solutions/#train>. See also CPD, supra note 90, at 40-41.

# TRANSFORMING THE SYSTEM

- ▶ Adopt and implement the Stop Militarizing Law Enforcement Act of 2015, H.R. 1232,<sup>102</sup> which has been introduced to the House and prohibits the transfer by the Department of Defense of military equipment that is not suitable for law enforcement purposes; and
- ▶ Create a mechanism for investigating complaints and issuing sanctions regarding inappropriate use of equipment and tactics during mass demonstrations.

**Law enforcement agencies, including local and state police departments and sheriff's offices, should create policies that do the following:**

- ▶ Train all police officers on appropriate community interactions and de-escalation tactics;<sup>103</sup>
- ▶ Ensure that police officers employ the practice of explaining to residents what they are doing whenever they act, particularly during an encounter that has occurred as a result of the initiative of the police officer, and especially when communities of color or their members are the target;<sup>104</sup>
- ▶ Require that police officers in supervisory roles emphasize protection of human rights by words and actions, leading by example and not tolerating denigrating language or racial/ethnic insensitivities;<sup>105</sup>
- ▶ Create early warning systems for detecting patterns of behavior, such as complaints filed against officers or personal hardships like divorce, which indicate potential vulnerabilities for the officer and the department. The primary purpose of such systems is not to punish but to provide counseling to officers so as to reduce their level of risk as well as risk to residents and communities;<sup>106</sup>
- ▶ Improve the overall effectiveness of internal affairs divisions by having policing administrators routinely examine their disciplinary procedures;<sup>107</sup>

102 Stop Militarizing Law Enforcement Act of 2015, H.R. 1232.

103 *Final Report of the President's Task Force on 21st Century Policing* 85 (May 2015).

104 Ibid.

105 Ibid.

106 Ibid.

107 Ibid.

# TRANSFORMING THE SYSTEM

- ▶ Prohibit the interrogation of individuals with mental health issues and children under the age of 18 without a legal guardian or counsel present;
- ▶ Encourage police officers to release people accused of less serious actions, issuing warnings instead of immediately turning to arrest;<sup>108</sup>
- ▶ Establish robust pre-booking diversion programs, such as programs that divert individuals to mental health providers, housing referral programs, and drug treatment programs;<sup>109</sup>
- ▶ Train police officers to determine when diversion is appropriate and reward police officers who divert individuals from jail;
- ▶ Encourage referral to external mental health programs where appropriate;<sup>110</sup>
- ▶ Eliminate volume-based performance metrics for police, which may create informal and/or formal arrest quotas;<sup>111</sup>
- ▶ Thoroughly train police on the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement** and require them to following these guidelines;<sup>112</sup>
- ▶ Strongly discourage the use of force against pregnant women and children;
- ▶ Eliminate surveillance of communities based on stereotypes, such as an NYPD program that infiltrated and engaged in surveillance of the Muslim community in New York City solely because of their religion;<sup>113</sup>
- ▶ Emphasize the importance of avoiding offensive or harsh language in the field to avoid escalation of minor situations, and adopt policies directing officers to speak to individuals with respect.

108 Ibid.

109 See Hallie Ryan, Lawyers' Committee for Civil Rights Under Law, *Unequal Justice: Mobilizing the Private Bar to Fight Mass Incarceration* 58 (April 2015); Department of Justice, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century* (August 2013); Tanya Coke, National Association of Criminal Defense Attorneys, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System* 3 (2013).

110 Marlee E. Moore & Virginia Aldigé Hiday, "Mental Health Court Outcomes: A Comparison of Re-arrest and Re-arrest Severity between Mental Health Court and Traditional Court Participants," 30 *Law and Human Behavior* 659 (2006).

111 Chettiar, et al., *supra* note 35, at 30.

112 Department of Justice, "Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence" (2015).

113 Compare *Raza et al. v. City of New York et al.*, No. 1:2013cv03448—Document 28 (E.D.N.Y. 2013) (alleging that the NYPD "engaged in an unlawful policy and practice of religious profiling and suspicionless surveillance of Muslim New Yorkers").

# TRANSFORMING THE SYSTEM

## Adopting policing approaches that promote police legitimacy and community trust

George L. Kelling and James Q. Wilson popularized the controversial strategy known as “broken windows policing” in a 1982 piece in the *Atlantic Monthly*, where they theorized that the policing of “public disorders,” such as loitering and nuisance offenses, reduces the incidence of serious and violent crimes.<sup>114</sup> Disorder policing approaches range from highly aggressive order maintenance strategies, including misdemeanor arrests and stop-question-frisks, to problem-oriented and community-coordination strategies. This style of policing has been widely adopted although the data on its efficacy is mixed.<sup>115</sup> For example, “after reviewing a series of evaluations on the role disorder policing may have played in New York City’s crime drop during the 1990s, the National Research Council’s Committee to Review Police Policy and Practices concluded that these studies did not provide clear evidence of effectiveness.”<sup>116</sup>

This strategy is highly controversial because it has at times been used as a method for surveilling communities of color, fostering community mistrust of law enforcement,<sup>117</sup> and encouraging racial profiling. A 2015 systemic review and meta-analysis of police disorder programs highlights the weaknesses of broken windows policing:

Aggressive order maintenance strategies that target individual disorderly behaviors do not generate significant crime reductions. In contrast, community problem-solving approaches that seek to change social and physical disorder conditions at particular places produce significant crime reductions. These findings suggest that, when considering a policing disorder approach, police departments should adopt a “community coproduction model” rather than drift toward a zero-tolerance policing model, which focuses on a subset of social incivilities, such as drunken people, rowdy teens, and street vagrants, and seeks to remove them from the street via arrest. In devising and implementing appropriate strategies to deal with a full range of disorder problems, police must rely on citizens,

114 James Q. Wilson & George L. Kelling, “Broken Windows,” 249 *Atlantic Monthly* 29 (1982).

115 Anthony A. Braga & Brenda J. Bond, “Policing crime and disorder hot spots: A randomized controlled trial,” 46 *Criminology* 577, 579 (2008) (noting the lack of strong empirical support for broken windows policing as a blanket policy).

116 Anthony A. Braga et al., “Can policing disorder reduce crime? A systematic review and meta-analysis,” 52 *Journal of Research in Crime and Delinquency* 567, 568 (2015).

117 Tom R. Tyler & Jeffrey Fagan, “The impact of Stop and Frisk policies upon police legitimacy,” in Nancy La Vigne et al., Urban Institute, *Key Issues in the Police Use of Pedestrian Stops and Searches* 30 (2012).

# TRANSFORMING THE SYSTEM

city agencies, and others in numerous ways.... A sole commitment to increasing misdemeanor arrests stands a good chance to undermine relationships in low-income, urban communities of color, where coproduction is most needed and distrust between the police and citizens is most profound.<sup>118</sup>

“Broken windows” policing should not be adopted; instead, policing should enhance the community space rather than systematically target individuals who live in a particular neighborhood.<sup>119</sup> For example, securing abandoned buildings, lighting dark passages, and fostering a cooperative relationship with the community in crime hot spots has actually been proven to be more effective at reducing crime than harsh policies that marginalize communities, such as stop and frisk and zero tolerance.<sup>120</sup> Aggressive policing tactics have minimal impact on reducing crime but tremendous impact on reducing police legitimacy and community trust. In fact, the Office of Inspector General for the NYPD found that issuing summonses did not reduce crime, finding “no empirical evidence demonstrating a clear and direct link between an increase in summons and misdemeanor arrest activity and a related drop in felony crime.”<sup>121</sup>

## Law enforcement agencies and police departments should:

- ▶ Rely upon collaborative approaches that respect the dignity of individuals within the community, focus on problem-solving, and are generally more community-centered and build community trust. Tactics might include relying upon the use of structural and environment strategies to reduce crimes, such as adding lighting in hot spot areas, securing abandoned buildings, and building partnerships with community members to address specific crimes. The widespread and systematic use of increasing police-civilian encounters through stop, frisk, and questioning, misdemeanor arrests, and summonses for less serious offenses should be prohibited;
- ▶ Seek community input to determine appropriate policing strategies and tactics; and

<sup>118</sup> Ibid. at 581.

<sup>119</sup> Anthony A. Braga et al., “Can policing disorder reduce crime? A systematic review and meta-analysis,” 52 *Journal of Research in Crime and Delinquency* 567, 568 (2015).

<sup>120</sup> Ibid.

<sup>121</sup> New York City Department of Investigation Office of the Inspector General for the NYPD (OIG-NYPD), *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (2016), [http://www.nyc.gov/html/doi/downloads/pdf/2016/Jun16/pr18oignypd\\_qualityoflife\\_report\\_62216.pdf](http://www.nyc.gov/html/doi/downloads/pdf/2016/Jun16/pr18oignypd_qualityoflife_report_62216.pdf).

# TRANSFORMING THE SYSTEM

- ▶ Ban tactics that rely on aggressive policing tactics, including the stopping, questioning, and frisking of individuals, systematic arrests for less serious crimes, and the questioning of individuals because of their physical location at the time of questioning.<sup>122</sup>

## Establishing a national “use of force” guidelines

Use of excessive force erodes public confidence in the police, decreases legitimacy, and gives the impression that police view themselves as above accountability. “[U]se of force by law enforcement officials should be exceptional.”<sup>123</sup> Accordingly, strong standardized “use of force” policies that are infused into police culture through adequate training, monitoring, and accountability should be adopted. A national standard for use of force with a standard policy and protocol should aim to greatly reduce instances of excessive force.

To this end, Congress and the Department of Justice should:

- ▶ Adopt clear and comprehensive<sup>124</sup> use of force policies, which should include training that emphasizes de-escalation, proper use of equipment and weapons, and respect for gender identification. Moreover, these policies should prohibit the use of racial profiling and incorporate performance measures and investigations (internal and external) of officer-related use of force (particularly shootings and in-custody deaths);
- ▶ Establish a National Use of Force Handbook that outlines recommendations that ensure compliance with constitutional and statutory obligations, encourages community legitimacy, and requires that applicants for federal funds comply with these guidelines. The recommendations must be consistent with the Police Executive Research Forum Use of Force Principles;<sup>125</sup>

122 Anthony A. Braga et al., “Can policing disorder reduce crime? A systematic review and meta-analysis,” 52 *Journal of Research in Crime and Delinquency* 567, 568 (2015). See also American Civil Liberties Union of New Jersey, “Selective Policing: Racially Disparate Enforcement of Low-Level Offenses in New Jersey” (2015). (“The study data revealed a clear pattern of Black and Hispanic/Latino communities disproportionately bearing the brunt of policing practices that focus on a strict enforcement of low-level offenses.”)

123 United Nations Human Rights Office of the High Commissioner, *Code of Conduct for Law Enforcement Officials*, Adopted by General Assembly resolution 34/169 of 17 December 1979, Art. 3 Commentary.

124 See CPD, *supra* note 90, at 43.

125 Police Executive Research Forum, *Guiding Principles on the Use of Force* (Jan. 29, 2016).

# TRANSFORMING THE SYSTEM

- ▶ Require that police departments that receive federal funds conduct non-punitive peer reviews of incidents involving use of force, separate from criminal and administrative investigations. For example, following each incident of force, police peers should review the incidents and provide feedback to the officer involved in the incident. To foster honest critique, this feedback should not be punitive.

Local governments and police departments should ensure that:

- ▶ Police are thoroughly trained on the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement**<sup>126</sup> and required to follow the guidelines, which include provisions on policing individuals with various gender expressions and responding to domestic disputes;
- ▶ Police leadership strongly discourage the use of force against pregnant women and children, creating clear and objective standards for the very rare situations in which it may be allowed; and
- ▶ Improve management is improved by creating a Use of Force Management Institute for police leaders and a Use of Force Management publication for city officials.<sup>127</sup>

Further, law enforcement agencies should adopt the Use of Force principles recommended by the Police Executive Research Forum.<sup>128</sup> These principles include:

- ▶ Placing the “sanctity of human life” at the heart of the agency’s work;
- ▶ Adopting policies that require reasonableness and proportionality;
- ▶ Formally adopting de-escalation as an agency policy;

126 Department of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence* (2015).

127 *Emerging Use of Force Issues: Balancing Public and Officer Safety*, Report from the International Association of Chiefs of Police/COPS Office Use of Force Symposium 8–9 (May 2012).

128 Police Executive Research Forum, *Guiding Principles on the Use of Force* (Jan. 29, 2016).

# TRANSFORMING THE SYSTEM

- ▶ Adopting a Critical Decision-Making Model, which requires officers to quickly collect information, assess threats, consider agency policy, and adopt options that allow for the best course of action, and reassessment;
- ▶ Requiring officers to intervene to prevent other officers from using excessive force;
- ▶ Requiring officers to promptly provide medical assistance to injured persons;
- ▶ Banning shooting at vehicles;
- ▶ Prohibiting the use of deadly force on persons who pose a danger only to themselves;
- ▶ Documenting use of force incidents and ensuring that the practices are non-discriminatory;
- ▶ Ensuring that use of force incidents resulting in serious bodily harm or death are reviewed by specially trained personnel;
- ▶ Ensuring transparency in practices;
- ▶ Ensuring that the training academy reflects these values;
- ▶ Replacing unproven and ineffective force guidelines, such as the “21 foot rule” and “drawing a line in the sand,” with effective guidelines to reduce the use of force, such as “Distance, Cover, and Time”;<sup>129</sup>
- ▶ Ensuring that there is substantial scenario-based training, which challenges officers and reflects real-world circumstances;
- ▶ Mandating comprehensive training for interacting with individuals who have mental health issues;
- ▶ Requiring public education that teaches communities how to communicate with the police about individuals with mental health issues.

129 Police Executive Research Forum, Use of Force: Taking Policing to a Higher Standard, 30 Guiding Principles Standard (Jan. 29, 2016).



# TRANSFORMING THE SYSTEM

## Ensuring that police union contracts promote fairness

Unions have played a significant role in improving work conditions and ensuring that civil servants are paid fair wages; they have been critical in contributing to the growth of the middle class in the United States.

However, given the unique role that police play in society as beneficiaries of the legal authority to use force to enforce the law, the police have a special responsibility to maintain community relationships that promote legitimacy. Contracts between municipal bodies and police unions must not only acknowledge this special role, but also foster police compliance with civil rights and human rights standards to ensure that these contracts are valid in both the constitutional sense and the community accountability sense.

To this end, **state legislatures** should pass legislation to promote accountability in policing, including in police union contracts, that:

- ▶ Requires police departments to retain the personnel files of police officers who have been investigated for excessive force and/or deadly force;<sup>130</sup>
- ▶ Requires civilian review for instances in which officers have been accused of improperly using deadly and/or excessive force;<sup>131</sup>
- ▶ Permits mayors to terminate police officers for gross misconduct, including multiple excessive force investigations;<sup>132</sup>
- ▶ Voids union contract provisions that are inconsistent with the legislation;<sup>133</sup>
- ▶ “Removes barriers to effective misconduct investigations and civilian oversight, including allowing officers to wait 48 hours or more before being interrogated after an incident, and other barriers that:

130 *Final Report of the President's Task Force on 21st Century Policing* 85 (May 2015).

131 *See Ibid.*

132 *See Ibid.*

133 *See Ibid.*

# TRANSFORMING THE SYSTEM

- ▶ Prevent investigators from pursuing other cases of misconduct revealed during an investigation;
- ▶ Prevent an officer's name or picture from being released to the public;
- ▶ Prohibit civilians from having the power to discipline, subpoena or interrogate police officers;
- ▶ State that the Police Chief has the sole authority to discipline police officers;
- ▶ Enable officers to appeal a disciplinary decision to a hearing board of other police officers;
- ▶ Prevent an officer from being investigated for an incident that happened 100 or more days prior;
- ▶ Allow an officer to choose not to take a lie detector test without being punished, require the civilian who is accusing that officer of misconduct to pass a lie detector first, or prevent the officer's test results from being considered as evidence of misconduct."<sup>134</sup>

## Promoting accountability

Police officers should be accountable public servants who work collaboratively, transparently, and fairly with the communities they serve. Too often, police departments and officers violate their role in the community and abuse their power by engaging in acts of excessive force; acting in a militarized manner; abusing asset forfeiture policies; and routinely stopping and frisking entire communities, among other practices that treat individuals, as Supreme Court Justice Sonia Sotomayor decried, "not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."<sup>135</sup>

Too often, the police have not been held accountable, and this lack of accountability has eroded community trust and fostered suspicion and resentment. In order to restore police legitimacy, there should be structures in place to promote responsible, accountable policing and measures to ensure that police are held accountable for their actions when they deviate from that standard.

<sup>134</sup> *Fair Police Contracts*, Campaign Zero, <http://www.joincampaignzero.org/contracts> (accessed 27 June 2016).

<sup>135</sup> *Utah v. Strieff* No. 14–1373 (June 20, 2016) (dissenting).

# TRANSFORMING THE SYSTEM

There are generally four mechanisms for holding law enforcement accountable: community-based, political, civil, and criminal.

## Community-based accountability

Creating an accountable police force starts by implementing policies that make them directly responsible to the people they serve. Civilian oversight, both on a policy level and for specific review of complaints and disciplinary measures, creates direct accountability that also provides the opportunity for police to learn from and build relationships with those they serve.<sup>136</sup> In Berkeley, CA, the Police Review Commission holds bimonthly meetings that are open to the public, where representatives of community organizations “voice criticisms, make proposals, and introduce resolutions to review or reform specific police policies.”<sup>137</sup> Civilian review boards also keep police accountable when used in a disciplinary fashion. However, communities must work to overcome the practical obstacles to the creation and effective implementation of civilian review boards, namely resistance from police departments. Community representatives and municipalities should work together to create civilian review boards that are independent, transparent, and representative, with adequate resources and outreach.<sup>138</sup> Ideally, they should have the power to conduct investigations and hearings, compel police cooperation, determine appropriate disciplinary action, and conduct statistical analysis of infractions.<sup>139</sup>

Creating clear procedures by which police officers provide information to and are transparent about their practices with the community creates the basis for mutual respect. This can include policies that require police officers to provide their name, badge number, and an informative card on how to report complaints to people with whom they interact. This can also include wearing body cameras with adequate privacy protections for the public and strengthening the right of civilians to record police interactions.

136 Civilian Review Boards can vary. See Civilian Review Boards, the CATO Institute's National Police Misconduct Reporting Project, <http://www.policemisconduct.net/explainers/civilian-review-boards/>, (accessed 27 June 2016).

137 *Fighting Police Abuse: A Community Action Manual*, ACLU, <https://www.aclu.org/fighting-police-abuse-community-action-manual#controlling>, (accessed 27 June 2016).

138 Civilian Review Boards, the CATO Institute's National Police Misconduct Reporting Project, <http://www.policemisconduct.net/explainers/civilian-review-boards/>, (accessed 27 June 2016).

139 See e.g., *Fighting Police Abuse: A Community Action Manual*, ACLU, <https://www.aclu.org/fighting-police-abuse-community-action-manual#controlling>, (accessed 27 June 2016); Civilian Review Boards, the CATO Institute's National Police Misconduct Reporting Project, <http://www.policemisconduct.net/explainers/civilian-review-boards/>, (accessed 27 June 2016).

# TRANSFORMING THE SYSTEM

## Political accountability

Political measures can influence the ways police departments are structured and behave. “Political checks,” both on a national and local level, including contingent federal funding, internal review, and increased reporting, can make police departments and officers more accountable. These measures can work in tandem with civil and criminal lawsuits to pressure police departments into adopting best practices.

One key political tactic is enhancing federal oversight of police departments by using Title VI of the Civil Rights Act of 1974. Currently, the Department of Justice Office of Civil Rights becomes involved in a police department when a complaint is made. Where they find that an entire police department has engaged in a “pattern or practice” of violating the civil rights of the community, the DOJ commences or threatens litigation against the offending jurisdictions, which often results in consent decrees that reform police practices in the jurisdiction. By enforcing Title VI, the DOJ can require reforms in the hundreds of police departments that receive federal funds:<sup>140</sup> \$3.8 billion is given to state and local governments each year in federal criminal justice grants.<sup>141</sup> Since Title VI prohibits recipients of federal funds, including police departments, from discriminating based on race, color, or national origin, the DOJ could require police departments to “show specific, demonstrable evidence of proactive efforts to address and overcome racially biased policing when those departments apply for federal funds, undergo evaluations, submit reports, and are audited for compliance with federal civil rights law.

Better still, it can **reward and incentivize** the departments that combine public safety and civil rights protections most effectively.<sup>142</sup> The demonstrable evidence of such policy changes can include the type of policy changes police departments provide in consent decrees with the federal government, including training in civil rights and de-escalation, stronger scrutiny of racial inequities and excessive force, and greater community accountability and oversight.<sup>143</sup> Thus, the DOJ can proactively encourage these reforms, providing adequate guidance and resources,<sup>144</sup> rather than reacting to abuses in a piecemeal fashion.

Police officers can also be made subject to “political” checks, such as peer reviews during incidents of misconduct and internal disciplinary panels. While these checks may exist, they are

140 Alan Jenkins, “DOJ Shouldn’t Wait for the Next Crisis in Policing,” *Huffington Post* (June 18, 2015), [http://www.huffingtonpost.com/alan-jenkins/doj-shouldnt-wait-for-the\\_b\\_7613100.html](http://www.huffingtonpost.com/alan-jenkins/doj-shouldnt-wait-for-the_b_7613100.html).

141 Ibid. Michele L. Jawando and Chelsea Parsons, *4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, Center for American Progress (Dec. 18, 2014), <https://www.americanprogress.org/issues/civil-liberties/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/>.

142 Jenkins, *supra* note 140.

143 Ibid.

144 Jawando, *supra* note 141.

# TRANSFORMING THE SYSTEM

often missing the necessary transparency<sup>145</sup> that can reassure the public that internal procedures are thorough and fair. At the same time, by regularly providing data to the public on the disciplinary dispositions of all misconduct complaints it will be easier to identify and address systemic problems in those processes.<sup>146</sup> Internal police procedures can also reflect a commitment to accountable, fair, and unbiased policing. Police departments can require implicit bias training and develop a policy to consider an officer's racial bias and record when hiring, certifying, deploying, or evaluating police officers.<sup>147</sup>

## Civil lawsuits

Police officers can also be held accountable through civil lawsuits. These include state causes of action and federal lawsuits brought pursuant to 42 U.S.C. 1983, the federal statute that prohibits constitutional violations by those operating under the "color of state law." These lawsuits can be brought against individuals who have deprived an individual of their rights<sup>148</sup> acting in an official capacity, whether or not their actions are sanctioned by the state and whether or not they're "off-duty."<sup>149</sup> Government entities can also be found liable under 1983, where they caused the constitutional violation to occur with an official policy or regulation.<sup>150</sup> Civil lawsuits are a primary mechanism to hold police officers and departments accountable for their actions: while the federal government typically **investigates a handful** of police departments each year, "private litigants filed over 15,000 cases in federal district courts to enforce civil rights, and incarcerated individuals filed well over 30,000 civil rights claims in 2013 alone."<sup>151</sup> Indeed, "Section 1983 litigation is by far the most-used vehicle for the enforcement of constitutional rights against police officers and other government officials."<sup>152</sup> "In order to truly hold police

145 Written Testimony Of Darius Charney Center for Constitutional Rights to the President's Task Force on 21st Century Policing, Listening Session on Policy and Oversight (Jan. 30, 2015), <http://www.cops.usdoj.gov/pdf/taskforce/submissions/Charney-Darius-Testimony.pdf>.

146 Ibid.

147 *Training*, Campaign Zero, <http://www.joincampaignzero.org/train>, (accessed 27 June 2016).

148 42 U.S.C. sec. 1983; *Double Exposure: Civil Liability and Criminal Prosecution in Federal Court for Police Misconduct*, FBI Law Enforcement Bulletin 23-32 (May 2008).

149 See, *United States v. Tarpley*, 945 F.2d 806, reh'g. denied (5th Cir. 1991), cert. denied, 504 U.S. 917 (1992) (holding that the presence of police and the air of official authority meant he was acting under the color of law even if he was off-duty); and *Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943). (holding that a Sheriff cannot divorce himself from his official capacity merely by removing his badge of office)

150 See *Monell v. Department of Social Services*, 436 U.S. 658 (1978); R. Schott, *Double Exposure: Civil Liability and Criminal Prosecution in Federal Court for Police Misconduct*, FBI Law Enforcement Bulletin 23-32 (May 2008).

151 Lynda G. Dodd, *What's Missing in the Police Reform Debate? (Part 1)*, Balkinization (Oct. 19, 2015), <http://balkin.blogspot.com/2015/10/whats-missing-in-police-reform-debate.html>

152 Ibid.

# TRANSFORMING THE SYSTEM

accountable for bad acts, civilians must be able to bring, and win, civil rights suits themselves... [I]n order to both bring and win civil rights suits, civilians need a level playing field in court.”<sup>153</sup>

Yet the Court has created significant obstacles to plaintiffs looking to hold public officials accountable, including immunizing prosecutors and police officers to different degrees and limiting the liability of municipalities and state bodies.<sup>154</sup> To overcome these obstacles, advocates need to utilize a long-term public campaign to prepare the way for legislation that minimize the hurdles plaintiffs face in 1983 cases.

## Criminal Prosecutions

Criminal lawsuits use the criminal justice system to hold officers accountable. The problems can be seen in highly publicized actions in which states attorneys delay in charging officers who have killed unarmed individuals and fail to secure indictments after officers have been charged with a crime. Critics attribute these failures to laws and policies that are overly deferential to police officers, incestuous relationships between prosecutors and police officers, and discriminatory jury selection practices. “The perception, real or perceived, is that local prosecutors have far too great of an interest to protect and justify the actions of local law enforcement. The perceived bias in the system has led to the erosion of trust that is needed to build public safety between law enforcement and local communities, suggesting that viable alternatives should be considered.”<sup>155</sup>

Advocates have called for independent prosecutors to address this injustice.<sup>156</sup> Independent or special prosecutors can provide state attorneys general with “additional prosecutorial authority over fatalities involving police”; “permanent ‘special prosecutors’ that are housed within the state office of the attorney general to provide a level of insulation from local law enforcement” can be created; or a system of “automatic referral outside the jurisdiction in fatal cases involving police” can be initiated.<sup>157</sup> Key to independent prosecutors is that an investigation is conducted by a neutral prosecutor who does not typically work with the police department subject of the investigation.

<sup>153</sup> Ibid.

<sup>154</sup> *Plumhoff v. Rickard* 134 S.Ct. 2012 (2014); see also, Erwin Chemerinsky, “How the Supreme Court Protects Bad Cops,” *The New York Times* (Aug. 26, 2014), [http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?\\_r=0](http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0).

<sup>155</sup> Jawando, *supra* note 141.

<sup>156</sup> See *Enhancing Prosecutorial Integrity*.

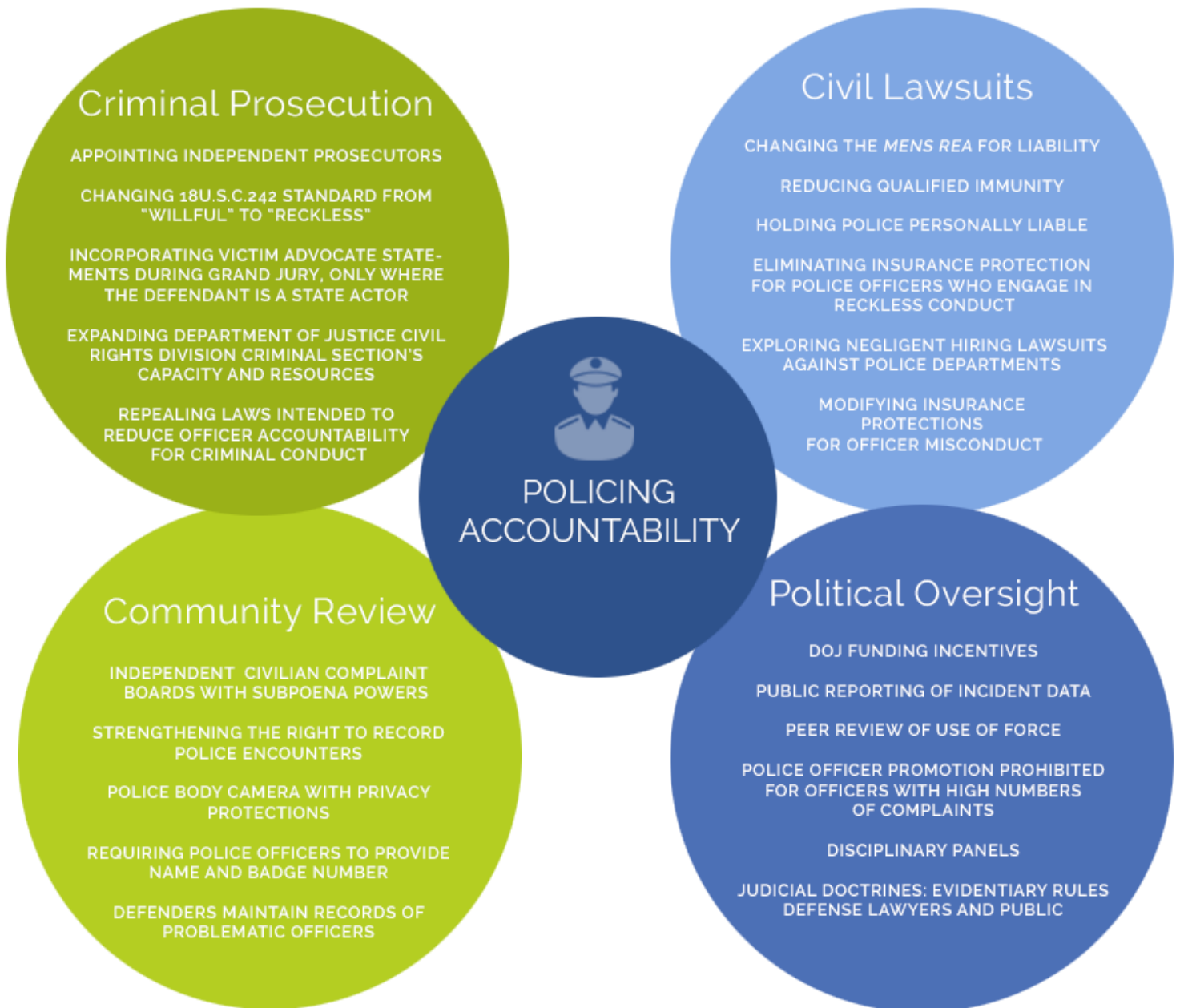
<sup>157</sup> Jawando, *supra* note 141.

# TRANSFORMING THE SYSTEM

Individual officers can also be found criminally liable under 18 U.S.C. 242; Section 242 is the criminal complement to 1983, which allows for criminal prosecution against an official who deprives people of their rights under the color of state law (while working in their official capacity). However, there are similar obstacles to implementation that limit Section 242's ability to hold officers accountable. In particular, it requires a police officer to act "willfully" when engaging in misconduct, a standard so high as to all but ensure that prosecutions are rarely pursued. By changing the criteria for criminal prosecution against police departments to "reckless," police officers can be prosecuted appropriately for their actions.

The chart below outlines the four primary mechanisms for holding police accountable. In addition to the recommendations above, a holistic approach to police officer accountability may reduce incidents of misconduct.

# TRANSFORMING THE SYSTEM





# TRANSFORMING THE SYSTEM

To promote accountability, local, state, and county legislatures should pass legislation that calls for the following:

- ▶ Establishment of an independent special investigator or prosecutor office responsible for investigating instances where police have seriously injured or killed civilians;<sup>158</sup>
- ▶ Inclusion of victim advocate statements by survivors of police violence, including family members of individuals who are victims of police violence, during grand jury hearings;<sup>159</sup>
- ▶ Passing legislation reducing the standard for qualified immunity;<sup>160</sup>
- ▶ Changing the *mens rea* for criminal liability under 18 U.S.C. 242 to recklessness;<sup>161</sup>
- ▶ Requiring that even where civil judgments are paid through municipal insurance payments that police departments must pay at least half of the civil judgment from their budget's insurance liability;
- ▶ Providing a negligent hiring cause of action against police departments that should have known that a particular officer would be likely to engage in unconstitutional conduct;<sup>162</sup>
- ▶ Requiring that police provide name, badge number, and "a card with instructions for filing a complaint to the civilian oversight structure"<sup>163</sup> before conducting a search;<sup>164</sup>
- ▶ Requiring a regular survey (see, for example: [Milwaukee survey](#)) to be fielded to the community to gauge their experiences and perceptions of the police and use this information to inform:

158 Coke, *supra* note 4, at 21. Newark's civilian review board may provide some model language:

"This Civilian Complaint Review Board (CCRB) will have independent authority to investigate police misconduct, subpoena data and testimony from the department, audit the department's policies and practices, and determine disciplinary decisions that, barring a 'clear error' in the board's investigation, will have to be carried out by the police director. The police department will also have to report racial and demographic information to the board regarding police activities, including stop and frisk." <http://www.policylink.org/blog/newark-community-oversight-pdf>.

159 *Victim Impact Statements*, National Center for Victims of Crime, <https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victim-impact-statements> (accessed 26 July 2016).

160 See Erwin Chemerinsky, "How the Supreme Court Protects Bad Cops," *The New York Times* (Aug. 26, 2014), [http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?\\_r=0](http://www.nytimes.com/2014/08/27/opinion/how-the-supreme-court-protects-bad-cops.html?_r=0); David A. Graham, "What Can the U.S. Do to Improve Police Accountability?," *Atlantic Monthly* (Mar. 8, 2016), <http://www.theatlantic.com/politics/archive/2016/03/police-accountability/472524/>; Sam Wright, "Want to Fight Police Misconduct? Reform Qualified Immunity Above the Law," (Nov. 3, 2015), <http://abovethelaw.com/2015/11/want-to-fight-police-misconduct-reform-qualified-immunity/>.

161 Michael J. Pastor, "A Tragedy and a Crime? Amadou Diallo, Specific Intent, and the Federal Prosecution of Civil Rights Violations," 6 *N.Y.U.J. Legis. & Pub. Pol'y* 171 (2002-2003); Richard M. Thompson, *Police Use of Force: Rules, Remedies, and Reforms* 26 (2015); Alison L. Patton, "The Endless Cycle of Abuse: Why 42 U.S. C. § 1983 Is Ineffective in Deterring Police Brutality," 44 *Hastings L.J.* 753, 756 n.13 (1993).

162 Sean Douris, *Negligent Hiring... Passing Around the Bad Apple*, Hendon Media Group.

163 *Community Oversight*, Campaign Zero, <http://www.joincampaignzero.org/oversight>, (accessed 27 June 2016).

164 *Ibid.*

# TRANSFORMING THE SYSTEM

- ▶ police department policies and practices
- ▶ police officer evaluations
- ▶ police officer pay incentives<sup>165</sup>
- ▶ Requiring that police provide *Miranda* warnings prior to conducting a consensual search;<sup>166</sup>
- ▶ Requiring the usage of body-worn cameras with applicable privacy protections, including creating protocols that indicate when cameras must be activated and guarding against the tampering of footage;<sup>167</sup>
- ▶ Creating or strengthening independent and civilian review of police departments;<sup>168</sup>
- ▶ Strengthening the community's right to record police officers to promote accountability and incentivize proper conduct by law enforcement officers;<sup>169</sup>
- ▶ Requiring police departments to “develop and publicly report a strategy and timeline for achieving a representative proportion of police officers who are women and people of color through outreach, recruitment, and changes to departmental practices.”<sup>170</sup>

The **Bureau of Justice Statistics** should collect data on police officers who have been arrested.

**Congress** should pass legislation requiring that all federal funding to law enforcement agencies be conditioned on police department compliance with the recommendations in this Report.

In addition, **law enforcement agencies, including local and state police departments, and sheriff's offices**, should incorporate these guidelines into their internal guidelines, manuals, policies, protocols, performance evaluations, and practices.

<sup>165</sup> *Community Representation*, Campaign Zero, <http://www.joincampaignzero.org/representation>, (accessed 27 June 2016).

<sup>166</sup> Ibid.

<sup>167</sup> CPD, *supra* note 90, at 33.

<sup>168</sup> Coke, *supra* note 4, at 21; CPD, *supra* note 63, at 27 (recommending a commission with full investigative powers to subpoena or compel testimony and documents).

<sup>169</sup> CPD, *supra* note 90, at 32.

<sup>170</sup> *Community Representation*, Campaign Zero, <http://www.joincampaignzero.org/representation>, (accessed 27 June 2016). The New York City Right to Know Act bill is an example of legislation that address this concern and is a “legislative package that aims to protect the civil and human rights of New Yorkers while promoting communication, transparency, and accountability in everyday interactions between the NYPD and the public.” Communities United for Police Reform, *Right to Know Act*, <http://changethenypd.org/RightToKnowAct>. It requires police officers to identify themselves and provide a specific reason for their law enforcement activity.

# TRANSFORMING THE SYSTEM

The **defense bar and legal aid societies** should maintain a database of police officers who have repeatedly been accused of misconduct by their clients. This database should include information on the police officer's name, precinct, and a brief description of the incident.

**Civil society, activists, and concerned community members** should:

- ▶ Campaign to establish a civilian review board or agency in their communities, or to strengthen an already existing board or agency; and
- ▶ Collaborate with local defense bar and legal aid societies to demand that problematic police officers be held accountable.



*For more information on the issue of police accountability and effective policing practices, check out:*

Justin Hansford and Meena Jagannath's "**Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson**," in which they describe bringing a complaint against the United States before the Committee Against Torture following the events in Ferguson, MO.

Developed by activists, protesters, and researchers across the nation, **Campaign Zero** is a data-informed platform that presents "comprehensive solutions to end police violence in America."

**Investigation of the Baltimore City Police Department**, from the U.S. Department of Justice, Civil Rights Division, discusses the importance of positive community-police relationships and highlights how a "commitment to constitutional policing builds trust that enhances crime fighting efforts and officer safety [while] ... frayed community relationships inhibit effective policing by denying officers important sources of information and placing them more frequently in dangerous, adversarial encounters."

Our former Communications Fellow Johnny Perez is a member of the **New York Advisory Committee to the U.S. Commission on Civil Rights**, which investigates violations of federal civil rights laws including abusive police practices.

# TRANSFORMING THE SYSTEM



PROMOTE JUSTICE IN

## Pre-trial Services & Practices

The right to due process is a cornerstone of our commitment to freedom and fairness.<sup>171</sup> The U.S. Constitution provides the right to due process, habeas corpus, and equal protection under the law to all people in the United States.<sup>172</sup> Ensuring that everyone is guaranteed fair treatment and due process means that there is a presumption of innocence following arrest.<sup>173</sup> At all stages of the criminal process, there should be decisions that are fair and reasonable under the circumstances. However, our due process guarantees have often been tenuous in practice. Current pretrial practices have the effect of coercing low-income individuals accused of committing a crime into pleas even when they are innocent.<sup>174</sup> Furthermore, detention should generally be avoided for immigration-related matters.<sup>175</sup>

Low-income people are often imprisoned before trial because they are unable to provide a monetary bond. *One of the greatest predictors of the final outcome of a case is whether an individual was detained pretrial.* Detention increases the likelihood that the individual will enter a guilty plea, increases the length of the individual's sentence, and increases the severity of the charge that the person takes.<sup>176</sup>

To protect the right of everyone to fair treatment when facing deprivations of liberty, we must restore principles that recognize the presumption of innocence.<sup>177</sup> Pretrial practices should

171 Due process protections as required in the immigration context are discussed in greater length in the Immigration section (see section 14) of this report.

172 U.S. Constitution Amendment XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

173 *Coffin v. United States*, 156 U.S. 432 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

174 CHJ, *supra* note 85.

175 See Immigration section 14 for additional discussion on due process issues in the immigration context.

176 James C. Oleson et al., *Pretrial Detention Choices and Federal Sentencing*, 78 Fed. Probation 12 (2014). "[P]retrial detention was the strongest predictor of incarceration in the model, even after controlling for legal (e.g., offense seriousness and criminal history) and extralegal variables (e.g., race, gender, and age."

177 Shima Baradaran, *Restoring the presumption of innocence*, 72 Ohio St. L.J. 1, 1 (2011). "[Current] limitations on the presumption are fundamentally inconsistent with its constitutional roots. The results of the presumption's diminution are also troubling as the number of defendants held pretrial has steadily increased such that the majority of people in our nation's jails have not been convicted of any crime."

# TRANSFORMING THE SYSTEM

encourage fairness, avoid incarceration where possible, and emphasize diversion to outside programs over incarceration.<sup>178</sup> Detention and money bail should only be imposed when an individualized assessment of the involved party require it.<sup>179</sup>

## Eliminating unnecessary pre-trial detention

A fair trial is premised on the guarantee of access to the courts and the right to a fair hearing. Studies show that pre-trial detention has a profound impact on whether an accused will be convicted of a crime.<sup>180</sup> This is especially the case for indigent accused persons.<sup>181</sup> Pre-trial detention has collateral consequences on those being detained before trial or even before a first appearance. Every year, of the nearly 12 million people booked into jails, mostly for misdemeanors, more than 60 percent are not convicted, and remain largely because they can't afford to post even small money bond amounts.<sup>182</sup> Even three days in jail can have serious collateral consequences, putting stress on "fundamentals like jobs, housing, and family connections."<sup>183</sup>

Prosecutors frequently use pretrial detention to coerce plea agreements from indigent individuals,<sup>184</sup> and research shows that accused persons who are detained pretrial are exponentially more likely to be convicted of a crime.<sup>185</sup> Eager to leave detention, incarcerated people are often reluctant to wait for trial to prove their innocence. They accept plea deals that permanently entangle them into the criminal system. The purpose of money bail is limited to assuring a person's presence at future court proceedings,<sup>186</sup> but it often serves to keep those without resources detained indefinitely, jeopardizing their jobs, families, and well-being. Courts

178 See generally CHJ, *supra* note 85.

179 Coke, *supra* note 401, at 15.

180 See, e.g., Oleson et al., *supra* note 176, at 78.

181 People who have only been accused of a crime spend months and sometimes years languishing in jails with horrible conditions, such as the infamous New York City jail at Rikers Island. Because of the abuses in that prison, there has been a major push to close it and reimagine a justice system in New York City that does not require that jail. See "Imagining a Rikers Island With No Jail," *The New York Times* (Feb. 24, 2016), [http://www.nytimes.com/2016/02/24/opinion/imagining-a-rikers-island-with-no-jail.html?\\_r=0](http://www.nytimes.com/2016/02/24/opinion/imagining-a-rikers-island-with-no-jail.html?_r=0).

182 Ram Subramanian et al., Vera Institute, *Incarceration's Front Door: The Misuse of Jails in America* (2015) 5.

183 *3 Days Count: Commonsense Pretrial*, Pretrial Justice Institute, <http://projects.pretrial.org/3dayscount/>.

184 Ryan, *supra* note 109, at 49, 56.

185 Oleson, *supra* note 176.

186 *Stack v. Boyle*, 342 U.S. 1, 4-6 (1951) ("Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."). See also 18 U.S.C. § 3142, Release or detention of a defendant pending trial ("The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court ... unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.").

# TRANSFORMING THE SYSTEM

routinely impose money bail without regard to an individual's resources, or possible alternative conditions of release, keeping presumptively innocent people incarcerated, sometimes for years.<sup>187</sup>

To remedy this injustice, local, state, and federal legislatures should pass legislative measures that:

- ▶ Reform bail practices to encourage release;<sup>188</sup>
- ▶ Abolish the use of cash bail;<sup>189</sup>
- ▶ Encourage the use of warning and citations rather than arrests;<sup>190</sup>
- ▶ Provide court notifications to defendants prior to court dates through pretrial services;<sup>191</sup>
- ▶ Prohibit for-profit pretrial agencies;<sup>192</sup>
- ▶ Prohibit for-profit transportation for incarcerated individuals;<sup>193</sup>
- ▶ Prohibit the use of bail schedules and bail minimums;<sup>194</sup>
- ▶ Prohibit the use of compensated sureties where cash bail is still used; instead, allowing defendants to make a deposit directly to the courthouse;<sup>195</sup>
- ▶ Require individualized risk assessments<sup>196</sup> for bail determinations, which favor a bail determination based on a defendant's actual risk,<sup>197</sup> relying upon a data assessment that mitigates biases embedded in the risk assessment tools and that is open to public

187 Michael Schwartz & Michael Winerip, "Kalief Browder, Held at Rikers Island for 3 Years without Trial Commits Suicide," *The New York Times* (June 8, 2015), <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>.

188 Coke, *supra* note 4, at 30.

189 Advocates have complained of the coercive use of cash bail. Ibid, at 9-10 ("The presumptive imposition of cash bail, particularly in misdemeanor cases, which unnecessarily incarcerates minority defendants and is used implicitly to coerce guilty pleas.").

190 Melissa Neal, Justice Policy Institute, *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail* (September 11, 2012), <http://www.justicepolicy.org/research/4364>.

191 Ibid.

192 Justice Policy Institute, *For Better or For Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice* (2012), [http://www.justicepolicy.org/uploads/justicepolicy/documents/\\_for\\_better\\_or\\_for\\_profit\\_.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf)

193 Eli Hager & Alysia Santo, The Marshall Project, *Inside the Deadly World of Private Prison Transport* (July 6, 2016) (describing the abusive transportation conditions of vans operated by for-profit companies which transport incarcerated individuals).

194 Pretrial Justice Institute, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (2012), <http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf>.

195 See generally *Com. v. Ray*, 435 Mass. 249 (2001); Fred Contrada, "Bail Bondsmen are a Thing of the Past in Massachusetts," *MASS Live* (Mar. 25, 2014), [http://www.masslive.com/news/index.ssf/2014/03/bail\\_bondsmen\\_are\\_a\\_thing\\_of\\_t.html](http://www.masslive.com/news/index.ssf/2014/03/bail_bondsmen_are_a_thing_of_t.html).

# TRANSFORMING THE SYSTEM

analysis and critique;

- ▶ Require that defendants be provided with counsel prior to bail determinations;<sup>198</sup>
- ▶ Expand pretrial services programs and adequately fund these programs;<sup>199</sup>
- ▶ Reform existing legislation, including the federal Bail Reform Act,<sup>200</sup> in compliance with these recommendations;
- ▶ Lower bail to an amount that factors the finances of the accused;<sup>201</sup>
- ▶ Incentivize restorative justice programs, including community prosecution programs and community courts that do not result in a criminal conviction, as alternatives to incarceration;<sup>202</sup>
- ▶ Establish time limits to allow the expeditious processing of arrested individuals with real consequences for courts that fail to meet these limits;<sup>203</sup>
- ▶ Establish special courts dedicated to addressing court backlogs;<sup>204</sup>
- ▶ Require that police interrogations are electronically recorded “during the time in which a reasonable person in the subject’s position would consider himself to be in custody and a law enforcement officer’s questioning is likely to elicit incriminating responses.”<sup>205</sup> If video recording is used, the camera should record both the interrogator and the person being interrogated;

196 Risk assessments should be favored to the extent they encourage the release of individuals who would otherwise be incarcerated. However, risk assessment tools may also exacerbate existing racial disparities in the criminal justice system by relying on data that is the result of racial biases that already exist in the criminal justice system. To address this issue, the data underlying risk assessment tools should be publicly available and transparent. The assessment tools should be culturally sensitive and provide for mechanisms to correct criteria that produce racially discriminatory outcomes.

197 Pretrial Justice Institute, *supra* note 194.

198 The Constitution Project, *Don’t I Need a Lawyer? Pretrial Justice and the Right to Counsel at First Judicial Bail Hearing* (2015), <http://www.pretrial.org/download/infostop/Don%27t%20I%20Need%20a%20Lawyer%20-%20Constitution%20Project%202015.pdf>.

199 Eaglin & Solomon, *supra* note 39, at 27-29.

200 18 U.S.C. § 3142.

201 *Ibid.* at 15.

202 Ram Subramanian et al., Vera Institute of Justice, *Incarceration’s Front Door: The Misuse of Jails in America* (2015), <http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf>.

203 *Ibid.*

204 *Ibid.*

205 *False Confessions & Recording Of Custodial Interrogations*, The Innocence Project (August 12, 2015), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/false-confessions-recording-of-custodial-interrogations#sthash.HzqqPHf5.dpuf>.

# TRANSFORMING THE SYSTEM

- ▶ Eliminate the use of monetary bail by ensuring that Congress passes the No Money Bail Act of 2016, H.R.4611;
- ▶ Encourage community supervision and alternative conditions of release where suitable.<sup>206</sup>

The **judiciary<sup>207</sup> and judicial ethics committees and organizations** should encourage bail determinations that ensure that individual defendants are not being incarcerated for poverty and are instead being assessed for actual risk.

## Judicial ethics committees and organizations should:

- ▶ Educate judges about the value of individualized risk assessments in determining flight risk, and encourage judges to use tools that mitigate against racial biases;<sup>208</sup>
- ▶ Educate judges on their role in contributing to the criminalization of poverty when improper bail determinations are made;<sup>209</sup>
- ▶ Establish court-based risk-assessment programs that rely upon data that is open to public critique and where needed;<sup>210</sup>
- ▶ Encourage the use of alternative conditions of release by providing bench cards that list suitable alternatives to manage risk.<sup>211</sup>

206 Ibid.

207 This recommendation aims to ensure that the judiciary is also held accountable for bail reform. Judge Jed S. Rakoff a federal trial judge in the South District of New York has spoken out about the importance of the judiciary in reducing mass incarceration: "More generally, judges ... became accustomed to imposing prison terms as the norm. With the passage of time, there were fewer and fewer judges who had any experience with a gentler approach.... And where in all this stands the judiciary? In some ways, this should be our issue. Not just because sentencing has historically been the prerogative of judges but also because we are forced to impose these sentences that many of us feel are unjust and counterproductive." Gabe Friedman, "Judge Rakoff Criticizes Judiciary, Bar for Silence on Mass Incarceration," *Bloomberg News*, (April 13, 2015), <https://bol.bna.com/judge-rakoff-criticizes-judicial-bar-for-silence-in-mass-incarceration/>.

208 Pretrial Justice Institute, *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process* (2012), <http://www.pretrial.org/download/pji-reports/Rational%20and%20Transparent%20Bail%20Decision%20Making.pdf>.

209 Timothy Schnacke, "Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial" (2014), <http://www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf>.

210 Pretrial Justice Institute, *supra* note 194.

211 See Amy L. Solomon, et al., "Putting Public Safety First: 13 Strategies for Successful Supervision and Reentry," *Public Policy Brief, No. 7*, The PEW Center on the States, (2008), <http://www.urban.org/research/publication/putting-public-safety-first-13-strategies-successful-supervision-and-reentry-policy-brief>; Marie VanNostrand, Kenneth Rose, and Kimberly Weibracht, "State of the science of pretrial release recommendations and supervision 2," Pretrial Justice Institute (2011), [http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20of%20Pretrial%20Recommendations%20and%20Supervision%20\(2011\).pdf](http://www.pretrial.org/download/research/PJI%20State%20of%20the%20Science%20of%20Pretrial%20Recommendations%20and%20Supervision%20(2011).pdf); E.J. Latessa, *What Works and What Doesn't in Reducing Recidivism: The Principles of Effective Intervention*, California Forward (2012), <https://cafwd.box.com/s/c9962d852ec4d0778d82>.



# TRANSFORMING THE SYSTEM

**Prosecutors and prosecutor organizations** should ensure that prosecutors are not employing pretrial detention as a coercive and potentially unethical trial strategy.

**Community members, advocates, and activists** should partner with **legal aid organizations and other indigent defense organizations** to monitor prosecutorial practices and demand that prosecutors who frequently misuse bail to coerce guilty pleas be disciplined for ethics violations.<sup>212</sup>

## Encouraging early provision of defense counsel

Effective counsel is crucial to ensuring that there are fair outcomes, especially for misdemeanor cases, which are often indigent defendants' first point of entry into the criminal justice system, yet it is rare for indigent defendants to receive prompt counsel. Early access to counsel may be critical in avoiding pretrial detention, refining the defense, and preventing downstream rights violations in the enforcement of sentences that include fines and fees.<sup>213</sup>

To ensure that there is early<sup>214</sup> provision of indigent defense counsel, the local bar, judiciary, local law schools, and the federal government and local government should:

- ▶ Create a rapid response indigent defense system that accommodates the need for counsel, especially for misdemeanor cases.<sup>215</sup> Such response system may include the following: partnerships between law school clinics and local bar associations; legislation providing funds to support such programs; and judiciary-led initiatives to ensure that indigent defendants are represented soon after initial arrest.<sup>216</sup>

The **Administration** should remain active in the development of **Goal 16 of the United**

212 The Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson* (2016).

213 See Douglas Colbert, "Prosecution Without Representation," 59 Buff. L. Rev. 333 (2011); Eaglin & Solomon, *supra* note 39, at 38.

214 Eaglin & Solomon, *supra* note 39, at 39 ("increasing access to indigent defense at the early stages of a case—such as at arraignments and bail hearings—would reduce pressures to plead guilty").

215 Ibid. at 38 ("Of the approximate 10 million misdemeanor cases filed annually, almost 25 percent of defendants go before a judge without a lawyer. Theoretically, public defenders are guaranteed for all cases where a criminal defendant faces a term of incarceration. Nevertheless, indigent counsel is often denied due to court practices, overwhelming caseloads, or a lack of adequate government resources for public defense.").

216 Thomas Giovanni & Roopal Patel, Brennan Center for Justice, *Gideon at 50: Three Reforms to Revive the Right to Counsel* (2013), <http://www.brennancenter.org/publication/gideon-50-three-reforms-revive-right-counsel>.

# TRANSFORMING THE SYSTEM

**Nation's Sustainable Development Goal**, which focuses on access to justice.<sup>217</sup>

The **Office for Access to Justice of the Department of Justice** and the **White House Legal Aid Interagency Roundtable** should identify key partnerships that could bridge gaps in indigent representation.

**Civil society** should be active in creating partnerships that bridge gaps in the provision of indigent defense.

217 Rule 16 of the Sustainable Development Goals aims to:

- Promote the rule of law at the national and international levels and ensure equal access to justice for all
- Develop effective, accountable and transparent institutions at all levels
- Ensure responsive, inclusive, participatory, and representative decision-making at all levels
- Ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements
- Promote and enforce non-discriminatory laws and policies for sustainable development

United Nations, Goal 16: Promote Just, Peaceful and Inclusive Societies, <http://www.un.org/sustainabledevelopment/peace-justice/>.

# TRANSFORMING THE SYSTEM

## Expanding diversion beyond first-time and less serious crimes



### Law Enforcement Assisted Diversion (LEAD)

Law Enforcement Assisted Diversion (LEAD) is a pre-arrest diversion program developed with the community to address low-level drug and prostitution crimes in Seattle. The program allows law enforcement officers to direct people who have committed low-level offenses in drug or prostitution activity to community-based services instead of jail.<sup>218</sup> By diverting these individuals to services, LEAD interrupts the “cycle of arrest, prosecution, and incarceration” for people on the margins, improves the lives of individuals and improves public safety.<sup>219</sup>

When law enforcement officers pick up a person who would otherwise be charged with a low level offense, the officer gives the individual the option of cutting out the criminal-justice system entirely and bring them to case workers. These case workers can provide immediate help—a place to sleep, warm clothing, a hot meal—as well as longer-term services for job training, drug treatment, and stable housing. Case workers tailor their services to the individual and expect relapses as part of recovery.<sup>220</sup>

LEAD has been shown to be effective at reducing arrests, reducing recidivism, and reducing costs. Three years into the pilot, researchers undertook an 18-month study to evaluate its effects.<sup>221</sup> The people in LEAD were 60 percent less likely to be arrested within the first six months of the evaluation and 58 percent less likely than people in the control group to be arrested.<sup>222</sup> And it saves money. Researchers found that the LEAD group cost the city less than the criminal justice and legal system utilization and associated costs.<sup>223</sup>

218 *Law Enforcement Assisted Diversion*, LEAD, <http://leadkingcounty.org/lead-tools/> (accessed 7 July 2016) [hereinafter LEAD].

219 Sara Jean Green, “LEAD Program for Low-Level Drug Criminals Sees Success,” *Seattle Times* (April 9, 2015), <http://www.seattletimes.com/seattle-news/crime/lead-program-for-low-level-drug-criminals-sees-success/>.

220 Ibid.

221 Susan Collins et al., LEAD Program Evaluation, U. of Wash-Harborview Medical Center (June 24, 2015), <http://leadkingcounty.org/lead-evaluation/>.

222 Ibid.

223 Ibid.

# TRANSFORMING THE SYSTEM

Criminal justice policy should focus on strengthening programs that are proven to be effective by expanding pre-booking diversion programs that prevent incarceration and do not result in a criminal record. Many diversion programs<sup>224</sup> have been proven to be effective at reducing crime, lowering recidivism, and promoting safe communities.<sup>225</sup> Several successful diversion programs are included in this document, including Crisis Intervention Teams, LEAD, specialty courts, and restorative justice processes. Diversion programs that have strong evaluation metrics in place and are proven to be effective should be expanded and replicated. There is a need to increase the number and diversity of diversion programs throughout the country, especially programs that do not result in a conviction record for defendants and lower both costs and crime. Nonetheless, there should be a focus on decriminalization for most offenses. Diversion programs are a suitable option when involving an individual in the justice system is inevitable or the only other alternative.

To ensure that diversion programs are considered as alternatives to criminalization, the local, state, and federal legislatures should pass legislation that:

- ▶ Creates diversion programs that do not result in convictions and are used as an alternative to incarceration.<sup>226</sup> However, these programs should not be used as a tool for the heightened policing of low-income communities. They should be viewed as an alternative where involvement in the criminal justice system would be the only other alternative.
- ▶ Pre-booking diversion programs should be available for all categories of cases including more serious cases.<sup>227</sup>
- ▶ Diversion programs should be provided with adequate funding and resource support.
- ▶ Diversion programs should adopt best practices, maintain comprehensive data on demographics and outcomes, and aim to reduce recidivism. These programs should provide proper social services; provide access to immigration attorneys where there might be immigration-related consequences; allow for independent oversight for the

<sup>224</sup> Diversion programs are alternative programs that often allow individuals to avoid criminal charges. These programs include various courts, such as mental health courts or human trafficking intervention courts, as well as restorative justice programs. These programs should not be used as alternate means for surveilling and policing marginalized communities.

<sup>225</sup> See generally CHJ, *supra* note 85.

<sup>226</sup> Eaglin & Solomon, *supra* note 38, at 30.

<sup>227</sup> CHJ, *supra* note 85. ("Jurisdictions can develop or adopt strategies and interventions that focus on those individuals most likely to recidivate, and that consider factors other than just current charge and criminal history in determining an intervention plan.")

# TRANSFORMING THE SYSTEM

programs; and demonstrate a proven ability to reduce harm.<sup>228</sup>

For their part, **the local bar, law schools, judiciary, and federal government** should encourage partnerships that foster the creation of local diversion programs that meet individual community needs.



*For more information on issues of pretrial justice, check out:*

Tim Schnacte's comprehensive report, ***Fundamentals of Bail***, describing the bail framework and necessary reforms;

**Pretrial Justice Institute (PJI)**, which is dedicated to advancing safe, fair, and effective juvenile and adult pretrial justice practices; and

**Equal Justice Under Law**, which engages in litigation and advocacy to "reform the structures, norms, and incentives that create and perpetuate violations of fundamental rights," specifically focusing on the misuse of money bail to detain individuals pretrial.

<sup>228</sup> Testimony of the Sex Workers Project, Urban Justice Center, the New York City Council Committee on Women's Issues and the Committee on Courts & Legal Services Hearing re: Oversight Hearing: Effectiveness of Human Trafficking Intervention Courts (Sept. 18, 2015).

# TRANSFORMING THE SYSTEM



ENHANCE

## Prosecutorial Integrity

Prosecutors represent the government, and therefore must reflect the highest levels of integrity and ethics in their work.<sup>229</sup> We expect our prosecutors to be unbiased, fair, and committed to transparent administration of justice. Unfortunately, studies show that prosecutors are frequently biased against low-income people and people of color.<sup>230</sup> There are currently inadequate systems in place to prevent these prosecutorial biases.

Moreover, prosecutors are often measured by performance standards that prioritize the volume of prosecutions and the rate of conviction over the quality of cases sought for prosecution.<sup>231</sup> This creates an incentive to increase prosecutions, and accordingly incarceration, even where prosecution may not be the most approach for a particular matter. This has resulted in prosecutors unintentionally relying upon prosecutions of low-income people and people of color to meet the cultural and political pressure to increase prosecutions and convictions. Prosecutors should instead be incentivized to use qualified and effective diversion programs as a tool for promoting safe communities and ensuring arrestees receive drug and mental health treatment when needed.

While all criminal justice actors should acknowledge their role in creating mass incarceration, prosecutors play a particularly crucial role in ensuring that incarceration is not a used as a substitute for social services.<sup>232</sup>

229 The American Bar Association Model Rule 3.8 provides ethics guidelines for prosecutors and states in part:

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense
- (f) refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused....
- (g) When a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall ... promptly disclose that evidence to an appropriate court or authority, and
- (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

230 Coke, *supra* note 4, at 11-12.

231 Ibid.

232 See generally Roberts, *supra* note 2.

# TRANSFORMING THE SYSTEM

## Promoting effective prosecution

Prosecutors should be required to base their decisions on practices that are proven to actually reduce crime and adhere to the highest ethical standards without bias.

To this end, the **Department of Justice** should:

- ▶ Publish district data concerning the U.S. Attorneys' compliance with the Smart on Crime Initiative, a DOJ initiative to conduct a "comprehensive review of the criminal justice system in order to identify reforms that would ensure federal laws are enforced more fairly and ... more efficiently,"<sup>233</sup> and charging in drug cases;<sup>234</sup>
- ▶ Issue guidance on reducing the impact of implicit racial bias in prosecutorial decision-making process;
- ▶ Review case selection and charging practices to ensure that only the most serious offenses with a substantial federal interest are being pursued;<sup>235</sup>
- ▶ Adopt federal guidelines that advise all prosecutors' offices on best practices to guide prosecutorial discretion, reduce reliance on incarceration, and ameliorate collateral consequences, including internal guidelines that help determine when prosecution should be pursued and a requirement that prosecutors produce internal documents justifying their decision to prosecute;
- ▶ Adopt federal guidelines that advise all prosecutors' offices on best practices for incorporating diversion programs into their offices' work.

**Local governments, prosecutors' offices, Congress, and state legislatures should encourage effective prosecutorial practices including:**

<sup>233</sup> Smart on Crime, *supra* note 109.

<sup>234</sup> American Civil Liberties Union, *Letter to Attorney General Lynch, ACLU Recommendations for Attorney General Loretta Lynch* (June 30, 2015).

<sup>235</sup> Charles Colson Task Force on Federal Corrections, *Transforming Prisons, Restoring Lives: Final Recommendations of the Charles Colson Task Force on Federal Corrections* (January 2016), <http://colsontaskforce.org/final-recommendations/Colson-Task-Force-Final-Recommendations-January-2016.pdf>.

# TRANSFORMING THE SYSTEM

- ▶ Prioritizing the prosecution of more serious offenses;<sup>236</sup>
- ▶ Adopting diversion programs<sup>237</sup> and restorative justice initiatives;
- ▶ Diverting individuals with mental health issues and substance abuse issues to appropriate treatment programs;<sup>238</sup>
- ▶ Creating performance review standards that reward diversion and the removal of racial inequities, and prioritize the prosecution of serious and violent offenses;<sup>239</sup>
- ▶ Raising the charging standard<sup>240</sup> by requiring that prosecutors consider the social costs of mass incarceration when determining whether it is in the “interests of justice”<sup>241</sup> to charge for a case and requiring prosecutors to charge crimes according to the likelihood of conviction rather than probable cause;
- ▶ Establishing offices of conviction integrity to ensure that credible challenges to convictions are fully reviewed;
- ▶ Focusing on the monitoring and training of inexperienced prosecutors, including creating internal guidelines to channel discretion and requiring written justification for decisions to prosecute;<sup>242</sup>
- ▶ Using recidivism rates and other metrics to evaluate prosecutor performance rather than the number of prosecutions or the rate of conviction;
- ▶ Eliminating the practice of adjudicating youth as adults;

236 Department of Justice, *supra* note 109, at 2 (“Given scarce resources, federal law enforcement efforts should focus on the most serious cases that implicate clear, substantial federal interests”); See Eaglin & Solomon, *supra* note 37, at 37 (“Prosecutors are starting to agree that they can and should prioritize reducing violent and serious crime, reducing incarceration, and reducing recidivism instead of focusing on increasing conviction rates and sentence lengths”); Coke, *supra* note 4, at 22 (“The Association of Prosecuting Attorney now advises district attorneys to rethink the prosecution of marijuana possession cases, said David LaBahn of the APA, because it limits, due to volume, their ability to focus on more serious, violent crimes”); CPD, *supra* note 90, at 6.

237 See DOJ, *supra* note 109. See generally CHJ, *supra* note 85.

238 See Coke, *supra* note 4, at 13.

239 See Eaglin & Solomon, *supra* note 39; Chettiar, et al., *supra* note 33.

240 See Coke, *supra* note 4, at 12.

241 ABA Standard recommends that prosecutors consider the interests of justice when determining whether to charge for a particular crime: Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges (a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.

242 Ibid.



# TRANSFORMING THE SYSTEM

- ▶ Promoting a culture for courageous leadership to thrive.<sup>243</sup>

The **American Bar Association** should revise Standard 3-3.9, which provides guidelines for prosecutors to dispose of a pending matter, to affirmatively encourage prosecutors to exercise discretion not to prosecute less serious acts.

In addition to pressuring government officials to support the above actions, advocates, activists, cultural workers and artists, and civil society should invest time and resources to engage in prosecutorial elections, highlighting the power of local prosecutors and increasing their accountability to the public.

## Encouraging transparency and accountability in prosecutorial decisions

Transparency and accountability measures can provide incentives for prosecutors to uphold the highest standards of integrity. For example, by collecting data about which charges prosecutors decline to pursue, or which sentences they request, supervisors can provide more effective guidance to junior prosecutors. They may discover, for example, that line prosecutors are seeking more severe penalties for some classes of individuals. This insight could be the impetus for focusing more attention on understanding this imbalance and, if necessary, implementing corrective measures. However, there is often a lack of data and transparency in the prosecutorial decision-making process that makes full evaluation impossible.

To remedy this lack of transparency, **local and state governments, prosecutors' offices, and the federal government** should call for the following:

- ▶ Independent review of the administration of prosecutors' office to ensure that there is equity in prosecutorial decision-making;<sup>244</sup>
- ▶ To address concerns regarding the disclosure of exculpatory material, states should

<sup>243</sup> Ibid.

<sup>244</sup> See Coke, *supra* note 4, at 12.

# TRANSFORMING THE SYSTEM

require open file discovery;<sup>245</sup>

- Data collection on prosecutorial decision-making, disaggregated by race, religion, sex, gender identity, age, sexual orientation, ethnicity, sexuality, and religious affiliation, on charging determinations, prosecutions, and diversion.<sup>246</sup>

The **Department of Justice** should adopt these policies for federal prosecutor offices.

## Reducing inequality in prosecution

Prosecutorial practices should uphold our commitment to equal justice for all. This requires an explicit commitment to racial equity in the prosecutorial decision-making process. Frequently, prosecutors do not treat African Americans as well as whites, either as criminal defendants or victims of crime.<sup>247</sup>

In a series of pilot projects, the Vera Institute of Justice is working with select prosecutors to remedy such discriminatory policies and practices through its Prosecution and Racial Justice Program.<sup>248</sup> Prosecutors' office should take affirmative steps to reduce racial inequities.

The Department of Justice, Congress, local and state legislatures, and prosecutors' offices should ensure that there is fairness in the prosecutorial decision-making process by adopting the following practices:

- Routine implicit bias training for prosecutors;<sup>249</sup>

245 The Innocence Project, *Prosecutorial Oversight: A National Dialogue in the Wake of Connick v. Thompson* (2016).

246 See Coke, *supra* note 4, at 12.

247 Robert J. Smith & Justin D. Levinson, "The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion," 35 *Seattle U. L. Rev.* 795 (2011).

248 Prosecution and Racial Justice Program, Vera Institute of Justice, <http://www.vera.org/centers/prosecution-and-racial-justice-program> (accessed 7 July 2016) (noting that the program is "[p]artnering with prosecutors to analyze the impact of their decisions and develop policies to address unwarranted racial and ethnic disparities").

249 The American Bar Association standard 3-1.6 recommends that prosecutors actively work to prevent bias: Standard 3-1.6 Improper Bias Prohibited (a) The prosecutor should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status. A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion. A prosecutor should strive to eliminate implicit biases, and act to mitigate any improper bias or prejudice when credibly informed that it exists within the scope of the prosecutor's authority.

# TRANSFORMING THE SYSTEM

- ▶ Routine review of data metrics to expose racial disparities with the aim of promptly addressing them;<sup>250</sup>
- ▶ Increased funding for additional programs similar to the Vera initiative;<sup>251</sup>
- ▶ Incorporation of racial impact review in performance review for individual prosecutors.



For more information on the role of prosecutors in mass incarceration and ways to reform the system, check out:

Human Rights Watch's report ***An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty***, which describes how federal prosecutors use charging decisions to force plea deals in drug cases;

The Vera Institute for Justice's study, ***The Anatomy of Discretion: An Analysis of Prosecutorial Decision Making***, in which Bruce Frederick and Don Stemin analyze the discretion allotted to prosecutors to make pivotal decisions with little public or judicial scrutiny generally.

The **Center for Prosecutor Integrity** is dedicated to strengthening prosecutorial ethics and has published a white paper, ***Roadmap for Prosecutor Reform***, with recommendations for enhancing prosecutorial ethics.

250 One research report by the National Association of Criminal Defense Lawyers discusses the successes of routine examination of charging disparities:

In one district attorney's office with which the Vera Institute worked, the data showed that African American women arrested for drug offenses were prosecuted more frequently, and stayed in the system longer, than white women with the same charges. While some staff proffered justifications for the higher rate (for example, the theory that some of these women were also prostitutes), six months after raising the disparity and asking employees to scrutinize their charging practices, the disparity had disappeared.

See Coke, *supra* note 4, at 11.

251 Vera Institute of Justice, *supra* note 248.

# TRANSFORMING THE SYSTEM



ENSURE FAIR TRIALS AND

## Quality Indigent Defense

Every accused person is entitled to a fair trial. Indigent defendants have a constitutional right to competent representation at trial.<sup>252</sup> Yet, there is a national indigent defense crisis.

At the federal level, the Obama administration has created an initiative to aid state and county indigent defense systems. In 2010, the Department of Justice established the Access to Justice Initiative to ease the way toward more equitable and egalitarian handling of accused people by the police, courts, and corrections. Despite this effort, there are many instances in which defendants are deprived of their right to fair jury representation, provided with overburdened public defenders, and hampered by structural biases in the system.

### Requiring effective indigent defense

All defendants are entitled to competent attorney representation.<sup>253</sup> Low-income criminal defendants and those living in poverty should not be provided with overburdened attorneys, who are unable to provide them with competent representation.

Yet in many courthouses throughout the country, indigent defendants are either not receiving representation at all or being represented by attorneys who must juggle a caseload of several hundred defendants and are thus unable to provide the level of representation that our Constitution requires.<sup>254</sup> National and local bodies of government should adopt comprehensive strategies to address the indigent defense crisis in this country, both by ensuring adequate representation for all defendants and making the system easier to navigate.

The **Administration** should prioritize judicial appointments and focus on appointing judges who

<sup>252</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that assistance of counsel is a fundamental right under the Constitution); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“the right to counsel is the right to the effective assistance of counsel”).

<sup>253</sup> Ibid.

<sup>254</sup> Ryan, *supra* note 109 at 28-33.

# TRANSFORMING THE SYSTEM

represent diverse sectors within the legal industry, particularly those with public defense and public interest backgrounds.

**Congress, and local and state legislatures should pass legislation that does the following:**

- ▶ Requires a universal cap on criminal defense counsel caseloads;<sup>255</sup>
- ▶ Provides additional resources to increase indigent representation for misdemeanor offenses to ensure compliance with constitutional obligations;<sup>256</sup>
- ▶ Increases payments to attorneys on the indigent defense panel by increasing the attorney compensation rate, especially rate for time outside the courtroom, with regular increases tied to increases in payments to prosecutors, to create incentives for attorneys to allocate adequate time and preparation for these cases.<sup>257</sup>

**Legal aid societies, defender organizations, and the private defense bar** should encourage defense attorneys to follow best practices and provide guidelines that are responsive to the conditions of local defenders.<sup>258</sup> The Center for Court Innovation published a rubric of best practices for indigent representation, which include:<sup>259</sup>

1. Collecting the client's information
2. Nurturing the relationship with the client
3. Protecting the client while the case is pending
4. Evaluating the government's case
5. Conducting an independent investigation of the government's case
6. Challenging the government's case

<sup>255</sup> Ibid. at 31-32.

<sup>256</sup> See generally *ibid.*

<sup>257</sup> Ibid. at 4, 32.

<sup>258</sup> See Coke, *supra* note 4, at 12 (recommending that defenders practice self-awareness and patience, and educate other about implicit biases).

<sup>259</sup> Ziyad Hopkins, Center for Court Innovation, *The Committee for Public Counsel Services Answering Gideon's Call Project* (2012-DB-BX-0010): Best Practices, Objectives and Performances Indicators 4-7 (Nov. 2014), <https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2014/12/Best-Practices-Objectives-and-Performance-Indicators.pdf>.

# TRANSFORMING THE SYSTEM

7. Developing a theory of the case and post-disposition plan
8. Preparing to persuade the finder of fact to support the theory of the case
9. Affirming a continued duty to the client
10. Protecting post-representation client information.

**Local bar associations** and **law schools** should form partnerships with each other, courts, and defender attorney organizations to expand indigent defense programs.

## Promoting fair jury representation

Jury selection practices should encourage participation by a cross-section of the community. Yet, advocates complain that prosecutors frequently engage in racial discrimination during the juror selection process in clear violation of federal law. “Dedicated and thorough enforcement of anti-discrimination laws designed to prevent racially biased jury selection must be undertaken by courts, judges, and lawyers involved in criminal and civil trials, especially in serious criminal cases and capital cases.”<sup>260</sup>

Moreover, jurors from low-income communities are often unable to participate due to biased exclusion criteria. For example, prosecutors in some jurisdictions may strike prospective jurors because they have family members who have been involved in the criminal justice system.<sup>261</sup>

**The Department of Justice, particularly U.S. Attorneys**, should enforce 18 U.S.C. 243, which prohibits racially discriminatory jury selection, by prosecuting prosecutor offices that have a pattern or practice of racial discrimination in the jury selection process.<sup>262</sup>

**Congress** should ensure that the “rule banning racially discriminatory use of peremptory strikes announced in *Batson v. Kentucky* should be applied retroactively to death row prisoners and others with lengthy sentences whose convictions or death sentences are the product of illegal, racially biased jury selection but whose claims have not been reviewed because they were tried before 1986.”<sup>263</sup>

<sup>260</sup> Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (2010), <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>.

<sup>261</sup> See Coke, *supra* note 4, at 18.

<sup>262</sup> 8 U.S. Code § 243 covers the exclusion of jurors on account of race or color: No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.

<sup>263</sup> Equal Justice Initiative, *supra* note 260.

# TRANSFORMING THE SYSTEM

The judiciary and local and state legislators should promote jury selection practices that do the following, through legislation and through courtroom practices:

- ▶ Restore party-controlled voir dire, which allows attorneys for both sides in a criminal trial to thoroughly question jurors about relevant life experiences to eliminate the use of race or gender as proxies for experience;<sup>264</sup>
- ▶ Offer hardship accommodations to jurors, which include access to childcare, transportation passes, or mileage reimbursement, to ease the logistical and financial burden that low-income jurors face;<sup>265</sup>
- ▶ Ensure that prior involvement in the justice system does not bar an individual's ability to participate in a jury;
- ▶ Explore alternatives to voter-based juror rolls that ensure that community members who are not on the voter rolls can nonetheless participate in juries;<sup>266</sup>
- ▶ Eliminate the pro forma exclusion to jurors with family members in the criminal justice systems.<sup>267</sup>



*For more information on ensuring fair trials, check out:*

The **Sentencing Project**, which advocates for a “fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.”

**The Lawyers’ Committee for Civil Rights**, which seeks to “secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities.”

<sup>264</sup> Ibid.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Ibid.

# TRANSFORMING THE SYSTEM



ENCOURAGE

## Equitable Sentencing

People convicted of crimes should receive fair sentences. These sentences should reflect the severity of the crime and be administered in a fair manner. Nonetheless, the explosion of the American prison population is largely due to sentences that are disproportionate to the severity of crimes. Prisons and jails are filled by many people who pose no threat to their communities.<sup>268</sup> Laws that impose mandatory minimums contribute to mass incarceration.

Like other parts of the criminal justice system, there are severe racial disparities in how sentences are handed down. African American defendants are more likely to receive severe sentences than whites convicted of the same crime.<sup>269</sup> It is critical to actively work against racial bias through implicit bias trainings, regularly reviewing data on biases in the sentencing process, and the inclusion of judicial bench cards that are intended to reduce bias during sentencing.

### Creating equitable sentencing practices

There must be a concerted effort to promote equitable sentencing practices that reflect the severity of crime and ensure that prison is not overused as a punishment. Sentencing laws should ensure that there is individualization, which allows sentences that take into account the circumstances of an offense; humanity that focuses on sentences that respect the dignity of the individual and the impact of sentences on families and communities; parsimony, which allows for sentences that are no more severe than necessary; proportionality, which requires that sentences be proportioned to the severity of the offense; and regularity, which allows sentences be guides by “consistently applied standards or guidelines.”<sup>270</sup>

<sup>268</sup> See Roberts, *supra* note 2.

<sup>269</sup> Marc Mauer, “Racial impact statements as a means of reducing unwarranted sentencing disparities,” 5 *Ohio St. J. Crim. L.* 19 (2007).

<sup>270</sup> Michael Tonry, “Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration,” 13 *Criminology & Public Policy* 503 (2014).



# TRANSFORMING THE SYSTEM

## Congress, and state and local legislatures should:

- ▶ Repeal “truth-in-sentencing” laws, which limit access to parole and decreases in the amount of time that a person convicted of an offense serves;<sup>271</sup>
- ▶ Restore judicial discretion and review in sentencing determinations so that judges may consider the circumstances surrounding criminal conduct;<sup>272</sup>
- ▶ Eliminate cocaine and crack sentence differences;
- ▶ Prohibit the imposition of fines or jail time for alleged failure to appear, which seek to punish rather than ensure appearance in court, to ensure that individuals are not being incarcerated for missing a court date;<sup>273</sup>
- ▶ Shorten sentence lengths across the board;<sup>274</sup>
- ▶ Adopt a stated goal of reducing incarceration in half by 2030 to encourage smarter sentences;<sup>275</sup>
- ▶ Eliminate mandatory minimums;<sup>276</sup>
- ▶ Repeal drug free school zone laws and habitual offender laws;<sup>277</sup>
- ▶ Provide training programs for judges on implicit bias;
- ▶ Educate judges on their role in reducing mass incarceration;
- ▶ Replace incarceration with community service and/or probation for less serious offenses;

271 See Coke, *supra* note 4, at 30.

272 Because of concerns about the improper use of discretion, it is critical that judges also engage in conscious steps to reduce racial bias through implicit bias trainings, reflecting on data for sentences, and the use of judicial bench cards to reduce the impact of racial bias in the exercise of discretion. See *The Sentencing Project, Reducing Racial Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers* (2016): Discretion is an important component of the criminal justice system and is necessary for efficient system flow. It is neither desirable nor possible to eliminate discretion throughout the criminal justice system; professional judgment is a core component of making day-to-day operations manageable. Nevertheless, individual discretion can lead to racial injustices. *These can be safeguarded if discretion is well-informed and monitored*. What is needed is an introspective look at the substance of discretion and to find ways to either curb inappropriate use, such as through the development of standards, or to use discretion affirmatively to reduce racial disparity.

Discretion may aid in reducing the severity of sentences across the board, it may also result in racial disparities. To address the issue of disparities, this Report recommends that judges undergo implicit bias trainings and rely upon bench cards that help to mitigate against racial bias. At any rate, judges should have discretion to reduce overly harsh sentences, but there must be measures in place to ensure that they are not being biased in this process.

273 Ibid. at 15.

274 Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, Marshall Project (Mar. 4, 2015, 7:15 AM) <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent#.K3YcRSP8E>.

275 Leadership Development Executive Summary, JustLeadershipUSA, [https://www.justleadershipusa.org/wp-content/uploads/2015/01/JLUSA\\_Leadership\\_Development.pdf](https://www.justleadershipusa.org/wp-content/uploads/2015/01/JLUSA_Leadership_Development.pdf) (accessed 7 July 2016).

276 Ibid.

277 Ibid.

# TRANSFORMING THE SYSTEM

- ▶ Provide a review process for incarcerated individuals who are over the age of 55 and who have served five years of sentences that are in excess of 10 years to be released from prison;<sup>278</sup>
- ▶ Make all incarcerated individuals who are serving fixed sentences of five years and higher or an indeterminate term, who have served five years of their sentences, to be eligible for release;
- ▶ Allow all incarcerated individuals who are 35 years of age and older and who are serving fixed sentences of three years and higher or an indeterminate term, who have served three years of their sentences, to be eligible for release;<sup>279</sup> and
- ▶ Considering that there is considerable research on the discriminatory impact of the death penalty, abolish the death penalty while lowering sentences as whole.<sup>280</sup> However, sentences that result in life without the possibility of parole should not be used a substitute for the death penalty.<sup>281</sup>

The **United States Sentencing Commission** should revise the Sentencing Guidelines to allow for alternatives to incarceration, especially for individuals who been convicted of less serious crimes.<sup>282</sup>

## Federal and state judges should:

- ▶ Place individuals in contempt of court for civil fees or fines only where the court has determined that the individual has the financial means to pay the fees or fines.
- ▶ Take “the welfare of the family of the accused...into account, with particular attention to the best interests of the child.”<sup>283</sup>

278 Office of the Inspector General, U.S. Department of Justice, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* (2015) (recommending the expansion of the Bureau of Prisons compassionate release program, which allows for the release of elderly individuals who are incarcerated).

279 Michael Tonry, “Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration,” 13 *Criminology & Public Policy* 503 (2014).

280 See, e.g., Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption* (2015).

281 David R. Dow, “Life Without Parole Is a Terrible Idea: Examining the California SAFE Act,” *Daily Beast* (Apr. 12, 2012), <http://www.thedailybeast.com/articles/2012/04/27/life-without-parole-is-a-terrible-idea.html>.

282 Charles Colson Task Force on Federal Corrections, *supra* note 235.

283 UN African Descent, *supra* note 77.

# TRANSFORMING THE SYSTEM

## Restoring transparency and accountability in sentencing

Transparency and accountability are cornerstones of effective justice administration. To ensure that sentencing practices are fair, we must demand that sentencing data is maintained and inequities are immediately addressed.

**State governments, judicial ethics organizations, Congress, and state and local legislatures should:**

- ▶ Provide details on judicial sentencing determinations, disaggregated by race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin, and religious affiliation;
- ▶ Provide regular and routine training programs for judges on implicit bias;<sup>284</sup>
- ▶ Assess the impact of political fundraising and corporate contributions on sentencing to reduce their impact;<sup>285</sup>
- ▶ Educate judges on their role in reducing mass incarceration and provide them with bench cards, which provide judges with short questions and guidelines to consider before judicial proceeding to encourage them to reduce their biases during proceedings.<sup>286</sup>

284 Ibid.

285 See Coke, *supra* note 4, at 30. In most states, incarcerated people are not counted for the decennial census in the communities where they resided prior to incarceration. Rather, they are counted in the communities where they are imprisoned. Because incarcerated people cannot vote in most states, using these counts to draw state and county legislative districts enhances the weight of a vote cast by people who live near prisons at the expense of urban communities. Several states have enacted legislation to reverse this practice and, thereby assure that assorted census-based tax revenues are allotted to the home communities of incarcerated people instead of those where they are incarcerated. Ending the practice of prison-based gerrymandering will change the balance of power in many states from rural to urban, more accurately reflecting the states' populations, and provide opportunities for the successful passage of reforms that positively affect urban communities and communities of color.

286 Ibid. at 40.

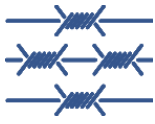
# TRANSFORMING THE SYSTEM



*For more information on sentencing reform, check out:*

The **Sentencing Project**, which advocates for a “fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.”

# TRANSFORMING THE SYSTEM



ENSURE DECENT

## Detention Conditions

Decent, rehabilitative prisons are a basic human right<sup>287</sup> and crucial to the successful reintegration of formally incarcerated people. Yet, the conditions in some prisons are so abysmal and abusive that incarcerated people leave the facilities in far worse physical and emotional shape than they entered. It is crucial that prison conditions do not violate the basic human rights of incarcerated individuals. In order to foster successful reintegration, which will in turn reduce recidivism and promote safe communities, prison conditions should be decent, offer rehabilitation, and respect the human rights of individuals who are incarcerated.

In order to facilitate successful reentry, policies should encourage prison education initiatives, vocational training, and proper health protection.

## Respecting incarcerated people' right to health care

The actual health of incarcerated people cannot be ignored in promoting successful reentry into their home communities. While most prisons provide access to basic medical services, policies should be adopted to allow persons who have been incarcerated and recently released to maintain their Medicaid status with little or no interruption.

Medical care should be inclusive and responsive to people of various genders, sexualities, and gender expressions. Moreover, there should be legislation allowing for active Medicaid enrollment during periods of incarceration.

287 Office of the United Nations High Commissioner for Human Rights, Human Rights and Prisons, <http://www.ohchr.org/Documents/Publications/training11Add3en.pdf>.

# TRANSFORMING THE SYSTEM

The **National Council for Incarcerated and Formerly Incarcerated Women** has identified several policy initiatives that Congress and state governments should take:<sup>288</sup>

- ▶ Affirmatively including the voices of incarcerated and formerly incarcerated individuals in assessing policy initiatives that affect incarcerated people;
- ▶ Requiring the provision of gender-specific and gender-sensitive medical care;
- ▶ Providing education and care for women with HIV, AIDS, and Hepatitis C, including treatment for curable Hepatitis C;
- ▶ Providing mental health and drug treatment;
- ▶ Allowing access to essential medical care and appropriate feminine hygiene products including condoms and dental dam.

To achieve the goal of protecting incarcerated people's health, Congress and state governments should additionally:

- ▶ Increase Medicaid insurance enrollment of people in the criminal justice system;<sup>289</sup>
- ▶ Maintain active Medicaid enrollment during periods of incarceration.<sup>290</sup>

**Prison officials and the Bureau of Prisons (BOP) should:**

- ▶ “[E]nsure that LGBT-inclusive sexual health care is available as part of essential medical care in its facilities, and make condoms and other barriers freely available to federal prisoners as part of basic sexual health care and sexual health care literacy programs. The BOP should also provide guidance to states and local recipients of federal law-

<sup>288</sup> These policy recommendations are taken from recommendations by the Council although they are not fully listed on the website. Founding Council member Topeka K. Sam reviewed the recommendations on August 25, 2016.

<sup>289</sup> See generally, Chloe Cockburn et al., American Civil Liberties Union & Drug Policy Alliance, *Healthcare Not Handcuffs: Putting the Affordable Care Act to Work for Criminal Justice and Drug Policy Reform* (Dec. 2013) (describing how the Affordable Care Act expanded coverage for mental health issues), 14-15.

<sup>290</sup> Ibid.

# TRANSFORMING THE SYSTEM

enforcement funding on the elements of basic sexual health care and literacy programming, including condom availability in all facilities of confinement.”<sup>291</sup>

- ▶ Provide incarcerated people who are transgender with any required medical therapies, including hormone therapy;
- ▶ Prohibit the use of shackles on women during labor or postpartum recovery and provide adequate postpartum care including a minimum recovery period and depression screenings;
- ▶ Allow independent commissions that allow formerly incarcerated people to inspect prison conditions;
- ▶ Ensure that HIV-positive incarcerated individuals receive care consistent with Department of Health and Human Services treatment standards and guidelines upon detention and transfer.<sup>292</sup>

## Respecting the dignity of incarcerated individuals

The conditions in prisons should ensure that incarcerated people’ basic human rights are respected. Solitary confinement is commonly used in American prisons.<sup>293</sup> However, even short periods of time in solitary confinement can cause mental health issues and severely affect imprisoned persons. “[P]risoners exposed to solitary confinement become verbally and physically aggressive; develop fantasy worlds and other paranoid psychoses; and grow anxious, withdrawn, and hopeless,” wrote Alex Kozinski in the *Yale Law Review*. “One early study found that nearly all of the prisoners in Maine’s isolation unit had either contemplated or attempted suicide.”<sup>294</sup>

President Obama acknowledged the impact of solitary confinement and has called for its ban for young people and people with mental health issues in federal facilities, noting that it is “linked to depression, alienation, withdrawal, a reduced ability to interact with others, and the potential

291 Catherine Hanssens et al., *A Roadmap for Change: Federal Policy Recommendations for Addressing the Criminalization of LGBT People and People Living with HIV* (2014), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap\\_for\\_change\\_full\\_report.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf).

292 Ibid.

293 Alison Shames et al., Vera Institute of Justice, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives* (May 2015), <http://www.vera.org/sites/default/files/resources/downloads/solitary-confinement-misconceptions-safe-alternatives-report.pdf>.

294 Alex Kozinski, “Worse than Death,” 125 *Yale L.J.* F. 230 (2016), <http://www.yalelawjournal.org/forum/worse-than-death>.

# TRANSFORMING THE SYSTEM

for violent behavior.”<sup>295</sup> Local and state governments should adopt measures similar to those adopted by the federal government.

Prisons should also be able to accommodate persons of varying abilities and gender profiles. Incarcerated persons should not be subject to hostile conditions because of their sexuality, race, gender, or age. There should be adequate protections in place to prevent sexual abuse in prisons.<sup>296</sup> Women and LGBTQ incarcerated people should be protected against targeting by prison staff and from sexual exploitation and abuse. Incarcerated people should also be provided with access to adequate hygiene products. Moreover, persons with physical disabilities should be provided with reasonable accommodations pursuant to the provisions of the Americans with Disabilities Act.<sup>297</sup> These provisions should include, for example, access to a video phone for incarcerated individuals who are deaf. Imprisoned persons should also have access to educational programs and vocations to facilitate their successful reintegration into the community.

To achieve the goal of fostering positive prison conditions, Congress and state governments should:

- ▶ Provide incentives to state governments and prisons that successfully reduce the occurrence of prison rape consistent with the mandates of the Prison Rape Elimination Act;<sup>298</sup>
- ▶ Abolish the use of solitary confinement for juveniles and individuals with mental,<sup>299</sup> psychiatric, and/or physical issues;
- ▶ Prohibit the use of solitary confinement for longer than 15 days in all circumstances and bar its use as a form of punishment;<sup>300</sup>

295 Barack Obama, “Barack Obama: Why We Must Rethink Solitary Confinement,” *The Washington Post* (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html).

296 Miriam Zolia Pérez, “The Movement to Stop Prisons from Shackling Women in Labor Builds,” *ColorLines* (Oct. 4, 2011, 9:31 AM), <http://www.colorlines.com/articles/movement-stop-prisons-shackling-women-labor-builds>; see also compliance with the Prison Rape Elimination Act SOURCE/LINK?

297 The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) prohibits discrimination against individuals with disabilities.

298 42 U.S.C. Ch. 1, aiming to “make the prevention of prison rape a top priority in each prison system.”

299 NM Center on Law and Poverty & American Civil Liberties Union of New Mexico, *Inside the Box: The Real Costs of Solitary Confinement in New Mexico’s Prisons and Jails* 12 (2013), <https://www.aclu-nm.org/wp-content/uploads/2010/04/Solitary-Confinement-Report-FINAL.pdf>.

300 Juan Mendez (Special Rapporteur on Torture), *General Recommendations of the Special Rapporteur on Torture*, U.N. Doc. E/CN.4/2003/68, <http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>.



# TRANSFORMING THE SYSTEM

- ▶ Promote flexible visitation policies that encourage incarcerated individuals to maintain familial and community relationships;
- ▶ Ensure that video phone calls are treated solely as a supplement to in-person visits, rather than a replacement for them;<sup>301</sup>
- ▶ Place incarcerated people in the least restrictive housing required for their safety and adopt policies in line with the recommendations of the Department of Justice;<sup>302</sup>
- ▶ “Understand that to be considered ‘successful,’ a prison must reduce recidivism”;<sup>303</sup>
- ▶ Provide prison educational programs that allow individuals to obtain a trade or vocation;<sup>304</sup>
- ▶ Males should be separated from females in prisons;<sup>305</sup>
- ▶ Encourage partnerships with local colleges and educational programs to allow incarcerated people to further their education during their incarceration;
- ▶ Re-fund Pell grants for incarcerated people;
- ▶ Strongly discourage the use of detention for immigration matters;
- ▶ Phase out private prisons for immigration detention;
- ▶ Ensure that detained persons have access to appropriate health, hygiene, and mental health services and products;
- ▶ Mandate unannounced visits to prisons, jails, and other detention centers and allow selected civil society groups and United Nations special procedures and representatives to evaluate conditions;<sup>306</sup>

301 Bernadette Rabuy & Peter Wagner, Prison Policy Initiative, *Screening Out Family Time: The for-profit video visitation industry in prisons and jails* 29 (2015).

302 U.S. Department of Justice, *U.S. Department of Justice Report and Recommendations Concerning the Use of Restrictive Housing* (Jan. 2016), <https://www.justice.gov/dag/file/815551/download>.

303 *Prisons*, Right on Crime, <http://rightoncrime.com/category/priority-issues/prisons> (accessed 7 July 2016).

304 See Ryan, *supra* note 109 at 59.

305 Statement to the Media, *supra* note 76.

306 *General Recommendations of the Special Rapporteur on Torture*, E/CN.4/2003/68, <http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>.

“Independent non-governmental organizations should be authorized to have full access to all places of detention, including police lockups, pretrial detention centres, security service premises, administrative detention areas, detention units of medical and psychiatric institutions and prisons, with a view to monitoring the treatment of persons and their conditions of detention. When inspection occurs, members of the inspection team should be afforded an opportunity to speak privately with detainees.”

# TRANSFORMING THE SYSTEM

- ▶ Use “the most powerful incentive—earned time off one’s sentence—should be used to encourage participation in addiction treatment, cognitive behavioral therapy, educational classes, faith-based programs, and other self-betterment activities prescribed in accordance with individualized case plans.”<sup>307</sup>

**The Federal Communications Commission** should regulate the voice and video call industries, instituting rate caps on calls, prohibiting the use of either as a replacement for in-person visitation, requiring that calls be charged on a per-minute basis, and developing minimum quality standards for calls.<sup>308</sup>

## Prison officials and the BOP should:

- ▶ Adopt and enforce policies that protect incarcerated people against sexual abuse in prison;
- ▶ Eliminate prison practices that violate incarcerated people’ human rights, including the shackling of incarcerated pregnant women;<sup>309</sup>
- ▶ “The BOP should implement an actuarial risk and needs assessment tool,<sup>310</sup> ensuring that the tool is used only to inform treatment, programming, and service-delivery decisions ... develop case plans and deliver programming based on individual risk to reoffend, criminogenic needs, and other personal factors and characteristics that may influence

307 Charles Colson Task Force on Federal Corrections, *supra* note 235.

308 Bernadette Rabuy & Peter Wagner, Prison Policy Initiative, *Screening Out Family Time: The for-profit video visitation industry in prisons and jails* 29 (2015).

309 See Letter from National Advocates for Pregnant Women to Governor Andrew Cuomo, SUPPORT for A.6430-A/S.983-A– *An Act to Amend the Correction Law, in Relation to the Restraint of Pregnant Female Prisoners During Childbirth* (Sept. 25, 2015), [http://advocatesforpregnantwomen.org/Letter\\_Gov\\_Cuomo\\_Shackling\\_NAPW.pdf](http://advocatesforpregnantwomen.org/Letter_Gov_Cuomo_Shackling_NAPW.pdf). Shackling pregnant women is a demeaning practice that puts a woman’s health and pregnancy at grave risk. For example, shackling increases a woman’s risk of falling and renders her unable to break potential falls. It heightens the risk of blood clots, limits the mobility needed for a safe pregnancy and delivery, and interferes with doctors’ ability to care for their patients and provide medical services during emergencies.

310 Nathan James, Congressional Research Service, *Risk and Needs Assessment in the Criminal Justice System* (Oct. 2015), <https://www.fas.org/spp/crs/misc/R44087.pdf>. “Risk and needs assessment instruments typically consist of a series of items used to collect data on behaviors and attitudes that research indicates are related to the risk of recidivism.... The Risk-Needs-Responsivity (RNR) model has become the dominant paradigm in risk and needs assessment. The risk principle states that high-risk offenders need to be placed in programs that provide more intensive treatment and services while low-risk offenders should receive minimal or even no intervention.”

# TRANSFORMING THE SYSTEM

the rehabilitative process ... [and] conduct a system-wide assessment to identify surpluses and shortages in programming<sup>311</sup> capacity at each facility.”<sup>312</sup>

- ▶ Comply with human rights standards for prison conditions that respect the culture, gender, hygiene, and sexuality of incarcerated individuals.<sup>313</sup>

In addition, the [National Council for Incarcerated and Formerly Incarcerated Women](#) has identified several policy initiatives that Congress and state governments should take:<sup>314</sup>

- ▶ Gender-specific programs informed by incarcerated and formerly incarcerated women and men;
- ▶ Prohibition of the video taping of strip searches;
- ▶ Ongoing and regular training of corrections officers and prison staff;
- ▶ Restoration of G.E.D. and Pell grants.

The Department of Justice should:

- ▶ “[I]ssue a clarification through the Frequently Asked Questions section on the Prison Rape Elimination Act (PREA) Resource Center [which] aim[s] to provide assistance to those responsible for state and local adult prisons and jails, juvenile facilities, community corrections, lockups, tribal organizations, and [incarcerated individuals] and their families in their efforts to eliminate sexual abuse in confinement”<sup>315</sup> website indicating that transgender people must be allowed to specify the gender of the officer they would prefer to be searched by in the event a search is legally justified and necessary.”

311 Programming may include G.E.D. programs and other educational opportunities. This assessment should look to expand available programming to ensure that incarcerated people are able to benefit.

312 Charles Colson Task Force on Federal Corrections, *supra* note 235.

313 *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, <http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf>.

314 These policy recommendations are taken from recommendations by the Council although they are not fully listed on the website.

315 National PREA Resource Center, About, <http://www.prearesourcecenter.org/about>.

# TRANSFORMING THE SYSTEM

- ▶ “[I]ssue a clarification through the Frequently Asked Questions section on the Prison Rape Elimination Act (PREA) Resource Center website indicating that transgender people must be allowed to specify the gender of the officer they prefer to be searched by in the event a search is legally justified and necessary.” The Resource Center provides assistance to those responsible for state and local adult prisons and jails, juvenile facilities, community corrections, lockups, tribal organizations, and [incarcerated individuals] and their families in their efforts to eliminate sexual abuse in confinement.<sup>316</sup>
- ▶ Aggressively pursue the enforcement of PREA<sup>317</sup> in holding cells.<sup>318</sup>

## Banning Private Prisons and Excessive Fees

The high levels of incarceration have forced cash-strapped states into unseemly public-private partnerships with perverse incentives. The business of incarceration turns incarcerated people—and the desperation of their friends and family—into profit by cutting costs necessary for the safety of those in and outside the prison; charging families excessive fees to maintain communication with incarcerated individuals; and making sure that prisons stay full regardless of the needs of the community. Private prisons have had a profound effect on the landscape of incarceration.

While studies by the **U.S. Government Accountability Office** and the **U.S. Attorney General, in addition to other private institutions**, have found no evidence that private corrections reduced cost or raised performance quality, they have shown that the cost-cutting measures have resulted in withheld medical care and unqualified and abusive corrections officers that have undermined the safety of incarcerated individuals<sup>319</sup> and the community.<sup>320</sup> Perhaps even more concerning than the conditions of private prisons is their political investment in increasing incarceration. Beyond even minimum occupancy contracts, private prisons actively invest in policies and legislation that increases prison populations, such as mandatory minimum

316 National PREA Resource Center, About, <http://www.prearesourcecenter.org/about>.

317 2 U.S.C. ch. 147 § 15601 et seq.

318 Hanssens, et al., *supra* note 291.

319 Studies have found that assaults in private prisons occur at double the rate found in public facilities. C. R. Blakely and V. W. Bumphus, *Private and Public Sector Prisons—A Comparison of Selected Characteristics*, 68 Federal Probation, 27-33 (2004), [www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2004-06/prisons.html](http://www.uscourts.gov/uscourts/FederalCourts/PPS/Fedprob/2004-06/prisons.html).

320 S. D. Camp and G. G. Gaes, *Growth and quality of U.S. private prisons: Evidence from a national survey*, Federal Bureau of Prisons, Office of Research and Evaluation (2001), [http://www.bop.gov/news/research\\_projects/published\\_reports/pub\\_vs\\_priv/orepres\\_note.pdf](http://www.bop.gov/news/research_projects/published_reports/pub_vs_priv/orepres_note.pdf); B. Lundahl et al., “Prison privatization: A meta-analysis of cost effectiveness and quality of confinement indicators,” *Research on Social Work Practice*, 19, 383-395 (2009).

# TRANSFORMING THE SYSTEM

sentences, three-strikes laws, and truth-in-sentencing.<sup>321</sup> Occasionally the relationship between private prison companies and public officials are even more sinister.<sup>322</sup>

The DOJ has taken the first step in reducing the Bureau of Prisons' reliance on private prisons and asked the BOP to “help in beginning the process of reducing—and ultimately ending—our use of privately operated prisons.”<sup>323</sup> This is an important first step, and state and local government should follow suit.

**To create safe and appropriate corrections options, state, federal, and local governments should:**

- ▶ Invest in community-based alternatives to incarceration;
- ▶ Prohibit “pay to stay” policies that allow prisons to charge incarcerated people the cost of room, board, and medical care;<sup>324</sup>
- ▶ Transfer the responsibility for public safety from profit-oriented corporations to public entities and prohibit the privatization of prisons;
- ▶ Ensure that video phone calls are treated solely as a supplement to in-person visits, rather than a replacement for them;<sup>325</sup> and
- ▶ Strengthen protection for whistle-blowers to report on inappropriate relationships and corrupt practices between private entities and public officials.

321 The Correction Corporation of America states their interest in their 2010 Annual Report: The demand for our facilities and services could be adversely affected by the relaxation of enforcement efforts, leniency in conviction or parole standards and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws. 2010 annual report on form 10-K, Corrections Corporation of America, <http://phx.corporateir.net/External.File?item=UGFyZW50SUQ9NDE5MTEwfENoaWxkSUQ9NDMyMjg1fFR5cGU9MQ==&t=1>; see also, Cody Mason, *Too Good to be True: Private Prisons in America*, The Sentencing Project 16 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf>.

322 One example of the sinister relationship between private prisons and public officials is the Luzerne County (PA) “kids for cash” scandal in which judges were paid millions of dollars to funnel juveniles into new private facilities. See William Ecenbarger, *Kids for Cash* (2012); Cody Mason, *Too Good to be True: Private Prisons in America*, The Sentencing Project 16 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/Too-Good-to-be-True-Private-Prisons-in-America.pdf>.

323 Sally Q. Yates, Memorandum for the Acting Director, Federal Bureau of Prisons (August 18, 2016), <http://apps.washingtonpost.com/g/documents/national/justice-department-memo-announcing-the-end-of-its-use-of-private-prisons/2127/>.

324 American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons>.

325 Bernadette Rabuy & Peter Wagner, Prison Policy Initiative, *Screening Out Family Time: The For-Profit Video Visitation Industry In Prisons And Jails*: 29 (2015).

# TRANSFORMING THE SYSTEM

The **Federal Communications Commission (FCC)** should regulate the prison phone industry by continuing to work to lower the rate caps on calls in correctional facilities.<sup>326</sup>



*For more information on prison conditions, check out:*

**Human Rights Watch**, which investigates human rights violations domestically and internationally, including abuses in the criminal justice in the United States and a **legacy of investigating U.S. prison conditions**.

**United Nations Standard Minimum Rules for the Treatment of Prisoners**, which provides the basic minimal guidelines for ensuring that the human rights of incarcerated individuals are respected during the course of their detention.

326 Prison Phone Justice, <https://www.prisonphonejustice.org/>; see also Jon Brodtkin, "In Blow to Inmates' Families, Court Halts New Prison Phone Rate Caps," *ARS Technica* (Mar. 6, 2016), <http://arstechnica.com/tech-policy/2016/03/in-blow-to-inmates-families-court-halts-new-prison-phone-rate-caps/>.

# TRANSFORMING THE SYSTEM



REQUIRE EQUITABLE

## Parole and Probation

Parole and probation practices should be fair and consistent. They should be used as a tool to allow accused persons to safely remain in their communities. Instead, they are becoming tools for funneling people back into full custody.

Revocation of parole for minor technical violations is the leading cause of formerly incarcerated people returning to incarceration.<sup>327</sup> Individuals are routinely incarcerated for technical violations of probation or parole, such as missing a meeting or failing to obtain employment.<sup>328</sup> There must be policies adopted to ensure that parole and probation conditions are fair and reasonable. There has been considerable research on the benefits of a risk-needs-responsivity analysis in parole and probation. This approach should be promoted to ensure an individualized approach is adopted and should be encouraged as a tool for promoting release for individuals who would otherwise be incarcerated.<sup>329</sup>

Moreover, numerous studies show that parole and probation are applied in a discriminatory manner. African Americans are frequently given harsher conditions and longer terms, and are less likely to be offered parole than similarly situated whites.<sup>330</sup> Racial and ethnic disparities in parole and probation should be immediately addressed to reduce current inequities. The following policies should be adopted to ensure that these disparities do not persist.

327 Ibid.

328 American Civil Liberties Union, *Smart Reform is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities* (Aug. 2011), <https://www.aclu.org/files/assets/smartreformispossible.pdf>. Over a third of prison admissions in this country are for individuals who have committed technical parole and probation violations—such as missing a parole meeting or failing to perform community service—not because they committed new crimes. In some states, like California, as much as two-thirds of prison admissions are due to these technical violations.

329 Risk assessments should be favored to the extent they encourage the release of individuals who would otherwise be incarcerated. However, risk assessment tools may also exacerbate existing racial disparities in the criminal justice system by relying on data that is the result of racial biases that already exist in the criminal justice system. To address this issue, the data underlying risk assessment tools should be publicly available and transparent. The assessment tools should be culturally sensitive and provide for mechanisms to correct criteria that produce racially discriminatory outcomes.

330 See Coke, *supra* note 4, at 22-23.

# TRANSFORMING THE SYSTEM

## State and local governments should pass legislation that:

- ▶ Eliminates incarceration for parole and probation violations and instead uses sanctions that are reflective of the violation, such as community service for missed meetings, or drug treatment for failure to comply with mandatory drug testing;<sup>331</sup>
- ▶ Relies upon community-based supervision where there are repeat violations of parole and/or parole restrictions;<sup>332</sup>
- ▶ Prohibits long-term incarceration for minor parole violations;<sup>333</sup>
- ▶ “Encourage[s] the use of intermediate sanctions facilities, [such as halfway houses] rather than prisons, for these parolees when they commit technical violations rather than new crimes;”<sup>334</sup>
- ▶ Adopts a risk-need-responsivity analysis approach, which focuses on an individual’s risk of committing a crime, to favor release over an approach that is reliant upon incarceration;<sup>335</sup>
- ▶ Requires the collection, reporting, and publication of data disaggregated by race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin,<sup>336</sup> and religious affiliation; and
- ▶ Evaluates individual parole and probation officers by the percentage of unwarranted racial disparities in their supervision tasks.

331 ACLU, *Smart Reform is Possible: States Reducing Incarceration Rates and Costs While Protecting Communities* 13 (2011).

332 Ibid.

333 Ibid.

334 *Right on Crime*, *supra* note 303.

335 The risk-needs-responsivity approach is “[c]onsidered a best practice for criminal justice populations, this approach assesses both the risk of recidivism as well as needs related to substance use, mental health, and other social and environmental conditions, and determines the appropriate type and dose of treatments and other services necessary to maximize justice and health outcomes.” See CHJ, *supra* note 85, at 3.

336 See CPD, *supra* note 90, at 20; see also Coke, *supra* note 4, at 21.



# TRANSFORMING THE SYSTEM



FOSTER

## Successful Reintegration

Most Americans agree that after completing a criminal sentence, released persons should be given an opportunity to successfully reintegrate into their communities. Everyone is entitled to a second chance to become a productive member of society. However, recently released individuals face a series of obstacles to successful reintegration. Several states have instituted barriers to reentry including bans on voting, restrictions on accessing social services, and employment limitations. These restrictions have devastating effects on previously incarcerated individuals and make reentry extremely challenging.

During each of the last several years, roughly 700,000 people have left prison;<sup>337</sup> between 11 and 13 million have cycled through local jails.<sup>338</sup> At both the state and federal levels, curbing recidivism and eliminating barriers to successful, sustained reentry have become priorities driven by a mixture of concerns about the fiscal costs of incarceration and the humanitarian toll that economic and civic hurdles place on families and communities.

## Encouraging policies that promote successful reentry and reduce recidivism

Reintegration policies should be guided by an emphasis on reducing recidivism and community rebuilding following a period of incarceration. Barriers to successful reintegration include laws that serve to further punish released individuals and reduce their civic engagement. Everyone should be granted the privileges of full citizenship, and formerly incarcerated individuals should be provided with the tools to not only reintegrate into their communities but build their communities up.

337 Katti Gray, "Parlaying the Prison Experience," 24 *Diverse Issues in Higher Education* 14 (Feb. 2010).

338 Peter Wagner, "Jails Matter. But Who is Listening?" *Prison Policy* (Aug. 1, 2015), <http://www.prisonpolicy.org/blog/2015/08/14/jailsmatter/>.

# TRANSFORMING THE SYSTEM

State, local and federal governments should adopt policies that do the following:

- ▶ Expand the Second Chance Act of 2008, which intends to promote successful reintegration following incarceration;<sup>339</sup>
- ▶ Repeal post-conviction consequences that hamper successful reentry, including barriers to voting, employment, jury participation, and social services;<sup>340</sup>
- ▶ Institute graduated reentry and vocational programs, which provide structured transitional services to individuals within a year of release, such as the Montgomery Pre-Release Center that focuses on securing a job prior to release;<sup>341</sup>
- ▶ Require that reentry programs be competent in providing support to LGBTQ individuals;<sup>342</sup>
- ▶ Remove barriers to federal housing subsidies for formerly incarcerated individuals;
- ▶ Prohibit the use of criminal background checks that are not specifically related to the job or employment license;<sup>343</sup>
- ▶ “Reduce the potential tort liabilities to employers for negligent hiring suits. Reduced tort liability will make employers more likely to hire parolees. Statistics show that parolees with good, steady jobs are less likely to reoffend;”<sup>344</sup>
- ▶ Prohibit the use of criminal background checks on housing applications;<sup>345</sup>

339 42 USC § 3797(w)(2) (Supp. 2010). The purpose of the legislation is to “to break the cycle of criminal recidivism, increase public safety, and help States, local units of government, and Indian Tribes better address the growing population of criminal offenders who return to their communities and commit new crimes....”

340 Fortune Society, Advocacy, Policy Recommendation, <http://fortunesociety.org/#advocacy>.

341 Ibid.; see generally Anne Morrison Piehl, *Preparing Prisoners for Employment: The Power of Small Rewards*, Manhattan Institute (May 2009).

342 Center for American Progress & Movement Advancement Project, Unjust: How the Broken Criminal Justice System Fails LGBT People 37 (2016), at 122, <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>.

343 Michelle Natividad Rodriguez & Beth Avery, National Employment Law Project, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records* 4 (April 2016), <http://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/> (providing guidelines on licensure requirements, which include requiring “assessment of candidates for licensure on a case-by-case basis, incorporating a standard that examines whether a conviction is occupation-related and how much time has passed since the conviction”).

344 *Parole & Reentry*, Right on Crime, <http://rightoncrime.com/category/priority-issues/parole-and-reentry/> (last visited July 7, 2016).

345 Fortune Society, *supra* note 340.

# TRANSFORMING THE SYSTEM

- ▶ Establish incarceration and post-incarceration programs specifically devoted to educating incarcerated and previously incarcerated persons. They should include vocational programs intended to provide job skills;<sup>346</sup>
- ▶ Ban educational institutions from requiring information concerning criminal history on application forms;<sup>347</sup>
- ▶ Change the definition of homeless to incorporate people who have been incarcerated for more than 90 days for the purpose of expanding housing options available to formerly incarcerated individuals because “the McKinney Vento<sup>348</sup> definition of homelessness does not recognize individuals in jail or prison for longer than 90 days as in need of supportive housing for homeless individuals” and thus people who have been incarcerated for more than 90 days are currently unable to seek housing in shelters and other housing options that are restricted to people who are homeless;<sup>349</sup>
- ▶ Remove restrictions on access to housing for formerly incarcerated persons;<sup>350</sup>
- ▶ Provide opportunities for imprisoned persons to maintain contact with family and other support networks by establishing an office tasked with maintaining family affairs and requiring that incarcerated people are sentenced to prisons near their support networks;<sup>351</sup>
- ▶ Eliminate bars on civic participation, including voting, jury participation, and ability to hold government elected positions;<sup>352</sup>
- ▶ Eliminate incarceration for failure to pay child support when the person has the means;<sup>353</sup>
- ▶ Eliminate “pay to stay” policies in which prisons can charge formerly incarcerated individuals for the cost of room, board, and medical care.<sup>354</sup>

346 Ibid.

347 Ibid.

348 McKinney-Vento Homeless Assistance Act of 1987 (Pub. L. 100-77, July 22, 1987, 101 Stat. 482, 42 U.S.C. § 11301 et seq.

349 Fortune Society, *supra* note 340.

350 Ibid.

351 Charles Colson Task Force on Federal Corrections, *supra* note 235.

352 Marc Mauer, “Commentary: Should Felons Vote? Yes,” *Philly.com* (May 18, 2016), [http://articles.philly.com/2016-05-18/news/73155367\\_1\\_felony-sentences-prison](http://articles.philly.com/2016-05-18/news/73155367_1_felony-sentences-prison); *Felony Disenfranchisement*, The Sentencing Project, <http://www.sentencingproject.org/issues/felony-disenfranchisement/> (accessed 2 July 2016).

353 Eli Hager, *For Men in Prison, Child Support Becomes a Crushing Debt*, Marshall Project (Oct. 18, 2015), <https://www.themarshallproject.org/2015/10/18/for-men-in-prison-child-support-becomes-a-crushing-debt#.SmgEWq9os>.

# TRANSFORMING THE SYSTEM

In addition, the [National Council for Incarcerated and Formerly Incarcerated Women](#) has identified several policy initiatives that Congress and state governments should take.<sup>355</sup>

- ▶ Encourage the collaboration of probate, family, and criminal courts prior to an individual's release;
- ▶ Fund legal and counseling services to facilitate family unification;
- ▶ Provide entrepreneurial and educational skills training opportunity;
- ▶ Prohibit parole and probation policies that automatically prevent formerly incarcerated people from visiting prisons and jails;
- ▶ Prohibit income deduction to halfway houses;
- ▶ Require the inspection of halfway house living conditions by qualified specialists;
- ▶ Fund community-based halfway houses and treatment over privatized entities;
- ▶ Hire formerly incarcerated individuals to staff halfway houses;
- ▶ Require the reinstatement of voting rights;
- ▶ Expand the availability of record sealing, expungement, and employment certifications;
- ▶ Prohibit the license bans based on former incarceration status.

354 American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons>.

355 These policy recommendations are taken from recommendations by the Council although they are not fully listed on the website. We obtained these recommendations through our interactions with the Council.

# TRANSFORMING THE SYSTEM



*For more information on reentry, check out:*

**Just Leadership USA**, which empowers people most affected by mass incarceration to drive policy reform. Our current and past Communications Institute Fellows Ronald Simpson-Bey, Khalil Cumberbatch, and Glenn Martin work on policies to empower the formerly incarcerated.

**National Council for Incarcerated and Formerly Incarcerated Women and Girls (NCIFWG)**, an organization devoted to engaging incarcerated and formerly incarcerated women and girls in policy reform.

**National Employment Law Project** fights to ensure that people who have been involved in the criminal justice system have a fair chance at employment.

# TRANSFORMING THE SYSTEM



FOSTER AN ENVIRONMENT FOR

## Respecting Children's Rights

Children are still developing and may make mistakes as they are growing toward adulthood. There is considerable research that shows that adolescents' decision-making skills are at a much lower as compared to those of adults.<sup>356</sup> Children and adolescents should not be treated like adults because they do not have the same mental capacity of adults. Despite this, some courts and prosecutors routinely administer adult consequences<sup>357</sup> to children by issuing harsh sentences and requiring incarceration for childhood behaviors. We must adopt policies that ensure that children reach their full potential and are not placed off track for childhood mistakes.

Sadly, these adult penalties have even entered into our schools. Schools should be institutions of learning and safe spaces for children. Instead, they are too often places in which children may be funneled into the criminal justice system. Children of color have suffered the most from this approach, with wide racial disparities in how children are suspended, expelled, and referred to the criminal justice system.<sup>358</sup>

356 See, e.g., Laurence Steinberg, *The Science of Adolescent Brain Development and Its Implications for Adolescent Rights and Responsibilities* (2014) (describing how neuroscience has confirmed that there are physical differences between the brains of adults and adolescents, which affects decision-making).

357 For example, a 12-year-old was arrested for spraying perfume: Chris McGreal, "The U.S. Schools with their own police," *The Guardian* (Jan. 9, 2012), <http://www.theguardian.com/world/2012/jan/09/texas-police-schools>; a 13-year-old was arrested for burping in class: "Student Arrested for Burping, Lawsuit Says," *CBS News* (Dec. 1, 2011), <http://www.cbsnews.com/news/student-arrested-for-burping-lawsuit-claims/>; and a 12-year-old was arrested for doodling on her desk: Stephanie Chen, "Girl's Arrest for Doodling Raises Concerns about Zero Tolerance," *CNN* (Feb. 18, 2010), <http://www.cnn.com/2010/CRIME/02/18/new.york.doodle.arrest/index.html?hpt=C1>.

358 See generally Russell J. Skiba et al., "Parsing Disciplinary Disproportionality Contributions of Infraction, Student, and School Characteristics to Out-of-School Suspension and Expulsion," 51 *Am. Edu. Research J.* 640 (2014).

# TRANSFORMING THE SYSTEM

## Ensuring that children are treated appropriately for their age<sup>359</sup>

The juvenile justice system has made inroads, leading to a 45 percent reduction in juvenile incarceration since the 1990s.<sup>360</sup> However, additional work needs to be done to ensure that young people are not treated as adults in the criminal justice system; alternatives to incarceration are fully developed; facilities are rehabilitative and appropriate for all children, specifically by ensuring that juvenile facilities for girls are examined through a gender-specific lens and developed to accommodate their needs; and young people are not exposed to abusive conditions when incarcerated. In 2012 the U.S. Supreme Court found that mandatory life without parole was unconstitutional as it violated the Eighth Amendment. The ruling in *Miller v. Alabama* required both states and the federal government to consider the particular circumstances of the juvenile defendant in determining an individual's sentence.<sup>361</sup> The 2016 case *Montgomery v. Alabama* ensured that that decision was applied retroactively.<sup>362</sup>

### Congress, the DOJ, and state legislatures should:

- ▶ Strengthen the Juvenile Justice and Delinquency Prevention Act,<sup>363</sup> which focuses on the prevention and control of crime conducted by young people and improving the juvenile justice system;
- ▶ Support evidence-supported programs with technical support, incentive grants, and information sharing;<sup>364</sup>
- ▶ “Expand flexibility in funding, so that local jurisdictions may spend funds now used for housing some of their youths in large state youth lockups on less costly community-based programs supported by research. Effective community-based models include multi-systemic therapy, victim-offender mediation, mentoring, vocational programs, and

359 See generally Terrance Laney & Janaé Bonsu, Black Youth Project, *Agenda to Keep Us Safe* 100 (2016), <http://agendatobuildblackfutures.org/wp-content/uploads/2016/01/BYP100-Agenda-to-Keep-Us-Safe-AKTUS.pdf> (addressing the need for policies that protect youth of color to reverse their overcriminalization).

360 Justice Policy Institute, *Sticker Shock: Calculating the Full Price Tag for Youth Incarceration* 2 (2014).

361 132 S. Ct. 2455 (2012).

362 577 U.S. \_\_\_\_ (2016).

363 Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 42 U.S.C. § 5601 et seq.

364 Mark Soler et al., “Juvenile Justice: Lessons for a New Era,” 16 *Georgetown J. on Poverty L. & Pol’y* 483, 538-41 (2009).

# TRANSFORMING THE SYSTEM

group homes modeled after those in Missouri for youths that require a residential setting;<sup>365</sup>

- ▶ De-incentivize programs that have been proven ineffective at reducing the rate of juvenile offenses, such as “Scared Straight” and boot camps programs;<sup>366</sup>
- ▶ Eliminate the automatic transfer of young people into adult courts;<sup>367</sup>
- ▶ Abolish life without parole for offenses committed before the individual was 18 years of age;<sup>368</sup>
- ▶ “Approve standards recommended by the National Prison Rape Elimination Commission addressing the prevention, detection, and response to sexual misconduct in facilities that incarcerate adults and youth”;<sup>369</sup>
- ▶ “Collect better data about pregnant girls in the juvenile justice system, and support provisions in the reauthorization of the JJDP [Juvenile Justice and Delinquency Prevention Act] to improve data collection regarding this population”;<sup>370</sup>
- ▶ Issue guidelines and trainings on best practices for juvenile justice administration and facilities;
- ▶ “Implement evidence-based practices to increase the effectiveness of juvenile probation and parole, such as graduated sanctions that respond to each violation of the rules of supervision with a swift, sure, and commensurate sanction. Graduated incentives should also be employed to reward exemplary conduct. Research has demonstrated graduated responses are far more effective because they send a clear message at the time of the behavior rather than waiting for relatively minor violations to pile up and then applying the ultimate sanction—revocation to a youth lockup”;<sup>371</sup>
- ▶ Create a national mechanism by which juvenile records are automatically expunged or sealed once the child turns 18;

365 Juvenile Justice, Right on Crime, <http://rightoncrime.com/category/priority-issues/juvenile-justice/> (accessed 7 July 2016).

366 Ibid.

367 Ibid.

368 Ibid. See generally Equal Justice Initiative, *All Children Are Children: Challenging Abusive Punishment of Juveniles* (2012), <http://www.eji.org/allchildrenarechildren>.

369 Soler, *supra* note 364, at 483, 538-41.

370 Ibid.

371 Right on Crime, *supra* note 365.



# TRANSFORMING THE SYSTEM

- ▶ Require the collection of publicly available data, disaggregated by race, religion, sex, gender, gender identity/expression, age, housing status, sexual orientation, HIV status, ethnicity, sexuality, immigration status, national origin, and religious affiliation, on the juvenile justice system at various points;
- ▶ Adopt protocols for promptly addressing racial, ethnic, gender, and other unwarranted disparities that the disaggregated data reveal.<sup>372</sup>

## Congress and state legislatures should:

- ▶ Require collaboration between the juvenile justice system and the child welfare systems;<sup>373</sup>
- ▶ Develop and fund gender-specific programs that enhance girls' cultural strengths, promote trauma recovery, and provide information on female health and contraception;<sup>374</sup>
- ▶ Provide mental health services that are sensitive to various genders and gender expressions and sexualities;
- ▶ Fund services for LGBTQ youth and youth who have left their homes and reauthorize the Runaway and Homeless Youth Act programs for \$165 million for financial year 2017;<sup>375</sup>
- ▶ Develop independent monitoring systems for facilities;<sup>376</sup>

372 To ensure that the system is fair, it is important that there is routine data collection that is supported by protocols for addressing disparities. For example, Native American youth appear to suffer from unfair application in juvenile justice matters as revealed by their disproportionate treatment and confinement. See Lakota People's Law Project, *supra* note 30, at 7. "The national average for new commitments to adult state prisons by Native American youth is almost twice (1.84 times) that for white youth. In the states with enough Native Americans to facilitate comparisons, Native American youth were committed to adult prison from 1.3 to 18.1 times the rate of white youth."

373 See Brian Goldstein, *Crossover Youth: The Intersection of Child Welfare & Juvenile Justice*, Juvenile Justice Information Exchange (Nov. 15, 2012); *Improving Outcomes for Multi-System Involved Youth Who Cross Over Between Child Welfare and Juvenile Justice—Webinar Series*, Office of Juvenile Justice and Delinquency Prevention, <https://www.nttac.org/index.cfm?event=trainingCenter.traininginfo&eventID=27&from=training&dtab=1> (accessed 25 July 2016); Katie Ishizuka and Paul D. Ashton, *Fostering Change: How Investing In D.C.'s Child Welfare System Can Keep Kids Out of the Prison Pipeline*, Justice Policy Institute (April 9, 2013), <http://www.justicepolicy.org/research/5165>.

374 See *Understanding Trauma through a Gendered Lens*, NCCD Center for Girls and Young Women; Barbara E. Bloom & Stephanie S. Covington, *Gender-Specific Programming for Female Offenders: What is it and Why is it Important?* The Center for Gender and Justice (Nov. 11, 1998), <http://www.stephaniecovington.com/assets/files/13.pdf>; National Council for Incarcerated and Formerly Incarcerated Women and Girls, <http://thecouncil.us/> (last visited July 25, 2016).

375 *Current Status*, The National Network for Youth, <https://www.nn4youth.org/policy-advocacy/fy2017-appropriations/> (accessed 7 July 2016).

376 Center for Children's Law and Policy, *Independent Monitoring Systems for Juvenile Facilities* (Aug. 6, 2012), <http://www.modelsforchange.net/publications/546>

# TRANSFORMING THE SYSTEM

- ▶ Develop racial impact strategies to eliminate racial disparities in the juvenile justice system.<sup>377</sup>

## Raising the age of criminal responsibility

We all want safer, more just communities for our children. But the criminal justice system has at times treated children like adults. “Adolescents are children, and prosecuting and placing them in the adult criminal justice system doesn’t work for them and doesn’t work for public safety.”<sup>378</sup> We know that adolescents are still developing with limited ability to properly judge their actions. We also know that they are highly amenable to change and rehabilitation. Yet, those who are tried and sentenced as adults, who spend critical years of maturation and personal development in incarcerated, are more likely to recidivate after their sentence and more likely to engage in a lifelong relationship with the criminal justice system.<sup>379</sup> According to the federal Centers for Disease Control, young people transferred to the adult criminal justice system have approximately 34 percent more re-arrests for felony crimes than youth retained in the youth justice system.<sup>380</sup> Around 80 percent of youth released from adult prisons reoffend, often going on to commit more serious crimes.<sup>381</sup> What’s more, when given lengthy sentences, youths are more likely to commit suicide.<sup>382</sup> Some states routinely try 16- and 17-year-olds as adults. Each year in New York alone, which prosecutes all people over 16 as adults, over 50,000 16- and 17-year-olds face the possibility of prosecution as adults in criminal court—the vast majority for low-level crimes (75.3 percent are misdemeanors).<sup>383</sup> Fourteen states have no minimum age for trying children as adults. Children as young as eight have been prosecuted as adults. Some states set the minimum age at 10, 12, or 13.<sup>384</sup>

377 Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, The Sentencing Project (May 2014), <http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf>;

378 Raise the Age NY, *Get The Facts*, <http://raisetheage.ny.com/get-the-facts> (accessed 7 July 2016).

379 Child Trends Data Bank, *Young Adults in Jail or Prison* (2012), <http://www.childtrends.org/?indicators=young-adults-in-jail-or-prison>.

380 Robert Hahn et al., Centers for Disease Control and Prevention, *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: Report on Recommendations of the Task Force on Community Preventive Services* (Nov. 30, 2007), <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm>.

381 National Campaign to Reform State Juvenile Justice Systems, *The Fourth Wave: Juvenile Justice Reforms for the Twenty-First Century 20* (2013), <http://raisetheage.ny.com/wp-content/uploads/2011/08/The-Fourth-Wave.pdf>.

382 They are also more likely to be raped and assaulted in adult prisons and exhibit the aggression that accompanies victimization. Vincent Shiraldi & Jason Zeidenberg, *The Risks Juveniles Face When They Are Incarcerated With Adults*, Justice Policy Institute (1997), [http://www.justicepolicy.org/images/upload/97-02\\_rep\\_riskjuvenilesface\\_jj.pdf](http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf).

383 Raise the Age NY, *supra* note 378.

384 *Children in Prison*, Equal Justice Initiative, <http://www.eji.org/childrenprison> (accessed 7 July 2016).

# TRANSFORMING THE SYSTEM

Extensive research has shown that the relevant parts of the brain that govern “impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable” do not reach maturity until the early or mid-twenties. Contrary to the arbitrary designation of 18 as the age of maturity, experts place the “biological” age of maturity between 22 and 25 years of age.<sup>385</sup>

To remedy this situation, Congress and state legislatures should:

- ▶ Raise the age of criminal responsibility in adult court to at least 18 years of age in every jurisdiction in the country including instituting a minimum age for processing in adult criminal court where none exists,<sup>386</sup>
- ▶ Progressively raise the age of juvenile court jurisdiction to at least 21 years old with additional, gradually diminishing protections for young adults up to age 24 or 25.<sup>387</sup>

## Eliminating unfair sex-related registries for youth

Everyone deserves a chance to grow and change over time. Yet young people who have been convicted of a sex crime while children may find themselves paying for the consequences of their conduct for the rest of their lives through mandatory registration on sex-related registries. Due to laws written to consider the age of the victim but not the age of the person who committed the act, youth are often disproportionately punished for normal or experimental sexual behavior. Child registrants include kids who played games of “doctor” with other children, high school streakers and flashers, and teens who had consensual sex with near-age peers. Children can be placed on registries for sex-related acts they commit when they are as young as 8, 10, and 12 years old.

Young people who commit sex-related offenses need support to understand the impacts of their actions, and interventions to address the root causes. Registration and notification do not

<sup>385</sup> Tony Cox, *Brain Maturity Extends Well Beyond Teen Years*, NPR (Oct. 11, 2011), <http://www.npr.org/templates/story/story.php?storyId=141164708>.

<sup>386</sup> Vincent Schiraldi et al., U.S. Department of Justice, National Institute of Justice, *Community-Based Responses to Justice-Involved Young Adults* (2015), <https://www.ncjrs.gov/pdffiles1/nij/248900.pdf>.

<sup>387</sup> Ibid.

# TRANSFORMING THE SYSTEM

rehabilitate or reduce recidivism, and instead destroy children, families, and communities. These registries often require continuous registration and may have onerous restrictions that prevent these young people from moving on with their lives. There are currently 39 states that place children on registries. The U.S. Supreme Court has recently highlighted the importance of eliminating life sentences for children.<sup>388</sup> These registries are essentially life sentences for children.<sup>389</sup> Our former Communications Institute Fellow Nicole Pittman has committed herself to getting children off registries for sex-related offenses in the United States.

To eliminate unfair registries, Congress and state legislatures should:<sup>390</sup>

- ▶ “Explicitly exempt all persons who were below the age of 18 at the time of their offense from all sex offender registration, community notification, and residency restriction laws”;<sup>391</sup>
- ▶ Amend legislation so that youth adjudicated delinquents in juvenile court are no longer required to register for sex-related offenses under any circumstances;<sup>392</sup>
- ▶ Immediately relieve young people currently required to of the duty to register;<sup>393</sup>
- ▶ Expunge all records relating to the registration status of young people;<sup>394</sup>
- ▶ Terminate all ongoing registration and notification requirements and restrictions upon the act’s effective date;<sup>395</sup>

388 See *Montgomery v. Louisiana*, 577 U.S. \_\_\_\_ (2016) (holding that all young people sentenced to mandatory life without parole sentences are entitled to challenge the constitutionality of their sentences).

389 Sarah Stillman, “The List,” *The New Yorker* (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes>

390 These requirements were devised following consultation with the Center for the Youth Registration.

391 Nicole Pittman, Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* (2013), <https://www.opensocietyfoundations.org/reports/raised-registry-irreparable-harm-placing-children-sex-offender-registries-us>; Justice Policy Institute, *Registering Harm: How sex offense registries fail youth and communities* (2011), [http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh\\_act.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/walsh_act.pdf).

392 Ibid.

393 Ibid.

394 Ibid.

395 Ibid.

# TRANSFORMING THE SYSTEM

- ▶ Provide an avenue for individuals who believe that he or she should have been removed from the duty to register under the new law, but are still being required to register, to petition the court for relief of the duty to register.<sup>396</sup>

Alternatively, they should:

- ▶ Eliminate the practice of placing youth adjudicated of sex-related offenses in juvenile court on registries for sex-related offenses;
- ▶ Remove youth under 18 convicted in adult court of sex-related offenses from registries, unless an evidence-based assessment indicates they are a high risk of committing sexual harm in the future; and
- ▶ Use a public health response to sex-related offenses that recognizes that treatment and prevention are more appropriate responses for persons accused of sex-related offenses,<sup>397</sup> including comprehensive sexuality education.<sup>398</sup>

Until youth registration is fully eliminated in all 50 states:

**Judges, defense attorneys, and prosecutors** should ensure that there is proper consideration concerning the possibility, requirements, and term of registration.

**Police** should eliminate the use of flyers or any form of publicized information about people on the registry in order to protect people on the registry for sex-related offenses from undue harassment.

## Preventing the “school to prison pipeline”

The tendency for overcriminalization has entered into schools.<sup>399</sup> Many schoolchildren have been funneled into the criminal justice system due to overly punitive school disciplinary

<sup>396</sup> Ibid.

<sup>397</sup> Ibid.

<sup>398</sup> Ibid.

<sup>399</sup> Catherine Y. Kim et al., *The School-to-Prison Pipeline: Structuring Legal Reform* (2010).

# TRANSFORMING THE SYSTEM

approaches and zero tolerance policies.<sup>400</sup> There has been a trend of criminalizing schoolchildren for ridiculously minor acts of misconduct.<sup>401</sup> For example, a Florida 5-year-old was handcuffed and charged with battery on a police officer in 2012,<sup>402</sup> while a San Mateo 7-year-old special education student was sprayed with pepper spray for climbing on furniture while at school in 2011.<sup>403</sup> New York City, Houston, and Miami all employ more school police officers than they do school counselors.<sup>404</sup>

There should be a concerted effort to replace these policies, which inappropriately channel large numbers of young people into the criminal justice system. The substantial investment in school policing should be replaced by culture and discipline strategies, such as restorative justice, that have been proven effective at keeping young people in school and keeping schools safe, as well as an increase in social services, school counselors, and school activities that enrich the environment in our nation's schools.

## The Department of Justice should:

- ▶ Eliminate the funding of police officers in schools<sup>405</sup> and invest in school-wide restorative justice program to improve school safety;<sup>406</sup>
- ▶ Require that police officers deployed in schools enter a memorandum of understanding with the school district outlining the nature of school policing;<sup>407</sup>

400 Ibid.; see also Tanya E. Coke, National Association of Criminal Defense Attorneys, *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System* 30 (2013), [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2013\\_racial\\_disparity\\_report.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/2013_racial_disparity_report.pdf).

401 See, e.g., Chris McGreal, "The US Schools with Their Own Police," *The Guardian* (Jan. 12, 2012), <https://www.theguardian.com/world/2012/jan/09/texas-police-schools> (describing an incident where a 12-year-old was arrested for spraying perfume on herself); "Student Arrested For 'Passing Gas' at Fla. School," *NBC News* (Nov. 24, 2008), [http://www.nbcnews.com/id/27898395/ns/us\\_news-weird\\_news/t/student-arrested-passing-gas-fla-school/#.V2ro3OsrKUk](http://www.nbcnews.com/id/27898395/ns/us_news-weird_news/t/student-arrested-passing-gas-fla-school/#.V2ro3OsrKUk) (recounting incident where a 13-year-old was arrested for passing gas).

402 Dav Manoucheri, "5-Year-Old Handcuffed, Charged with Battery On Officer," *NBC: KRCA 3* (Feb. 9, 2012), <http://www.kcra.com/5-Year-Old-Handcuffed-Charged-With-Battery-On-Officer/12648852>.

403 Henry K. Lee, "San Mateo Pays Family of Boy Pepper-Sprayed by Cop," *SFGate* (Dec. 8, 2011), <http://www.sfgate.com/bayarea/article/San-Mateo-pays-family-of-boy-pepper-sprayed-by-cop-2384518.php>.

404 Matt Barnum, *Exclusive—Data Shows 3 of the 5 Biggest School Districts Hire More Security Officers than Counselors*, 74 (Mar. 27, 2016), <https://www.the74million.org/article/exclusive-data-shows-3-of-the-5-biggest-school-districts-hire-more-security-officers-than-counselors>.

405 Catherine Y. Kim & India Geronimo, American Civil Liberties Union, *Policing in Schools: Developing a Governance Document for School Resource Officers in K-12 Schools* (Aug. 2009), <https://www.aclu.org/other/policing-schools-developing-governance-document-school-resource-officers-k-12-schools>.

406 See e.g., National Inst. for Justice, DOJ, *Restorative Justice* (2007); Office of Special Education Programs, U.S. Dep't of Education, *Positive Behavioral Supports and Interventions, Is School-Wide Positive Behavior Support an Evidence-Based Practice?* (2009).

407 For model Memorandum of Understanding language, please see Ibid.

# TRANSFORMING THE SYSTEM

- ▶ Require that school-based law enforcement officers, including school police and school resource officers, who deployed pursuant to federal funding be trained to respect students' constitutional and other rights.<sup>408</sup>

## Local government and school administrations should require the following:

- ▶ Adoption of policies that prioritize education over penalization, facilitating the repeal of overly punitive school discipline policies that push schoolchildren into the criminal justice system;<sup>409</sup>
- ▶ Elimination of “zero tolerance” policies, which reflect “a philosophy or policy that mandates the application of predetermined consequences, most often severe and punitive in nature, that are intended to be applied regardless of the gravity of behavior, mitigating circumstances, or situational context in schools”;<sup>410</sup>
- ▶ That referrals to law enforcement should be viewed as a last resort and used only when needed to ensure public safety;<sup>411</sup>
- ▶ Maintenance by schools of publicly available data on student disciplinary measures and referrals to law enforcement agencies, disaggregated by students' race, gender, sexuality, nationality, and eligibility for free or reduced lunch;<sup>412</sup>
- ▶ Implementation of restorative justice practices by school districts to eliminate harsh disciplinary procedures and avoid criminalization in the classroom.<sup>413</sup>

408 Kim & Geronimo, *supra* note 405.

409 Ibid.

410 American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations* (2008), <http://www.apa.org/pubs/info/reports/zero-tolerance.pdf> (finding that “zero tolerance” are largely ineffective at promoting school safety).

411 Ibid.

412 Ibid.

413 Ibid.

# TRANSFORMING THE SYSTEM



For more information on respecting the rights of children in the criminal justice system, check out:

The **Justice Policy Institute (JPI)**, a think tank dedicated to reducing society's reliance on incarceration with a particular focus on reforming the juvenile justice system.

**Equal Justice Initiative (EJI)**, which provides legal representation to indigent defendants and incarcerated individuals denied fair treatment by the criminal justice system with a focus area on ensuring the rights of children involved in the justice system.

**Raise the Age NY**, a campaign designed to increase public awareness of the need to implement a "comprehensive approach to raise the age of criminal responsibility in NYS so that the legal process responds to all children as children."

Vincent Schiraldi, Bruce Western, and Kendra Bradner, who advocate for appropriate, community-based responses to justice-involved young adults in their 2015 report, ***Community-Based Responses to Justice-Involved Young Adults***,<sup>414</sup>

Our 2014 Communications Institute Fellow Nicole Pittman of Impact Justice, who discusses the harms of placing children on registries for sex-related offenses in her 2013 report, ***Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US***.

**Dignity in Schools Campaign (DSC)**, which "challenges the systemic problem of pushout in our nation's schools and works to dismantle the school-to-prison pipeline" through advocacy, organizing, and leadership development.

**Restorative Justice Training Institute**, which provides training and resources to schools and youth-focused organizations.

414 Vincent Schiraldi et al., U.S. Department of Justice, National Institute of Justice, *Community-Based Responses to Justice-Involved Young Adults* (2015), <https://www.ncjrs.gov/pdffiles1/nij/248900.pdf>.



# TRANSFORMING THE SYSTEM



ERADICATE THE CRIMINALIZATION OF

## Sex, Gender, and Sexuality

We all should have freedom to live without fear of being criminalized because of our expressed sex, gender, or sexuality. Nonetheless, women, women of color, LGBTQ people, and people suspected of engaging in sex work are often profiled for these reasons.

LGBTQ people have been targeted with increased police surveillance;<sup>415</sup> black women and other domestic violence survivors may be treated like suspects when they call police for assistance with domestic violence;<sup>416</sup> women, LGBTQ women of color, transgender men, and others have been the targets of lewd remarks by police; and women and LGBTQ people suspected of sex work have been profiled because they were carrying condoms.<sup>417</sup> These acts should not be tolerated, and law enforcement should have clear, gender-sensitive guidelines to respond to complaints from diverse communities.

## Instituting gender-sensitive “use of force” guidelines

It is important that police officers receive clear mandates that prohibit excessive force that might violate an individual's gender integrity. Force should not be used on pregnant women and children. Victims of police sexual harassment and abuse should be able to report incidents of officer misconduct to an independent body that will take serious action against officers who prey on vulnerable communities. Law enforcement officers should be trained to adopt practices that reduce gender bias and prohibit the use of force on women are pregnant.

<sup>415</sup> See NCAVP, *supra* note 94.

<sup>416</sup> Crenshaw & Ritchie, *supra* note 28.

<sup>417</sup> Hanssens, et al., *supra* note 291.

# TRANSFORMING THE SYSTEM

## Local and state legislatures should pass legislation that:

- ▶ Creates heightened accountability for police officers who abuse their authority to engage in sexual harassment and sexual assault;<sup>418</sup>
- ▶ Requires police officers to respect various genders, sexualities, and gender identities during all police interactions, including searches and placements in police custody;<sup>419</sup>
- ▶ Modernizes legislation that currently criminalizes HIV status;<sup>420</sup>
- ▶ Creates an independent body that reviews police's compliance with the principles of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement** and allows for community complaints concerning police officers who have engaged in gender-insensitive policing approaches; and
- ▶ Prohibits the use of force, including chokeholds, Tasers, and/or other form of physical force on pregnant women or children<sup>421</sup> in favor of de-escalation.

## Local law enforcement agencies, chiefs of police, and police administrators should:

- ▶ Create heightened accountability for police officers who abuse their authority to engage in sexual harassment and sexual assault;<sup>422</sup>
- ▶ Ensure police officers and police management are thoroughly trained on the implementation of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement.**<sup>423</sup>

418 Crenshaw & Ritchie, *supra* note 28.

419 Ibid.

420 Center for American Progress & Movement Advancement Project, *supra* note 342, at 122.

421 Ibid, at 37..

422 Crenshaw & Ritchie, *supra* note 28.

423 Department of Justice, *supra* note 126.

# TRANSFORMING THE SYSTEM

## Protecting human trafficking survivors

Survivors of human trafficking should be provided with additional services, not subject to harsh criminalization and continued marginalization. The law should ensure that these victims are provided with proper resources after surviving the trauma of human trafficking.

### Local and state legislatures should pass legislation that:

- ▶ Grants a *vacatur*—which completely sets aside a criminal conviction and treats the conviction as if it never existed—to survivors of human trafficking as well as sex workers. The *vacatur* should adhere to the following model guidelines:
  - ▶ Ensures that there is a presumption of trafficking where trafficking survivors provide “official documentation” of trafficking, *without requiring* official documentation of trafficking;<sup>424</sup>
  - ▶ Ensures that the survivor is not required to undergo “rehabilitation” to receive the remedy;<sup>425</sup>
  - ▶ Requires confidentiality provisions that protect the survivor’s identity;<sup>426</sup>
  - ▶ Is the “most complete remedy possible under the law,” eliminating any possible negative legal consequences of the conviction;<sup>427</sup>
  - ▶ “State[s] that the Court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements”;<sup>428</sup>
  - ▶ Permits court to take appropriate action to institute the remedy;<sup>429</sup>
  - ▶ Is retroactive and allows for a remedy for older convictions;<sup>430</sup>

424 Melissa Broudo & Sienna Baskin, Sex Workers Project, *Vacating Criminal Convictions for Trafficked Persons: A Legal Memorandum for Advocates and Legislators* 2 (Apr. 22, 2012), <http://sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>.

425 Ibid.

426 Ibid.

427 Ibid.

428 Ibid.

429 Ibid.

# TRANSFORMING THE SYSTEM

- ▶ Provide funding for legal services attorneys to bring these motions;<sup>431</sup>
- ▶ Grants a similar remedy for prostitution offenses not involving trafficking.<sup>432</sup>

## Decriminalizing the sex trade

Human rights advocates are in general agreement that sex workers and sex work should not be criminalized.<sup>433</sup> Criminalizing sex work marginalizes sex workers and others involved in the trade and prevents them from seeking or providing help when they might need it.<sup>434</sup> It also makes sex workers vulnerable to abuse by police and other criminal justice actors, who often exploit the illegality of their work for their personal benefit. The overpolicing of sex workers and their customers exposes sex workers to potential victimization, pushing them into further secrecy by encouraging them to mistrust the criminal justice system.<sup>435</sup> Decriminalizing sex work should be a priority to ensure the safety and wellbeing of sex workers. Where many forms of sex work, especially prostitution, remain criminalized, it need not remain a police priority.

Consistent with the resolution of the Presidential Advisory Council on HIV/AIDS, the **Department of Justice (DOJ)** and the **Centers for Disease Control and Prevention (CDC)** should “develop, disseminate, publicize, and promote guidance to state lawmakers and prosecutors to adopt legislation and policies that would eliminate the practice of using possession or presence of condoms as the basis of criminal prosecutions or sentence enhancement.”<sup>436</sup>

430 Ibid.

431 Ibid.

432 Ibid.

433 Amnesty International released a drafted policy of supporting sex work in order to comply with human rights obligations toward sex workers. See Amnesty International, 32nd International Council Meeting Circular No. 18 2015 ICM circular: *Draft policy on Sex Work* (July 7, 2015), (“In response to the human rights violations caused by the criminalisation of sex work, states must: repeal existing and/or refrain from introducing laws that criminalise (directly or in practice) the consensual exchange of sexual services for remuneration”). In recognition of this human rights approach to the treatment of sex work, police department should de-prioritize the policing of sex workers.

434 See *Amnesty International Policy on State Obligation to Respect, Protect and Fulfil the Human Rights of Sex Workers*, POL 30/4062/2016 (May, 26 2016); *Freedom Network Statement in Support of Amnesty International Vote* (August 2015) (“The vote to support decriminalization for both sex workers and third parties is an important step towards valuing the rights and safety of everyone in the sex trade, including trafficking victims, without detracting from the importance of anti-trafficking efforts and the ability to punish traffickers”).

435 See also Melissa Ditmore, Sex Workers Project, *The Use of Raids to Fight Trafficking in Persons* (2009) 47-48 (discussing the public health harms from using condoms as evidence of prostitution).

436 Hanssens, et al., *supra* note 291.

# TRANSFORMING THE SYSTEM

## Local and state legislatures should pass legislation that:

- ▶ Decriminalizes all aspects of sex work.<sup>437</sup>
- ▶ Provides a “comprehensive ban on confiscation, use, or mere possession or presence of condoms as evidence of any prostitution-related offense.”<sup>438</sup>
- ▶ Prohibits the profiling of people suspected of engaging in sex work including LGBTQ persons.<sup>439</sup>
- ▶ Creates heightened accountability for police officers who abuse their authority to engage in sexual harassment and sexual assault.<sup>440</sup>
- ▶ Prohibits the arrest of individuals who are survivors of trafficking.<sup>441</sup>
- ▶ Eliminates the use of condoms as proof of intent to solicit or engage in prostitution.<sup>442</sup>
- ▶ Grants a vacatur remedy for sex workers, which adheres to the following model guidelines:
  - ▶ Ensures that the sex worker is not required to undergo “rehabilitation” to receive the remedy;<sup>443</sup>
  - ▶ Requires confidentiality provisions that protect the sex worker’s identity;<sup>444</sup>

<sup>437</sup> See Amnesty, *supra* note 434.

<sup>438</sup> Crenshaw & Ritchie, *supra* note 28. See Juhu Thukral & Melissa Ditmore, Sex Workers Project, Urban Justice Center, *Revolving Door: An Analysis of Street-Based Prostitution in New York City* 76 (2003).

<sup>439</sup> See Thukral & Ditmore, *supra* note 438, at 76.

<sup>440</sup> Crenshaw & Ritchie, *supra* note 28. See also Thukral & Ditmore, *supra* note 438, at 76.

<sup>441</sup> See Thukral & Ditmore, *supra* note 438.

<sup>442</sup> Ibid. See also Ditmore, *supra* note 435.

<sup>443</sup> Melissa Broudo & Sienna Baskin, Sex Workers Project, *Vacating Criminal Convictions for Trafficked Persons: A Legal Memorandum for Advocates and Legislators* 2 (Apr. 22, 2012), <http://sexworkersproject.org/downloads/2012/20120422-memo-vacating-convictions.pdf>. See also Freedom Network Statement, *supra* note 445.

<sup>444</sup> Ibid.

# TRANSFORMING THE SYSTEM

- ▶ Is the “most complete remedy possible under the law,” eliminating any possible negative legal consequences of the conviction;<sup>445</sup>
- ▶ “State[s] that the Court must vacate the convictions and dismiss the accusatory instrument if an individual meets the elements;”<sup>446</sup>
- ▶ Permits courts to take appropriate action to institute the remedy;<sup>447</sup>
- ▶ Is retroactive and allows for a remedy for older convictions;<sup>448</sup>
- ▶ Provides funding for “legal services attorneys to bring these motions;”<sup>449</sup>
- ▶ Ensures that all sex work–related offenses include an element that requires coercion in order to find a party guilty of trafficking.<sup>450</sup>
- ▶ Grant a similar vacatur remedy for prostitution offenses not involving trafficking.<sup>451</sup>

## Local police departments should:

- ▶ De-prioritize the policing of sex work;<sup>452</sup>
- ▶ Avoid arresting individuals who may be survivors of trafficking;<sup>453</sup>
- ▶ Implement reporting structures that allow sex workers to comfortably report police officer sexual harassment.<sup>454</sup>

## Training and sensitizing on gender, sex, and

445 Ibid.

446 Ibid.

447 Ibid.

448 Ibid.

449 Ibid.

450 Janie A. Chuang, “Exploitation Creep and the Unmaking of Human Trafficking Law,” *Am.J. Int’l L.* 609, 612 (2014) (“[T]rafficking is defined as: (1) an act of recruitment, movement, harbouring, or receipt of a person, (2) by means of force, fraud, or coercion, (3) for the purpose of ‘exploitation.’”). CORRECT HERE RATHER THAN IN TRAFFICKING SECTION?

451 *Supra*, note 438.

452 Ibid at 76.

453 Ibid.

454 Ibid.

# TRANSFORMING THE SYSTEM

## sexuality issues

Criminal justice actors should receive adequate training and guidance to ensure that they are able to respond to persons of all genders, sexes, and sexualities properly. To this end, the following solutions and actions should be adopted.

Criminal justice actors, including law enforcement agents, prosecutors, defense attorneys, judges, and parole and probation officers should:

- ▶ Receive training on the implementation of the **Department of Justice Guidance on Preventing Gender Bias in Law Enforcement** to sensitize them to the issues of gender, sex, and sexuality and enable them to respond to persons of varying expressed sexes, genders, gender identities, and sexualities;<sup>455</sup>
- ▶ Have in place explicit bans on the profiling of persons for sex, gender, and/or sexuality;
- ▶ Have in place policies that ensure that community members' is not compromised due to their expressed gender and/or sexuality, while detained or otherwise interacting with law enforcement officials; and
- ▶ Have in place policies that ensure the safety and wellbeing of pregnant and postpartum women, including a ban on the use of shackles during labor and recovery and adequate care to postpartum women, including a minimum recovery period and screenings for postpartum depression.

State, and local governments should also:

- ▶ Have in place explicit bans on the profiling of persons for sex, gender, and/or sexuality;
- ▶ Decriminalize domestic abuse survivors by prohibiting policies such as nuisance ordinances that force survivors out of their homes or prevent them from calling police by levying steep fines against the landlord or homeowner if a home is a site of a certain

455 Department of Justice, *supra* note 126. This document provides guidance to police officers on curtailing unconscious bias; acknowledges that preventing gender discrimination in policing is a human rights matter; recognizes intersectionality (mentions challenges of LGBTQ, sex workers, people of color, and people with multiple of these identities); and commits to law enforcement accountability.

# TRANSFORMING THE SYSTEM

number of calls for police or alleged nuisance conduct.<sup>456</sup>

- ▶ Minimize the impact of trafficking on young people by enacting “safe harbor” laws, which provide immunity and services to children who have been trafficked.<sup>457</sup>



*For more information on the criminalization of sex, gender, and sexuality and policies to address it, check out:*

The **Sex Workers Project** at the Urban Justice Center, which provides advocacy, legal and social services to individuals who engage in sex work. Our former Communications Institute Fellows Crystal DeBoise and Jessica Peñaranda work with the sex worker community through the Sex Workers Project.

**Amnesty International’s 2016 policy report** on state obligations to “respect, protect, and fulfill the human rights” of sex workers.

**The New York Anti-Trafficking Network**, which sheds lights on the problem of trafficking of persons and provides survivors with support. The **#TalkTraffic Video Series** provides important insights about how to approach and solve trafficking.

Kimberle Williams Crenshaw and Andrea J. Ritchie’s report, ***Say Her Name: Resisting Police Brutality Against Black Women***, which highlights the importance of intersectionality in criminal justice reform and a racial justice movement.

The 2012 book by Joey L. Mogul, Andrea J. Ritchie, and Kay Whitlock, ***Queer (In)Justice: The Criminalization of LGBT People in the United States***, which illustrates the punishment of queer expression in the criminal justice system.

Black & Pink is “an open family of LGBTQ prisoners and ‘free world’ allies who support each other.” It conducted a comprehensive survey of LGBTQ incarcerated people titled ***Coming Out of Concrete Closets: A Report on Black & Pink’s National LGBTQ Prisoner Survey*** that highlights the challenges these individuals faces and provides policy recommendations for respecting their human rights.

456 The ACLU has recently brought suit against two municipalities that have such policies. See *Nancy Markham v. City of Surprise*, ACLU (Aug. 27, 2015), <https://www.aclu.org/cases/nancy-markham-v-city-surprise>; and *Briggs v. Borough of Norristown et al*, ACLU (Sept. 18, 2014) <https://www.aclu.org/cases/briggs-v-borough-norristown-et-al?redirect=womens-rights/briggs-v-borough-norristown-et-al>.

457 Polaris Project, *Human Trafficking Issue Brief: Safe Harbor* (Fall 2015), <https://polarisproject.org/sites/default/files/2015%20Safe%20Harbor%20Issue%20Brief.pdf>.



# TRANSFORMING THE SYSTEM



ELIMINATE THE

## Criminalization of Poverty

Over 46 million people in the United States face economic obstacles that keep them living in poverty.<sup>458</sup> Instead of increasing opportunities to succeed, our law too often funnels low-income people into the criminal justice system. Debtors' prisons—the jailing of people for nonpayment of court-imposed fines or fees without procedural protections—have emerged around the nation, despite clear Supreme Court precedent holding that such prisons violate constitutional rights to due process and equal protection of the law.<sup>459</sup>

Low-income people are saddled with crippling high fines and fees for minor traffic tickets, civil offenses, and even misdemeanor crimes that are not normally punishable with jail time. When they are unable to pay, they experience devastating consequences, including incarceration, that affect their future employability, family stability, and communities.<sup>460</sup> People are also criminalized for homelessness through overly broad local vagrancy, loitering, and encampment laws that lead to ticketing, fines, and even arrest.<sup>461</sup>

Additionally, people who are sentenced to jail for their crimes are frequently charged fees related to their incarceration and a host of other penalties that lead to the escalation of their fines and fees during their prison terms.<sup>462</sup> As a result, many released persons, who have already paid their “debt” to society by serving their time in prison, face overwhelming and growing debt burdens. A 2015 Brennan Center report found that 43 out of 50 states have statutes that charge

458 Carmen DeNavas-Walt & Bernadette D. Proctor, *Income and Poverty in the United States: 2014*, U.S. Census Bureau (Sept. 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p60-252.pdf>.

459 See *Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that individuals cannot be incarcerated for the inability to pay fines); American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons* (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons> (finding “indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage. In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them. These sentences are illegal, create hardships for men and women who already struggle with re-entering society after being released from prison or jail, and waste resources in an often fruitless effort to extract payments from defendants who may be homeless, unemployed, or simply too poor to pay.”).

460 Eisen, *supra* note 25 (“Every aspect of the criminal justice process has become ripe for charging a fee. In fact, an estimated 10 million people owe more than \$50 billion in debt resulting from their involvement in the criminal justice system. In the last few decades, additional fees have proliferated, such as charges for police transport, case filing, felony surcharges, electronic monitoring, drug testing, and sex offender registration. Unlike fines, whose purpose is to punish, and restitution, which is intended to compensate victims of crimes for their loss, user fees are intended to raise revenue.”).

461 *A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, National Coalition for the Homeless, <http://www.nationalhomeless.org/publications/crimreport/allcities.html> (accessed 7 July 2016).

462 Ibid.

# TRANSFORMING THE SYSTEM

incarcerated individuals “room and board” fees.<sup>463</sup> These debts are often sold to debt collection agencies that charge additional fees and interest on unpaid fines and fees, and adopt aggressive collection practices toward individuals who have only recently been released from prison and are struggling to regain their footing in society.<sup>464</sup>

The criminalization of the poor is exacerbated by state and local governments’ use of for-profit probation providers to collect unpaid fines and fees.<sup>465</sup> When courts fail to afford counsel to people facing jail time for nonpayment, they may also violate constitutional rights.<sup>466</sup>

These practices create a perpetual state of financial servitude for many who have already served their time.

## Eliminating the criminalization of poverty

The Supreme Court has held that no person should be jailed for nonpayment of fines they simply cannot afford.<sup>467</sup> The Constitution requires that people who are charged with nonpayment of fines and fees be provided a hearing on their ability to pay prior to being punished with jail time. It also requires that people are afforded counsel when sentenced to jail or a suspended jail sentence. States and local governments should take steps to comply with this mandate.

To address these issues, the Department of Justice (DOJ) should:

- Provide technical support and resources for courts and support for courts to promote compliance with constitutional standards;<sup>468</sup>

<sup>463</sup> See *Ibid.* at 4.

<sup>464</sup> See *Ibid.* at 8.

<sup>465</sup> The task of determining whether an individual can pay fines has frequently been outsourced to for-profit probation companies that often recommend that individuals be incarcerated for failure to pay fees or fines. Human Rights Watch, *Profiting from Probation: America’s “Offender-Funded” Probation Industry* (Feb. 5, 2014), <https://www.hrw.org/report/2014/02/05/profitting-probation/americas-offender-funded-probation-industry>.

<sup>466</sup> The Sixth Amendment of the U.S. Constitution provides the right to counsel while the Fourteenth Amendment provides the right to due process of the law prior to being deprived of one’s life, liberty, or property.

<sup>467</sup> *U.S. v. Salerno*, 481 U.S. 739, 747–51 (1987).

<sup>468</sup> See Letter from the Department of Justice to state and local courts regarding their legal obligations with respect to fines and fees and to share best practices, Department of Justice (Mar. 1, 2016), <https://www.justice.gov/crt/file/832461/download>, Department of Justice, *Smart on Crime: Reforming The Criminal Justice System for the 21st Century* (August 2013).

# TRANSFORMING THE SYSTEM

- ▶ Investigate and bring enforcement actions against debtors' prisons that touch on areas in which the DOJ has authority, e.g. juveniles;<sup>469</sup>
- ▶ "[I]ssue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances [including panhandling ordinances], intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal pattern and practice investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees."<sup>470</sup>

## Local and state governments should do the following:

- ▶ Repeal legislation authorizing the imposition of user fees, including public defender fees;
- ▶ Repeal legislation imposing mandatory "assessments" on individuals accused of criminal offenses, traffic offenses, and civil offenses;<sup>471</sup>
- ▶ Review municipal and state court procedures and rules to ensure that fine and fee collection comports with constitutional protections for due process and equal protection of the law, so that people are not jailed for nonpayment of civil fines, fees, and/or penalties they cannot afford to pay without prior procedural protections;<sup>472</sup>
- ▶ Ensure that counsel is appointed at the sentencing and post-sentencing enforcement stage whenever a person faces incarceration for nonpayment of a fine or fee;
- ▶ Eliminate incarceration and jailing for civil penalties and fines;<sup>473</sup>
- ▶ Establish a state and local taskforce to identify court practices that incarcerate indigent defendants for poverty and make recommendations to address these practices in municipal courts;
- ▶ Eliminate public defender fees;<sup>474</sup>

469 Ibid.

470 Hanssens, et al., *supra* note 291.

471 Alicia Bannon et al., Brennan Center for Justice, *Criminal Justice Debt: A Barrier to Reentry* 32 (2010), <https://www.brennancenter.org/publication/criminal-justice-debt-barrier-reentry>.

472 See note 110 and accompanying text. The ACLU report focuses on debtors' prisons in Louisiana, Michigan, Ohio, Georgia, and Washington.

473 See CPD, *supra* note 90, at 8; Eisen, *supra* note 25, at 8.

474 Bannon et al., *supra* note 471, at 32.

# TRANSFORMING THE SYSTEM

- ▶ Eliminate payment plan fees, late fees, collection fees, and interest that creates mounting debt for low-income individuals;<sup>475</sup>
- ▶ Eliminate bars on the right to vote, access housing, or access driver's licenses based on the nonpayment of criminal justice debt;<sup>476</sup>
- ▶ Require that judges with a pattern of unconstitutionally punishing defendants for nonpayment of civil fines and/or criminal justice debt are disciplined by ethics committees;<sup>477</sup>
- ▶ Eliminate fees for participation in community service and other alternatives to incarceration and fines/fees;
- ▶ Make alternatives to incarceration and to fines and fees available at sentencing and ensure that they accommodate the needs of people with child care needs, disabilities, limited access to public transportation, and other limitations;
- ▶ "Prohibit 'auto-jail' policies, repeated jail sanctions, and frequent court appearances" associated with criminal justice debt.<sup>478</sup>
- ▶ Permanently eliminate the use of asset forfeiture unless the government can prove that the property in question was connected with a crime by clear and convincing evidence.<sup>479</sup>
- ▶ Permanently eliminate programs that incentivize civil asset forfeiture, including federal-local/state sharing schemes;
- ▶ Require due process judicial hearings prior to the enforcement of civil penalties related to criminal activities, including nuisance abatement of property<sup>480</sup> and civil confinement (often used for people convicted of sex-related offenses), and require follow-up proceedings to ensure continued compliance with due process requirements.

475 Ibid.

476 Ibid.

477 The Ferguson Report outlined how courts were profiting from poverty.

478 Alexander, *supra* note 15.

479 Adam Bates, *National Police Misconduct Reporting Project: Civil Asset Forfeiture*, Cato Institute <http://www.policemisconduct.net/explainers/civil-asset-forfeiture/> (accessed 7 July 2016). See also Dick M. Carpenter II et al., Institute for Justice, *Policing for Profit: The Abuse of Civil Asset Forfeiture*, (2015), <http://ij.org/report/policing-for-profit/>.

480 Sarah Ryley, "The NYPD Is Kicking People Out of Their Homes, Even If They Haven't Committed a Crime: And It's Happening Almost Exclusively in Minority Neighborhoods," ProPublica & *N.Y. Daily News* (February 4, 2016), <https://www.propublica.org/article/nypd-nuisance-abatement-evictions> (describing NYPD practice of using nuisance abatement to effectively evict people from their homes for alleged criminal conduct without proof of this conduct).

# TRANSFORMING THE SYSTEM

Courts should comply with the guidance provide by the DOJ concerning the treatment of fines and fees, which are provided below:

- ▶ (1) Courts must not incarcerate a person for nonpayment of fines or fees without first conducting an indigency determination and establishing that the failure to pay was willful;
- ▶ (2) Courts must consider alternatives to incarceration for indigent defendants unable to pay fines and fees;
- ▶ (3) Courts must not condition access to a judicial hearing on the prepayment of fines or fees;
- ▶ (4) Courts must provide meaningful notice and, in appropriate cases, counsel, when enforcing fines and fees;
- ▶ (5) Courts must not use arrest warrants or license suspensions as a means of coercing the payment of court debt when individuals have not been afforded constitutionally adequate procedural protections;
- ▶ (6) Courts must not employ bail or bond practices that cause indigent defendants to remain incarcerated solely because they cannot afford to pay for their release;
- ▶ (7) Courts must safeguard against unconstitutional practices by court staff and private contractors.<sup>481</sup>

The **National Taskforce for Fees and Fines**, which was formed by the Conference of Chief Justices, the association of the top judicial leaders, and the Conference of State Court Administrators, the organization of court executives that oversees judicial administration in the state courts, should develop a protocol for disciplining judges who routinely violate constitutional requirements through practices that have the effect of incarcerating low-income individuals for their inability to pay fines or fees.

481 Letter by Vanita Gupta, U.S. Department of Civil Rights, (March 14, 2016), <https://www.justice.gov/crt/file/832461/download>.

# TRANSFORMING THE SYSTEM

## Eliminating the criminalization of aspects of homelessness

No one should face discrimination—and especially prosecution or imprisonment—because they do not have a place to live. Yet, at the same time as access to affordable housing has decreased, there has been an uptick in laws that criminalize homelessness. Local governments have relied upon the police to address homelessness rather than adopting problem-solving strategies that increase access to affordable housing and social services,<sup>482</sup> for example, investing in programs that adopt a Housing First approach, which “prioritizes providing people experiencing homelessness with permanent housing as quickly as possible—and then providing voluntary supportive services as needed.”<sup>483</sup>

Furthermore, criminalizing aspects of the consequences of homelessness has the effect of further marginalizing communities that already face marginalization. LGBTQ youth often find themselves without homes after experiencing rejection from their families. When on the streets, they often complain of police profiling and harassment, leading to further marginalization. It is important that governments instead increase access to housing, ensure that there are mental health services available, and adopt measures that eliminate discrimination based on housing status.

To address this issue, the **Department of Justice** should issue guidance to state and local governments on the constitutionality and cost-effectiveness of anti-homeless ordinances, intervene in litigation challenging such ordinances, incorporate investigation of civil rights abuses of homeless people as a standard practice in federal “pattern and practice” investigations, and include provisions addressing discriminatory policing of homeless people in federal consent decrees.”<sup>484</sup>

The **U.S. Interagency Council on Homelessness** should “publicly oppose specific local criminalization measures, as well as inform local governments of their obligations to respect the rights of homeless individuals.”<sup>485</sup>

482 National Alliance to End Homelessness, *A Plan, Not A Dream: How to End Homelessness in Ten Years* (July 2006), <http://www.endhomelessness.org/library/entry/a-plan-not-a-dream-how-to-end-homelessness-in-ten-years>.

483 *Housing First*, National Alliance to End Homelessness, [http://www.endhomelessness.org/pages/housing\\_first](http://www.endhomelessness.org/pages/housing_first) (accessed 7 July 2016)

484 Hanssens, et al., *supra* note 291.

485 National Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2015), [https://www.nlchp.org/documents/No\\_Safe\\_Place](https://www.nlchp.org/documents/No_Safe_Place).

# TRANSFORMING THE SYSTEM

## Local and state governments should:

- ▶ Prohibit the profiling of individuals on the basis of perceived housing status;<sup>486</sup>
- ▶ Curtail enforcement of loitering and related offenses;<sup>487</sup>
- ▶ Invest in more comprehensive long-term and short-term housing options, and ensure that placements respect individuals self-identified gender specifications;<sup>488</sup>
- ▶ Eliminate policies and practices that in effect result in the incarceration and increased policing of homelessness;<sup>489</sup>
- ▶ Improve police training on interacting with homeless communities,<sup>490</sup> including “police training curricula to improve relationships with LGBTQ youth and decrease profiling, harassment, and abuse”;<sup>491</sup>
- ▶ Ensure that the impact of homelessness on a person’s financial circumstances and efforts to earn money is considered in an ability-to-pay hearing when a homeless person is charged with nonpayment of fines and fees;
- ▶ Enact an enforceable Homeless Bill of Rights measure that ensures that homelessness is not treated as a crime.<sup>492</sup>

486 Ibid.

487 Ibid.; see also Adopting a Human Rights Approach to Policing .

488 National Law Center on Homelessness & Poverty *supra* note 485.

489 Ibid.

490 Ibid.

491 Meredith Dank et al., *Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, and YSWW Engaged in Survival Sex* 70 (Feb. 2015), <http://www.urban.org/research/publication/surviving-streets-new-york-experiences-lgbtq-youth-ymsm-and-ysww-engaged-survival-sex>.

492 Homeless Bill of Rights, <http://nationalhomeless.org/campaigns/bill-of-right/>.

# TRANSFORMING THE SYSTEM

## Adopting fair debt practices for fines and tariffs

Criminal justice fines and fees are a regressive, punitive measure that hits the most marginalized in our society first and hardest. They often create perverse incentives, by which municipalities seek to fund government operations through aggressive policing of modest infractions, often in a discriminatory fashion.<sup>493</sup> Moreover, the practice of attempting to collect payment from individuals who may be unemployed, homeless, or simply unable to afford it are often fruitless and lead to wasted resources.<sup>494</sup> In *Bearden*, the Supreme Court has held that it is “contrary to the fundamental fairness required by the Fourteenth Amendment” to incarcerate individuals for their failure to pay fines and fees.<sup>495</sup> Yet, courts across the country routinely incarcerate individuals for failure to pay criminal justice debt without regard to the financial circumstances that may make payment impossible.<sup>496</sup> In general, fines and fees should be avoided. If fines must be included, they should be fair, reasonable, and adjusted to meet the financial resources of the defendant. Debt collection practices should comply with the Fair Debt Collection Practices Act, which prohibits “abusive debt collection practices,”<sup>497</sup> and there should be explicit prohibitions on predatory debt collection practices.

To facilitate this, local and federal governments should adopt policies that do the following:

- ▶ Set caps on criminal justice debt;<sup>498</sup>
- ▶ Ensure that collection practices for criminal justice debts comply with the Fair Debt Collections Act;<sup>499</sup>

493 See United States Dep’t of Justice, Civil Rights Div., Investigation of the Ferguson Police Department 3 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf).

494 See, e.g., American Civil Liberties Union, *supra* note 459, at 5.

495 *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983), see also, *Tate v. Short*, 401 U.S. 395, 398 (1971).

496 See, e.g., American Civil Liberties Union, *supra* note 459, at 5.

497 15 U.S.C. §§ 1692-1692p.

498 Ibid.

499 Ibid.



# TRANSFORMING THE SYSTEM

- ▶ Provide a clear statutory right that allows indigent individuals to waive fees and fines related to their involvement in the justice system;<sup>500</sup>
- ▶ Create a sliding scale for criminal justice fines;
- ▶ Eliminate the use of probation administered by for-profit probation companies to collect payments toward fines and fees;
- ▶ Eliminate the imposition of interest and additional fees on people who cannot afford to pay in full on sentencing day;
- ▶ Establish debt payment plans for the repayment of criminal justice debts;<sup>501</sup> and
- ▶ Eliminate “pay to stay” policies in which prisons can charge formerly incarcerated individuals for the cost of room, board and medical care.<sup>502</sup>



*For more information on criminal justice debt and the criminalization of poverty, check out:*

The Department of Justice’s **Ferguson Report**, which describes how the city of Ferguson leveraged criminal justice debt to fund the municipality.

**Equal Justice Under Law**, a legal project devoted to ending systemic inequality that has successfully litigated to dismantle local criminal justice policies that discriminate against the poor.

The ACLU’s project to End Modern Day Debtor Prisons and their 2010 report, ***In for a Penny: The Rise of Modern Day Debtors Prisons***, which describes the results of a yearlong investigation into modern-day debtors’ prisons throughout the country, showing that “poor defendants are being jailed at increasingly alarming rates for failing to pay legal debts they can never hope to afford.”

**National Law Center on Homelessness and Poverty**, an organization dedicated to eliminating the root causes of homelessness and addressing it in the larger context of poverty, which explores the criminalization of homelessness in their 2014 report, ***No Safe Place: The Criminalization of Homelessness in U.S. Cities***.

500 Ibid.

501 Subramanian et al., *supra* note 202.

502 American Civil Liberties Union, *In for a Penny: The Rise of America’s New Debtors’ Prisons* (2010), <https://www.aclu.org/report/penny-rise-americas-new-debtors-prisons>

# TRANSFORMING THE SYSTEM



ELIMINATE THE CRIMINALIZATION OF

## Public Health Issues

The criminal justice system is too often used as a cure-all for social problems that are better suited to social services and public health responses.<sup>503</sup> People with disabilities are often criminalized for their disabilities when a public health response would be much more suitable. In particular, criminalization is routinely used in responding to mental health matters.<sup>504</sup> Because of inadequate mental health structures, incarceration is at times used to restrain people with mental health issues when medical treatment is actually needed.

Furthermore, a public health response would be more appropriate for drug policy. Over the past 40 years, the United States has relied upon heavy-handed drug policies that focus on criminalization and harsh sentences. Drug policy is one of the leading contributors to the current state of mass incarceration and has encouraged unfairness in the criminal justice system.<sup>505</sup> Black and brown communities have been targeted and suffered from harsher sentences and penalties.<sup>506</sup> Yet, these policies are ineffective: “A systematic review of more than 300 international studies found that when police ... [focus on policing] people who use or sell drugs, the result is almost always an increase in violence.”<sup>507</sup>

A public health response would be more effective for addressing addiction and in the general treatment of persons battling addiction. One example, although far from ideal in its scope and outcomes, is the Law Enforcement Assisted Diversion (LEAD) program, which “allows law enforcement officers to redirect” individuals to “community-based services, instead of jail and prosecution” and has been successful at reducing the recidivism rates there.<sup>508</sup>

503 The Center for Popular Democracy, *Building Momentum from the Group Up: A Toolkit for Promoting Justice in Policing* 5 (June 2015) [hereinafter CPD] (“Police and prisons have become the government’s answer to nearly every social problem in low income communities of color. The criminalization of poverty, mental illness, perceived anti-social behavior, and drug addiction has led to mass incarceration.”).

504 “In state prisons, more than half of the people incarcerated (56 percent) have a mental health problem and one in six (16 percent) have a serious mental illness (SMI). In local jails, almost two thirds (64 percent) and 17 percent meet these criteria, respectively. More than half of the people in state prisons (53 percent) and two thirds in local jails (68 percent) have substance use disorders.” See CHJ, *supra* note 85, at 4.

505 See generally, Doris Marie Provine, *Unequal Under Law: Race in the War on Drugs* (2008); see also, Michael Tonry, “Racial Politics, Racial Disparities, and the War on Crime” 40 *Crime & Delinquency* 475 (1994).

506 Leadership Conference Education Fund & Leadership Conference on Civil Rights, *Justice on trial: Racial Disparities in the American Criminal Justice System* (2000).

507 Drug Policy Alliance, *An Exit Strategy for the Failed War on Drugs: A Federal Legislative Guide* 5 (2013).

508 Law Enforcement Assisted Diversion Program, <http://leadkingcounty.org/> (accessed 7 July 2016); Sara Jean Green, “LEAD Program for Low-Level Drug Criminals Sees Success,” *Seattle Times* (April 9, 2015), <http://www.seattletimes.com/seattle-news/crime/lead-program-for-low-level-drug-criminals-sees-success/>.

# TRANSFORMING THE SYSTEM

## Crisis Intervention Teams

By training police to deescalate and divert those who need it to medical facilities, the Crisis Intervention Team (CIT), with more than 2,500 programs in 45 states and several foreign countries,<sup>509</sup> is a popular model to prevent unnecessary conflict with and incarceration of those with mental health problems by the police.



The first CIT program was created in 1988 in Memphis, TN, after a tragic incident in which police killed a man with mental health issues.<sup>510</sup> The Memphis Police Department and the “Memphis Chapter of the Alliance for the Mentally Ill (AMI)” partnered to create a pre-booking diversionary approach to mental health crisis events<sup>511</sup> that deescalated police encounters and provided treatment to people with mental health issues rather than incarceration, or violent altercation. It has become a model for thousands of similar programs throughout the country.<sup>512</sup> Since its implementation in 1988 the percentage of people with mentally health issues in police custody in Memphis has dropped from 15 percent in 1988 to 3 percent today<sup>513</sup> and arrests have dropped from 20 arrests per 100 calls to 2 arrests per 100 calls.<sup>514</sup>

CIT programs have been successfully implemented in many sites including Miami-Dade and Bexar County, Florida. The Miami-Dade CIT program significantly reduced recidivism of the mentally ill population and, accordingly, reduced costs. From 2000 to 2001, the CIT program reduced the recidivism rate for the population with mental health issues from approximately 70 percent to 11 percent in just one year. According to the Court Mental Health Project’s calculations, the reduced recidivism saved Miami-Dade \$2.3 million in one year.<sup>515</sup> The Center for Health Services estimates that San Antonio has saved \$50 million over the past five years.<sup>516</sup>

509 Brian Livingston, *Crisis Intervention Teams Complete*, Justice Center: Council of State Gov’ts (2013), <http://csjusticecenter.org/law-enforcement/media-clips/crisis-intervention-teams-complete/>.

510 *The New Asylums: Some Frequently Asked Questions*, frontline, <http://www.pbs.org/wgbh/pages/frontline/shows/asylums/etc/faqs.html#5> (accessed 7 July 2016).

511 The City of Memphis, *Crisis Intervention Team*, <http://www.memphistn.gov/Government/PoliceServices/CrisisInterventionTeam.aspx> (accessed 7 July 2016).

512 Lesley Buchan, National Association of Counties, *Ending the Cycle of Recidivism: Best Practices for Diverting the Mentally Ill from County Jails* 14 (2003), <http://namimarin.org/wp-content/uploads/2013/09/jail-diversion-and-mentally-ill1.pdf>.

513 CIT Facts and Benefits, CIT International, <http://www.citinternational.org/cit-overview/131-cit-facts-and-benefits.html> (accessed 7 July 2016).

514 Ibid.

515 Buchan, *supra* note 512 at 11.

516 Ibid.

# TRANSFORMING THE SYSTEM

Finally, it is also important to ensure that persons who are convicted of sex-related offenses receive appropriate treatment and social service support and are not subject to overly broad registries that are largely ineffective.<sup>517</sup>

## Eliminating the criminalization of disabilities

Individuals with physical and mental health concerns are especially vulnerable to increased criminalization. Poorly trained police staff may be ill-equipped to respond to individuals of various abilities and situations may unnecessarily escalate. They are also often targeted for their health status rather than for wrongdoing. During street encounters, police officers are almost twice as likely to arrest someone who appeared to have mental health issues for the same, usually minor infraction.<sup>518</sup> Criminalizing individuals with mental health issues often creates a never-ending revolving door into the criminal justice system with many mental health issues never receiving appropriate care.<sup>519</sup>

The vast population of incarcerated people with mental health issues reflects a justice system that disproportionately arrests, mistreats, retains, and re-arrests them. Today there are three times more people with a serious mental health issues in jails and prisons than in hospitals.<sup>520</sup> There are more people with mental health issues in Los Angeles County Jail, Chicago's Cook County Jail, or New York's Riker's Island Jail respectively than in any psychiatric hospital in the United States.<sup>521</sup>

Fortunately, the Affordable Care Act provides an opportunity to ensure that people with mental health concerns are not criminalized when they should be treated for their illness.<sup>522</sup> By investing in community mental health resources and appropriate diversions into treatment and away from the criminal justice system at every stage (i.e. arrest, booking, adjudication, detention, reentry), communities can give people with mental health issues the treatment they need, saving millions of dollars, and creating a healthier, safer, and more equitable society.

517 Richard Tewksbury, "Validity and Utility of the Kentucky Sex Offender Registry," 66 *Fed. Probation* 21 (2002).

518 L. Teplin, "Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill" 39 *American Psychologist* 794, 802 (1984).

519 Ibid.

520 E. Fuller Torrey et al., *More Mentally Ill Persons Are in Jails and Prisons than Hospitals: A Survey of the States*, Treatment Advocacy Center 1, (2010), [http://www.treatmentadvocacycenter.org/storage/documents/final\\_jails\\_v\\_hospitals\\_study.pdf](http://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf).

521 Ibid. at 10.

522 Cockburn *supra* note 289 (describing how the Affordable Care Act expanded coverage for mental health issues).

# TRANSFORMING THE SYSTEM

Police should prioritize diverting people with mental health issues into treatment and away from the criminal justice system before they have been booked.

People who are deaf and have other physical disabilities may also be subject to increased marginalization.<sup>523</sup>

Several police departments have implemented specialized police responses (SPRs), such as the Crisis Intervention Team, to change the way their officers interact with people with mental health issues. These programs partner with local mental health treatment centers to divert individuals with mental health issues into treatment.<sup>524</sup> It is collaboration between law enforcement agencies, community groups, and public officials. People who are deaf and have other physical disabilities may also be subject to increased marginalization.<sup>525</sup>

To this ensure that individuals are not criminalized for having a disability, Congress, and local and state legislatures should pass legislation that does the following:

- ▶ Ensures adequate resources for mental health to address the needs of people with disabilities;<sup>526</sup>
- ▶ Reinvests funds from prisons and incarceration to ensure that mental health programs are adequately funded;<sup>527</sup>
- ▶ Prohibits inappropriate treatment of mental health issues through criminal enforcement mechanisms;<sup>528</sup>
- ▶ Facilitates Affordable Care Act enrollments for persons with disabilities;<sup>529</sup>

523 Lydia L. Callis, "How the Criminal Justice System Fails the Deaf Community," *Huffington Post* (Jan. 10, 2015), [http://www.huffingtonpost.com/lydia-l-callis/post\\_8582\\_b\\_6127898.html](http://www.huffingtonpost.com/lydia-l-callis/post_8582_b_6127898.html); Disabilities Rights California, *An Ounce of Prevention: Law Enforcement Training and Mental Health Crisis Intervention* (2014), <http://www.disabilityrightsca.org/pubs/CM5101.pdf>.

524 Law Enforcement Assisted Diversion, LEAD, <http://leadkingcounty.org/lead-tools/> (accessed 7 July 2016).

525 Lydia L. Callis, "How the Criminal Justice System Fails the Deaf Community," *Huffington Post* (Jan. 10, 2015), [http://www.huffingtonpost.com/lydia-l-callis/post\\_8582\\_b\\_6127898.html](http://www.huffingtonpost.com/lydia-l-callis/post_8582_b_6127898.html); Disabilities Rights California, *An Ounce of Prevention: Law Enforcement Training and Mental Health Crisis Intervention* (2014), <http://www.disabilityrightsca.org/pubs/CM5101.pdf>.

526 See generally, Council of State governments, Criminal Justice/Mental Health Consensus Project 8-9 (2002), [http://issuu.com/csgjustice/docs/the\\_consensus\\_project\\_report\\_032513](http://issuu.com/csgjustice/docs/the_consensus_project_report_032513).

527 Cockburn *supra* note 289.

528 Council of State governments, *supra* note 526.

529 Cockburn *supra* note 289.

# TRANSFORMING THE SYSTEM

- ▶ Establishes public education regarding mental health screenings and expanded services available through the Affordable Care Act;<sup>530</sup>
- ▶ Provides that, where a police officer is required, properly trained medical responders accompany police members in response to mental health crises and/or provides that dispatchers and police are trained to recognize conflict involving mental health issues and deescalate mental health crisis when they occur, diverting a person with an apparent mental health issues to a treatment center;<sup>531</sup>
- ▶ Incentivizes and funds “pilot diversion programs that place treatment decisions within public health systems rather than the criminal justice system,” including diversion prior to booking, during detention, before adjudication, and upon release;<sup>532</sup>
- ▶ Where avoiding arrest and incarceration is not an option, expands the use of specialty courts including, drug courts, DWI courts, mental health courts, and human trafficking intervention courts for persons who indicate that they are survivors of all kinds of human trafficking. These programs should only be adopted as part of a continuum of diversions where they have been proven to reduce incarceration and improve public safety by employing best practices; allowing for proper service provision; providing access to immigration attorneys where there might be immigration-related consequences; and allowing for independent oversight for the programs.<sup>533</sup>

## Local governments and police departments should ensure that:

- ▶ Trained medical professionals are at hand to respond to mental health crises to guarantee a proper response and prevent criminalization where medical treatment is more appropriate;
- ▶ Police officers are trained on interacting with persons with physical and mental health issues, fostering a culture of respect for human dignity to encourage respect for persons with disabilities;

530 Ibid.

531 See Meridian Star, *Crisis Intervention Teams Complete*, Justice Center: The Council of State Governments (2013), <http://csgjusticecenter.org/law-enforcement/media-clips/crisis-intervention-teams-complete/>; Crisis Intervention Team, The City of Memphis, <http://www.memphistn.gov/Government/PoliceServices/CrisisInterventionTeam.aspx> (accessed 25 July 2016).

532 Drug Policy Alliance, *supra* note 507, at 31.

533 Testimony of the Sex Workers Project, *supra* note 228.

# TRANSFORMING THE SYSTEM

- ▶ Police officers are instructed to divert individuals with mental health issues who are accused of committing a less serious crime to suitable health care services and to avoid incarceration;<sup>534</sup>
- ▶ Partnerships between law enforcement agencies, social service agencies, and civil society are formed to guarantee that people with disabilities, including individuals with mental health disabilities, are referred to social services agencies and civil society groups for appropriate services rather than criminalized, where appropriate.

## Reforming registries for sex-related conduct

Though adopted with good intentions, research has shown that placing individuals convicted of sex-related offenses on registries is largely ineffective and frequently overly broad.<sup>535</sup> Sex-related registries are costly, and resources spent on closely monitoring the every move of individuals who previously committed a sex-related offense could instead be used to ensure that they receive appropriate treatment and are able to successfully reenter their communities. Persons accused of sex-related offenses have some of the lowest recidivism rates,<sup>536</sup> yet they suffer from a pervasive public perception that that they will inevitably engage in the same behavior. Protecting children and adults from sexual abuse and violence requires treating that conduct as a public health matter that is preventable.<sup>537</sup>

Moreover, inclusion on these registries is often for life and hampers rehabilitation by thwarting social service and family support.<sup>538</sup> The children and spouses of individuals who must register also suffer. There are currently 850,000 people required to register. Responses should be individualized, given the diversity of offenses that are treated as “sex offenses,” and diversity of people currently included on registries. There should be primary prevention such as comprehensive sex education and efforts to address the culture of consent that specifically require responses that are outside the criminal justice system.

534 Ibid.

535 Corinne Carey, Human Rights Watch, *No Easy Answers: Sex Offender Laws in the US* (2007).

536 See Gina Kolata, “The Many Myths About Sex Offenders,” *The New York Times* (Sept. 1, 1996), <http://www.nytimes.com/1996/09/01/weekinreview/the-many-myths-about-sex-offenders.html>; see also Press Release, Bureau of Justice Statistics, *5 Percent of Sex Offenders Rearrested for Another Sex Crime Within 3 Years of Prison Release* (Nov. 16, 2003), <http://www.bjs.gov/content/pub/press/rsorp94pr.cfm>; Hal Arkowitz & Scott O. Lilienfeld, “Once a Sex Offender, Always a Sex Offender? Maybe not,” *Scientific American* (April 1, 2008), <http://www.scientificamerican.com/article/misunderstood-crimes/>.

537 See Arkowitz & Lilienfeld, *supra* note 536.

538 See generally Cynthia Calkins Mercado et al., *The Impact of Specialized Sex Offender Legislation on Community Reentry*, 20 *Sexual Abuse: A J. of Research and Treatment* 188 (2008); Jill S. Levenson et al., *Megan’s Law and its Impact on Community Reentry for Sex Offenders*, 25 *Behavioral Sciences & Law* 587 (2007).

# TRANSFORMING THE SYSTEM

**Congress, and local and state legislatures should ensure that:**

- ▶ Registration is limited to adults who pose a high risk of repeating their offenses;<sup>539</sup>
- ▶ Access to registries is limited to law enforcement officials and released only on a need-to-know basis;<sup>540</sup>
- ▶ Registration data is consistently reviewed for accuracy;<sup>541</sup>
- ▶ Laws that require young people to register are eliminated;
- ▶ Online sex-related registries are eliminated, and where left in place, that adequate information is included to allow a layperson to understand the conviction;<sup>542</sup>
- ▶ Exonerated persons do not appear on the registry;<sup>543</sup>
- ▶ Residency requirements for registrants are eliminated;<sup>544</sup>
- ▶ There is substantial support for treatment programs for persons convicted of sex-related offenses, including treatment plans that are individualized to the person's learning style and formulated to respond to their risk and needs.<sup>545</sup>

**Congress and the Department of State** should repeal legislation that hampers the rehabilitation of people convicted of past sex-related offenses.<sup>546</sup>

539 Ibid.

540 Ibid.

541 Ibid.

542 Ibid.

543 Ibid.

544 Ibid.

545 See generally R. Karl Hanson et al., "The Principles of Effective Correctional Treatment Also Apply to Sexual Offenders: A Meta-Analysis" 36 *Criminal Justice & Behavior* 865 (2009).

546 For example, H.R.515—International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders, which passed Congress and places travel restrictions on persons who have been convicted of sex-related offenses should be repealed.



# TRANSFORMING THE SYSTEM

The **Department of Justice** should continue to support and fund the Center for Sex Offender Management,<sup>547</sup> which administers registration standards for sex-related conducted pursuant to the Adam Walsh Act of 2006, 42 U.S.C. §16911 et seq.<sup>548</sup>

**Local, state, and federal government should encourage:**

- ▶ Public education about the nature of sexual abuse, including information that the abuse is generally done by a trusted associate, symptoms of abuse, and how to talk to children about abuse;
- ▶ Collaboration between the community, law enforcement agencies, individuals who have been convicted of sex-related offenses, prevention groups, and specialized treatment providers to promote successful reintegration into the community.<sup>549</sup>

## Adopting sensible drug policy

Ineffective and harmful drug policies have overemphasized criminalization, although criminalization is far less effective and more costly than public health responses that focus on harm reduction. Instead, drug-related policies should treat drug addiction as a public health matter. Drug policy warrants proven public health responses and should be focused on “reducing the harms of drug misuse.”<sup>550</sup>

The City of Ithaca has adopted an evidence-supported plan to curtail drug addiction by adopting a public health approach in lieu of criminalization. This plan includes a focus on diverting individuals away from the criminal justice system and into social service programs, and supervised injection sites that are proven to be effective in harm reduction and in preventing the spread of disease.<sup>551</sup> The City of Ithaca has released a **report** that can serve as a model for local implementation of drug policy.

<sup>547</sup> Center for Sex Offender Management, *Enhancing the Management of Adult and Juvenile Sex Offenders: A Handbook for Policymakers and Practitioners* (2007).

<sup>548</sup> The Adam Walsh Act of 2006, 42 U.S.C. §16911 et seq. outlines registration requirements for individuals convicted of sex-related offenses.

<sup>549</sup> See Carey, *supra* note 535.

<sup>550</sup> Ibid.

<sup>551</sup> City of Ithaca, *The Ithaca Plan: A Public Health and Safety Approach to Drugs and Drug Policy* 3 (2016), <http://www.cityofithaca.org/DocumentCenter/View/4224>.

# TRANSFORMING THE SYSTEM



## THE CITY OF ITHACA

### A Public Health Approach to Substance Abuse<sup>552</sup>

Responding to the epidemic of substance abuse in the region and the nation, the mayor of Ithaca, Svante Myrick, formed the Municipal Drug Policy Committee, which released their report, *The City of Ithaca's Plan: A Public Health and Safety Approach to Drugs and Drug Policy*, after a year-long study on the best approach to substance abuse in the municipality. The plan called for a multi-pronged strategy to respond to drug use that is rooted in “public health and harm reduction principles and grounded in the experiences and needs of the community.” The plan recognized that the community could not “arrest their way” out of drug abuse; that the prevalence of health problems such as problem drug use reflect deeper issues related to social and economic opportunity and racial inequality; and that to simply implement programs that reduce the negative health and social consequences of drug use while maintaining older punitive practices that criminalize drug use would be ineffective. Our 2015 Communications Institute Fellow Cassandra Fredrique has stated, “This plan has the potential to change the conversation about what it is people need, as opposed to what it is we think people need. In that schism ... is the possibility for a new approach ... that centers compassion instead of stigma, that centers evidence instead of propaganda.”<sup>553</sup>

The City of Ithaca plan rests on four pillars: prevention, treatment, harm reduction, and law enforcement. Speaking about the plan, Mayor Myrick stated: “It’s a model of thinking about the problem that lets you put solutions in four categories.... For a long time if the problem was drugs, there was only one solution, it was law enforcement. And even our officers know ... that isn’t always the right answer. They would arrest the same person over and over and over again, and think, ‘This is not what the person needs. What the person needs is treatment.’”<sup>554</sup> The prevention pillar will focus not only on providing education, but expanding programming, job training, and apprenticeships for youth to prevent the disengagement and economic lockout that leads to drug use and drug dealing. The treatment pillar will build the infrastructure for medicated detox and continued, local treatment in the community. The harm reduction pillar will focus on ways to keep people who use drugs from hurting themselves or the community. The fourth pillar, law enforcement, allows police to divert those who have committed low-level crimes such as drug possession into housing, treatment, job, or other needed services similar to the LEAD program in Seattle.<sup>555</sup>

552 City of Ithaca, *The Ithaca Plan: A Public Health and Safety Approach to Drugs and Drug Policy* (2016), <http://www.cityofithaca.org/DocumentCenter/View/4224>.

553 Kelsey O’Connor, “The Ithaca Plan Follows a Tried History of Drug Strategies,” *Ithaca Journal* (Mar. 4, 2016), <http://www.ithacajournal.com/story/news/local/2016/02/26/ithaca-plan-follows-tried-history-drug-strategies/80977058/>.

554 Kelsey O’Connor, “Mayor Answers Questions About Ithaca’s New, Bold Drug Plan,” *Ithaca Journal* (Mar. 4, 2016), <http://www.ithacajournal.com/story/news/local/2016/02/22/myrick-answers-questions-ithacas-new-bold-drug-plan/80778706/>.

555 See Law Enforcement Assistance Diversion below.

# TRANSFORMING THE SYSTEM

**The Administration** should “work with Congress to restore [and expand] federal funding to syringe exchange programs, “which has been proven to significantly reduce the transmission of HIV when used as part of a comprehensive approach to HIV prevention.”<sup>556</sup>

The **Centers for Disease Control and Prevention (CDC)** should educate local lawmakers about the importance of “syringe exchange as a useful tool for reducing HIV infection and drug use.”<sup>557</sup>

The **Department of Justice** should downgrade to low priority the prosecution of drug-related offenses and should opt out of prosecutions related to marijuana.

## Local and state legislators should pass measures that:

- ▶ Adopt a harm reduction model for drug policy that focuses on treating the underlying issues of addiction over criminalization;<sup>558</sup>
- ▶ Adopt syringe exchange programs;<sup>559</sup>
- ▶ Treat drug-related consumption as a public health matter and encourage law enforcement to refer eligible arrestees to social services;<sup>560</sup>
- ▶ Adequately fund non-criminal drug-related diversion programs and social services.<sup>561</sup>

556 Hanssens, et al., *supra* note 291.

557 Ibid.

558 See Drug Policy Alliance, *supra* note 507, at 9-11; see e.g. City of Ithaca, *The Ithaca Plan: A Public Health and Safety Approach to Drugs and Drug Policy* (2016), <http://www.cityofithaca.org/DocumentCenter/View/4224>.

559 See Ibid.

560 Ibid.

561 See e.g., Law Enforcement Assisted Diversion, LEAD, <http://leadkingcounty.org/lead-tools/> (accessed 7 July 2016).

# TRANSFORMING THE SYSTEM



For more information on the criminalization of public health issues (such as mental health and substance abuse) and relevant policy solutions to address it, check out:

The Council of State Governors, a nonprofit that provides expertise on a national and local level. They have provided considerable research into the criminalization of mental health issues, including ***Criminal Justice/Mental Health Consensus Project*** (2002), a comprehensive examination of available policy reforms.<sup>562</sup>

The Bazelon Center for Mental Health Law, which provides technical support for a progressive mental health policy agenda and legal cases. Their document on ***The Role of Mental Health Courts*** analyzes the limits and promise of Mental Health Courts.<sup>563</sup>

Other organizations advocating for people with mental health issues in the criminal justice space include:

[Treatment Advocacy Center](#)

[The GAINS Center for Behavioral Health and Justice Transformation.](#)

The ***Drug Policy Alliance***, a national advocacy leader of drug law reform that is grounded in science, compassion, health, and human rights" together with the ACLU examined how the Affordable Care Act has expanded coverage for mental health and substance abuse issues and how jurisdiction can use that to provide public health solutions in ***Healthcare Not Handcuffs, Putting the Affordable Care Act to Work for Criminal Justice and Drug Policy Reform.***

***Red Umbrella Project***, a peer-led organization, investigated human trafficking intervention courts in New York and has outlined comprehensive recommendations that ensure that these courts respect the rights of sex workers.

***Law Enforcement Assistance Division (LEAD)***, a pre-arrest diversion program in Seattle in which police officers divert people who have committed low-level offenses or petty crimes into appropriate services, such as housing, job training, or treatment centers and away from the criminal justice system.

The 2007 Human Rights Watch report ***No Easy Answers: Sex Offender Laws in the U.S.***<sup>564</sup> in which Corrine Carey examines the complexity of sex offender laws and registries.

562 Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (2002).

563 Robert Bernstein & Tammy Seltzer, Bazelon Center, *The Role of Mental Health Courts in the Criminal Justice System* (2003).

564 See Carey, *supra* note 535.

# TRANSFORMING THE SYSTEM



PROMOTE FAIRNESS AT THE INTERSECTION OF

## Immigration and Criminal Justice

Some immigrants experience mandatory detention, racial profiling, and due process violations because of laws and policies that violate their human rights. There is a severe lack of due process for immigrants in detention. Mandatory detention and lack of discretion for immigration judges to grant bond has resulted in immigrants being held in detention for lengthy periods of time without any progress or change in their cases.<sup>565</sup> Such laws and policies violate the principles of equal justice, due process, and proportionality under our criminal justice system. It is important to remember that crime has gone *down* in cities like Phoenix and New York in periods during which immigrants were moving there, indicating that immigrant families often add stability to neighborhoods.<sup>566</sup>

The fact is that crime has gone *down* in cities like Phoenix and New York in periods during which immigrants were moving there, indicating that immigrant families often add stability. Nonetheless, immigrants may experience infringements of their rights due to laws and policies that violate the principles of equal justice, due process, and proportionality under our criminal justice system. For example, mandatory detention and lack of discretion for immigration judges to grant bond has resulted in immigrants being held in detention for lengthy periods of time without any progress or change in their cases.

Policies should ensure that due process is respected for everyone and that law enforcement agents are bound by the dictates of the law. Lawmakers should renew our country's commitment to international human rights; eliminate collaborations between local law enforcement and immigration authorities; protect the human rights of families and children who migrate; eliminate the expansion of exclusion based on aggravated felonies; eliminate the use of detention for immigration-related matters; stop deportations; and provide individuals in immigration proceedings access to lawyers.

<sup>565</sup> Michael Tan, *Immigration Detainees Have the Right to Due Process, Too*, ACLU (Sept. 2012), <https://www.aclu.org/blog/immigration-detainees-have-right-due-process-too>.

<sup>566</sup> Ruben G. Rumbaut & Walter A. Ewing, Immigration Policy Center, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-born Men* (Spring 2007), [http://www.americanimmigrationcouncil.org/sites/default/files/docs/Imm%20Criminality%20\(IPC\)](http://www.americanimmigrationcouncil.org/sites/default/files/docs/Imm%20Criminality%20(IPC)) (finding that overall crime rates have decreased where immigration rates increased).

# TRANSFORMING THE SYSTEM

## Renewing our commitment to international human rights norms

An independent review commission should operate on the federal and local levels, providing meaningful review of immigration enforcement practices with a focus on human rights protections. This commission should make regular reports and recommendations on community relations and security to local and federal governments. An internal complaint process for reporting human and civil rights violations must be accessible and transparent to provide timely investigation of all claims.

### The Department of Homeland Security (DHS) should:

- ▶ Provide training and certification for local and federal agents on human rights;<sup>567</sup>
- ▶ Establish an independent review commission;<sup>568</sup>
- ▶ Provide oversight of the complaint review process;
- ▶ Hold officials accountable when they violate domestic or international human rights principles.

**Local, state, and regional officials** should support community education programs to inform border communities about civil and human rights. The education program must be coupled with improvements in the internal complaint and review process of the DHS.<sup>569</sup>

567 US Human Rights Network Human Rights, *Violations Against Immigrant Worker Civil, Labor, and Human Rights Defenders*, [http://www.ushrnetwork.org/sites/ushrnetwork.org/files/8.\\_new\\_orleans\\_workers\\_center\\_for\\_racial\\_justice\\_and\\_coalition.pdf](http://www.ushrnetwork.org/sites/ushrnetwork.org/files/8._new_orleans_workers_center_for_racial_justice_and_coalition.pdf); *see also* ACLU, United States' Compliance with the International Covenant on Civil and Political Rights, (September 2013), [https://www.aclu.org/files/assets/american\\_civil\\_liberties\\_union\\_shadow\\_report\\_to\\_the\\_u.s.\\_fourth\\_periodic\\_report\\_final.pdf](https://www.aclu.org/files/assets/american_civil_liberties_union_shadow_report_to_the_u.s._fourth_periodic_report_final.pdf); Border Network For Human Rights, *Behind Every Abuse is a Community* 10-14 (June 2006), [http://www.borderaction.org/PDFs/BNHR\\_Report\\_to\\_HRC.pdf](http://www.borderaction.org/PDFs/BNHR_Report_to_HRC.pdf).

568 Border Network for Human Rights, the Border Action Network, and the U.S.-Mexico Border and Immigration Task Force, U.S.-Mexico Border Policy Report, *Effective Border Policy: Security, Responsibility and Human Rights at the U.S.-Mexico Border* (Nov. 2008), <https://law.utexas.edu/humanrights/borderwall/communities/municipalities-US-Mexico-Border-Policy-Report.pdf>.

569 Ibid.

# TRANSFORMING THE SYSTEM

## Protecting the human rights of child migrants and families

Our communities should act with care and compassion toward child migrants who have increasingly arrived at the border after fleeing violence and poverty in their home countries, and are attempting to reunite with their families. Unfortunately, our government has responded to this serious refugee situation by substantially increasing family detention and putting both children and families on a fast-track deportation process without legal representation.<sup>570</sup> This is a grave injustice and does not reflect our national values. Instead, we should implement policies that preserve families' and children's domestic and international human rights protections, particularly when they are in detention; provide them with legal representation; improve community support by providing case management services to all children upon reunification; and address the driving factors that push children to make a perilous journey.

### To facilitate the protection of the human rights, the Administration should:

- ▶ Allow parents who have Temporary Protected Status (TPS)—which provides temporary refuge to those already in the U.S. who cannot safely return home due to ongoing armed conflict, natural disasters, or other extraordinary circumstances<sup>571</sup>—to apply for derivative TPS for their children.
- ▶ Expedite applications under the Central American Minors (CAM) Refugee/Parole Program, which seeks to provide certain minors with a legal, safe alternative to undertaking dangerous, unauthorized journeys to the United States by enabling minors affected by violence in Central America to legally reunite with their parents who are living lawfully in the United States;<sup>572</sup>

570 Esther Yu-Hsi Lee, "Obama Administration Promises to Ramp Down the Detention of Migrant Moms and Kids," *Think Progress* (June 25, 2015), <http://thinkprogress.org/immigration/2015/06/25/3673367/family-detention-centers-johnson-advocates/>; see also Human Rights First, *How to Manage the Increase in Families at the Border* (June 2014), <http://www.humanrightsfirst.org/sites/default/files/Families-at-the-Border.pdf>; Julia Preston, "U.S. Will Step Up Deportations, Focusing on Central Americans," *The New York Times* (May 2016), <http://www.nytimes.com/2016/05/14/us/us-will-step-up-deportations-focusing-on-central-americans.html?rref=collection%2Ftimestopic%2FDeportation>; "The families applied for asylum, but the vast majority—86 percent, according to a report by the Transactional Records Access Clearinghouse, a group that studies federal data—went to court without lawyers. Court records show that asylum seekers have a very low chance of success without lawyers."

571 Kate Jastram and Kathleen Newland, United Nations High Commissioner for Refugees, *Family Unity and Refugee Protection* (June 2003), <http://www.unhcr.org/3bd3d4a14.pdf>; see also Letter from Robert D Evans to Senator Edward Kennedy, American Bar Association (January 2007), [http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/immigration/2007jan22\\_tpsderivative\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/immigration/2007jan22_tpsderivative_1.authcheckdam.pdf).

# TRANSFORMING THE SYSTEM

- ▶ Broaden access to the CAM Program by allowing parents without legal status to file for their children to come to the United States and permitting children with viable refugee claims who do not have a parent in the United States to apply;<sup>573</sup>
- ▶ Use executive authority to permit a larger number<sup>574</sup> of unaccompanied children into the United States as refugees and expand the use of humanitarian parole<sup>575</sup> to include children fleeing harm and/or reuniting with family;<sup>576</sup> and
- ▶ End support of interdiction policies that deny children the opportunity to seek protection.

## The Administration and Congress should:

- ▶ Invest in community-based and comprehensive youth violence prevention strategies;
- ▶ Make assistance to foreign police and military entities conditional on compliance with basic human rights standards, particularly in El Salvador, Guatemala, Honduras, and Mexico, and use this leverage to reduce corruption and dissuade “mano dura” policies (heavy-handed criminal law policies that violate human rights);<sup>577</sup>
- ▶ Strengthen the regional systems of protection for children and migrants in Central America and Mexico, particularly in child welfare, asylum, humanitarian visa, and anti-trafficking systems;

572 Faye Hipsman and Doris Meissner, *Migration Policy Center, In-Country Refugee Processing in Central America: A Piece of the Puzzle* (2015), <http://www.migrationpolicy.org/sites/default/files/publications/In-Country-Processing-FINALWEB.pdf> [hereinafter In-Country Refugee Processing Report].

573 Statement of Mary Meg McCarthy of the National Immigrant Justice Center to the Senate Subcommittee on Immigration and the National Interest Hearing on Eroding the Law and Diverting Taxpayer Resources: An Examination of the Administration's Central American Minors Refugee/Parole Program (April 2015), [http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20CAM%20Testimony%202015\\_04\\_23.pdf](http://immigrantjustice.org/sites/immigrantjustice.org/files/NIJC%20CAM%20Testimony%202015_04_23.pdf).

574 *In-Country Refugee Processing Report* (“In fiscal year (FY) 2014, almost 69,000 unaccompanied minors seeking entry into the United States were apprehended by the U.S. Border Patrol, up from 39,000 in FY 2013 and 24,000 in the prior year.”).

575 Statement of Mary Meg McCarthy op cit. (“Under humanitarian parole, U.S. Citizenship and Immigration Services (USCIS) has the authority to allow individuals into the United States for a temporary period of time based on an urgent humanitarian need.”)

576 Ibid.

577 Statement by the Mesoamerican Working Group on the Impact of U.S. Security Assistance on Human Rights in Mexico, Central America, and Colombia (Oct. 2014), <http://cepr.net/documents/Statement%20by%20the%20Mesoamerican%20Working%20Group%2010-29-2014.pdf>; see also, Peter J. Meyer, et al., Congressional Research Service, *Unaccompanied Children from Central America: Foreign Policy Considerations* (April 2016), <https://fas.org/sgp/crs/homesec/R43702.pdf>; Human Rights Watch, *Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children* (Mar. 2016), [https://www.hrw.org/sites/default/files/report\\_pdf/mexico0316web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/mexico0316web_0.pdf).



# TRANSFORMING THE SYSTEM

- ▶ End economic agreements and policies that displace people and fail to uphold human and labor rights;<sup>578</sup>
- ▶ Sign, adopt, and ratify the International Convention on the Protection of All Migrant Workers and Their Families and the Convention on the Rights of the Child.<sup>579</sup>

## Congress should:

- ▶ Require that the “best interests of the child” be a primary consideration in all procedures, actions, and decisions made by a federal agency or court regarding unaccompanied children and principal child applicants, including in deportations determinations that would result in family deportation. As opposed to unaccompanied children, principal child applicants have families and are the principal applicants for relief from deportation through means such as asylum;<sup>580</sup>
- ▶ In asylum cases, base the definition of “membership in a particular social group” on the immutable characteristics test first used in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), which says that membership in a particular social group can be based either on a shared characteristic members cannot change or a characteristic they should not be required to change;<sup>581</sup>
- ▶ Mandate the appointment of legal counsel for all children in removal proceedings, including a mix of private pro bono representation and direct representation by appointed lawyers;<sup>582</sup>
- ▶ Establish a national legal service program to provide children with information about their legal rights and conduct individual legal assessments;
- ▶ Permit immigration judges the discretion to appoint an independent child advocate who will advocate for the best interests of the child when necessary. Unaccompanied children

578 *E-Verify Program: Hurting Workers, Business and Our Economic Recovery*, NELP (July 2011), <http://www.nelp.org/content/uploads/2015/03/EVerifyHurtingWorkersBusinessandourEconomicRecovery.pdf?nocdn=1>.

579 G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20 1989); *see also* G.A. Res. 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Their Families (December 18 1992).

580 Center for Gender and Refugee Studies and Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), [http://www.uchastings.edu/centers/cgrs-docs/treacherous\\_journey\\_cgrs\\_kind\\_report.pdf](http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf).

581 *Matter of Acosta*, 19 I. & N. Dec. 211, 211 (BIA 1985).

582 *See generally* Benjamin Good, “A Child’s Right to Counsel in Removal Proceedings,” 10 *Stan. J. C.R. C.L.* 109 (2014).

# TRANSFORMING THE SYSTEM

may require special protections given that they face legal proceedings that could lead to deportation and are without an adult to advise them and ensure their welfare.<sup>583</sup>

## The Department of Justice should:

- ▶ Exempt children from the expedited removal process,<sup>584</sup> which is a summary, out-of-court removal proceeding done by a DHS officer rather than through an appearance before an immigration judge, and ensure that children can consult with legal services before accepting voluntary return;<sup>585</sup>
- ▶ Ensure that children and families seeking refugee status are provided with adequate representation prior to removal or adjudication;<sup>586</sup>
- ▶ Exempt families escaping violence from the expedited removal process and ensure that they can consult with legal services before accepting voluntary return or adjudication.

## The Department of Homeland Security should:

- ▶ End the use of family detention and utilize a range of alternatives, including placing families in community-based case management services or licensed child welfare programs that support the least restrictive form of custody, safety, and access to legal services;<sup>587</sup>
- ▶ Ensure that children and other people in vulnerable situations are not exploited or abused in short-term or long-term custody. This includes creating greater oversight and accountability to prevent shackling, handcuffing, inhumane detention conditions,

583 *A Treacherous Journey Report* *supra* note 580.

584 William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 PL 110-457, December 23, 2008, 122 Stat 5044 (Unaccompanied children cannot be placed into expedited removal proceedings. However, accompanied children are still vulnerable.).

585 American Immigration Council, *A Guide to Children Arriving at the Border: Laws, Policies and Responses* (June 2015), [http://immigrationpolicy.org/sites/default/files/docs/a\\_guide\\_to\\_children\\_arriving\\_at\\_the\\_border\\_and\\_the\\_laws\\_and\\_policies\\_governing\\_our\\_response.pdf](http://immigrationpolicy.org/sites/default/files/docs/a_guide_to_children_arriving_at_the_border_and_the_laws_and_policies_governing_our_response.pdf). ("Expedited removal is used when a noncitizen encounters immigration authorities at or within 100 miles of a U.S. border with insufficient or fraudulent documents."); see also Necessary to End Family Detention and Reform Procedures, Agree 188 Organizations, Women's Refugee Commission (May 2015), <https://www.womensrefugeecommission.org/news/press-releases-and-statements/2256-family-detention-sign-on-2015-05> ("Many Central American mothers and their children fleeing violence have been subjected to expedited removal and 'mandatory detention,' often in remote locations that severely inhibit access to counsel, due process, and protection."); Jerry Markon, "Can a 3-Year Old Represent Herself in Immigration Court? This Judge Thinks So," *The Washington Post* (March 3, 2016), [https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d\\_story.html](https://www.washingtonpost.com/world/national-security/can-a-3-year-old-represent-herself-in-immigration-court-this-judge-thinks-so/2016/03/03/5be59a32-db25-11e5-925f-1d10062cc82d_story.html) ("A senior Justice Department official argues that three- and four-year-olds can learn immigration law well enough to represent themselves in court.").

586 American Immigration Council Report *supra* note 585.

587 National Immigrant Justice Center, *The Real Alternatives to Family Detention* (July 2015), <http://immigrantjustice.org/sites/immigrantjustice.org/files/TheRealAlternativestoFamilyDetention.pdf>.

# TRANSFORMING THE SYSTEM

inadequate access to medical care, and verbal, physical, and sexual abuse by implementing public, enforceable standards for all DHS detention facilities.<sup>588</sup> These facilities should be the responsibility of accountable public entities and not that of private for-profit corporations.

- ▶ Ensure that every accompanied and unaccompanied child from contiguous countries such as Mexico is screened by licensed child welfare professionals to ensure appropriate care while in detention and adequate screening for immigration relief. Refrain from interviewing children from non-contiguous countries such as El Salvador, Guatemala, or Honduras who will be screened by licensed child welfare professionals in the custody of the Office of Refugee Resettlement. Current screening practices should also be improved so that child survivors of trafficking and persecution are effectively identified, referred for appropriate services. When appropriate, agents should assist with trafficking certification.<sup>589</sup>
- ▶ Clarify DHS standards for prosecutorial discretion to recognize that children are eligible for a favorable exercise of that discretion, especially when deportation is against the child's best interests.<sup>590</sup>
- ▶ Promote favorable prosecutorial discretion,<sup>591</sup> the authority of an agency or officer to decide what charges to bring and how to pursue each case, for all children should trump a child's categorization as an enforcement priority if they have recently crossed the border. There are three enforcement priority levels that categorize people who are at the greatest risk of deportation. Priority One focuses on people who are threats to national security, border security, and public safety; Priority Two focuses on people who are misdemeanants and have recent immigration violations; Priority Three focuses on people

588 ACLU, *Conditions of Confinement in Immigration Detention Facilities* (June 2007), [https://www.aclu.org/files/pdfs/prison/unsr\\_briefing\\_materials.pdf](https://www.aclu.org/files/pdfs/prison/unsr_briefing_materials.pdf); see also ACLU, *Systemic Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection* (June 2014), <http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf>. From the National Immigrant Justice Center's 2014 Policy Brief, there were reports of the CBP keeping holding rooms at extremely cold temperatures and children were barely fed and placed in three-point shackles. A 14-year-old girl, K.A., reported CBP repeatedly confiscating her asthma medication and her inhaler and not returning her inhaler to her until after she was suffering from an asthma attack. J.R., another 14-year-old girl, reported only being fed twice a day with a frozen sandwich and a rotten burrito; other children also detailed the lack of food and constant vomiting due to the food that was provided. Multiple other children reported that the bathroom was situated in plain view of all the other detainees with a security camera in front of it, so there was no privacy whatsoever. A.B., a 15-year-old boy, and several other children reported instances of being shackled with three-point shackles from ankles to waist to wrists.

589 Hearing before the Inter-American Commission on Human Rights, *Human Rights Situation of Migrant and Refugee Children and Families in the United States* (October 2014), [https://www.aclu.org/files/assets/iachr\\_-\\_human\\_rights\\_situation\\_of\\_migrant\\_and\\_refugee\\_children\\_and\\_families\\_in\\_the\\_united\\_states-v2.pdf](https://www.aclu.org/files/assets/iachr_-_human_rights_situation_of_migrant_and_refugee_children_and_families_in_the_united_states-v2.pdf).

590 Memorandum from Janet Napolitano, Secretary of Homeland Security, to David Aguilar, Alejandro Mayorkas, and John Morton, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

591 Immigration Policy Center, *Understanding Prosecutorial Discretion in Immigration Law* (Sept. 2011), [http://www.immigrationpolicy.org/sites/default/files/docs/IPC\\_Prosecutorial\\_Discretion\\_090911\\_FINAL.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/IPC_Prosecutorial_Discretion_090911_FINAL.pdf).

# TRANSFORMING THE SYSTEM

who have previous immigration violations. There is specific guidance on prosecutorial discretion and immigration detention for each priority level;<sup>592</sup>

- ▶ De-prioritize deportations that would result in family separation.

**Customs and Border Protection (CBP)** should implement an access policy for civil society to allow for regular oversight and monitoring of its facilities. DHS should place child welfare professionals to oversee the care and custody of all children in CBP custody.<sup>593</sup>

## Fostering vibrant, safe, and stable border communities

Throughout the Southwest border region, there are urban and rural communities with a long history of diversity, economic vibrancy, cooperation, and deep roots in the area. Border communities, like communities throughout the country, are entitled to human rights, due process, and policies that recognize their dignity, humanity, and the constitutional protections that this nation values. Unfortunately, policymakers have far too often thrown border communities under the bus by pursuing policies in the name of security that in reality undermine both safety and human rights.

These injustices are frustrating to communities but not inevitable. We can and should make commonsense policy changes to uphold human rights, due process, and safety in all of our communities. ICE agents, Border Patrol agents, police officers, and other law enforcement officers working in the border region should receive regular training in human rights, including civil rights, ethics, and community relations.

The pending Supreme Court case of *Hernandez v. Mesa* is a clear example of what can go wrong when border agents believe that they are above the law.<sup>594</sup> According to the complaint, on a summer day in 2010, 15-year-old Sergio Hernandez and some friends were playing on a ramp

592 National Immigration Project and Immigrant Legal Resource Center, *A advisory on Immigration Enforcement: Summary of New Priorities and Program Changes Announced by President Obama* (Nov. 2014), [http://www.ilrc.org/files/documents/ilrc\\_enforcement\\_2\\_pager-final.pdf](http://www.ilrc.org/files/documents/ilrc_enforcement_2_pager-final.pdf); see also Immigration Policy Center, *Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System* (Dec. 2012), [http://www.immigrationpolicy.org/sites/default/files/docs/falling\\_through\\_the\\_cracks\\_3.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/falling_through_the_cracks_3.pdf); Madison Burga and Angelina Lerma, "The Use of Prosecutorial Discretion in the Immigration Context after the 2013 ICE Direction: Families are Still Being Torn Apart," 42W. *State Univ. L. Rev.* 25, 28 (2015), <http://lawscl.org/cgi/viewcontent.cgi?article=1001&context=wslawreview>.

593 Letter from Child Welfare Professionals at CBP Border Stations to Department of Homeland Security, (January 2015), [http://www.luc.edu/media/lucedu/chrc/pdfs/Child\\_Welfare\\_Professional\\_Recommendation%20FINAL%201%2022%202015%20WITH%20ORGS.pdf](http://www.luc.edu/media/lucedu/chrc/pdfs/Child_Welfare_Professional_Recommendation%20FINAL%201%2022%202015%20WITH%20ORGS.pdf); see also Betsy Cavendish and Maru Cortazar, Appleseed, *Children at the Border: The Screening, Protection and Repatriation of Unaccompanied Mexican Minors* (2011), <http://bit.ly/1mt5hbi>.

# TRANSFORMING THE SYSTEM

on the Mexican side of the border between Mexico and the United States.<sup>595</sup> He and his friends were chased by some border agents and fled. Agent Mesa drew his firearm at the unarmed Hernandez and shot him in his head. While only 60 feet separated the two, Hernandez was technically shot in Mexican territory.<sup>596</sup> The circumstances of the death were initially denied by Custom and Border Protection (CBP). However, cell phone video footage clearly demonstrated that the police had acted aggressively.<sup>597</sup> This case has sparked outrage concerning accountability at the border and CBP's secrecy and abusive practices. Law enforcement agencies should be held accountable for such human rights violations and create a work culture where such conduct is clearly impermissible.

Recent reviews and investigations of the CBP show that there is a lack of accountability, which fosters corruption and creates an atmosphere of impunity surrounding the use—and abuse—of power, including the use of deadly force.<sup>598</sup> CBP's practices amount to extensive civil and human rights abuses. There are also legal issues at stake, specifically due process issues. The zero-tolerance program followed by the CBP has created a mass assembly-line justice system where individuals are apprehended, handed over to U.S. Marshals, placed in county jails to await trial at a federal courthouse, sentenced in a matter of hours or days, sent to a Federal Bureau of Prisons facility to serve their sentence, and then handed over to ICE for removal proceedings. Lack of oversight and unenforceable custody standards have contributed to cruel, degrading ill-treatment of individuals detained and held in the custody of CBP personnel. Further reports looking into the CBP's culture of abuse show denial of food and water; overcrowding in holding rooms that may also be unreasonably hot or cold; denial of medical care for acute or chronic conditions; verbal abuse ranging from profanity to racial slurs and sexual harassment; physical abuse that borders on torture with individuals forced to remain in prone positions for extended periods of time; psychological abuse often paired with threats or intimidation to coerce individuals into signing legal documents they do not understand; confiscation of personal belongings prior to repatriation, including critical identity documents and currency; and excessive use of force, including deadly force, through beatings, Tasers, or firearms.<sup>599</sup>

594 American Civil Liberties Union Statement on Human Rights Violations on the United States–Mexico Border (Oct. 2012), [https://www.aclu.org/files/assets/121024\\_aclu\\_written\\_statement\\_ochcr\\_side\\_event\\_10\\_25\\_12\\_final\\_0.pdf](https://www.aclu.org/files/assets/121024_aclu_written_statement_ochcr_side_event_10_25_12_final_0.pdf).

595 *Hernandez v. United States*, 785 F.3d 117, 119 (5th Cir. 2015).

596 *Ibid.*

597 *Chronology of Border Patrol Use of Force Issues since 2010*, Southern Border Communities Coalition (Feb. 22, 2014), <http://southernborder.org/chronology-of-border-patrol-use-of-force-issues-since-2010/>.

598 Walter Ewing, "Corruption Flourishes Within CBP," *Immigration Impact* (Dec. 10, 2015), <http://immigrationimpact.com/2015/12/10/corruption-flourishes-within-cbp/>.

599 Statement on Human Rights Violations, *supra* note 594.

# TRANSFORMING THE SYSTEM

## The Department of Justice should:

- ▶ End Operation Streamline and de-prioritize prosecuting illegal entry and illegal reentry.<sup>600</sup> Operation Streamline is a program that requires the federal criminal prosecution and imprisonment of all people crossing the border unlawfully. Under Streamline, instead of being processed for deportation, apprehended migrants are detained for 1 to 14 days before appearing in court. Counsel is frequently not provided until courtroom appearances and judges combine the initial appearance, arraignment, plea, and sentencing into one mass hearing for the 70 to 80 defendants processed daily;<sup>601</sup>
- ▶ Enforce 90- and 180-day custody review processes and oppose any expansion of mandatory detention.<sup>602</sup> These custody review processes take place when an individual has been given final order of removal, deportation, or exclusion but remains in detention 90 days after the final order has been given. ICE reviews the individual's custody status to decide whether to release the individual or continue to detain him/her to try to remove him/her from the U.S. If the individual remains in custody after this at the 180-day mark, the review process happens again;<sup>603</sup>
- ▶ Prosecute and punish CBP agents for acts of deadly force, excessive force, and other crimes.<sup>604</sup> CBP officers violate the organization's use of force policy and at times use deadly force as a result of frustration rather than necessity; there are many examples of abuse of power especially with the culture of impunity and violence that surrounds the CBP;<sup>605</sup>
- ▶ Educate the defense bar on these distinctions to ensure that the immigration consequences of seemingly minor criminal law charges are fully considered.<sup>606</sup> Since the

600 US: *Reject Mass Migrant Prosecutions, "Operation Streamline" Program Unjust, Wasteful*, Human Rights Watch (July 28, 2015), <https://www.hrw.org/news/2015/07/28/us-reject-mass-migrant-prosecutions>.

601 Chris Rickerd, *Immigration Reform Should Eliminate Operation Streamline: Prosecuting and Incarcerating Migrants is Unnecessary, Expensive, and Overwhelms Border Jurisdictions*, ACLU, [https://www.aclu.org/files/assets/operation\\_streamline\\_issue\\_brief.pdf](https://www.aclu.org/files/assets/operation_streamline_issue_brief.pdf): Operation Streamline raises due process concerns. Migrants have little time (from a few minutes to only a half hour) with their attorney. Yet some defendants are U.S. citizens or have claims to relief. Because attorneys represent up to 80 defendants at a time, they may not be able to speak confidentially with each client, or may have a conflict of interest among clients.

602 See generally U.S.-Mexico Border Policy Report *supra* note 568.

603 *Guide to 90-Day Custody Review Process*, Florence Immigrant and Refugee Rights Project (2013), <http://firrp.org/media/90-Day-Custody-Review-Guide-2013.pdf>.

604 See generally *Hernandez*, 785 F.3d at 117.

605 Vahe Mesropyan, *United States Custom and Border Protection Engages in Excessive Force for Which There Is No Accountability*, Submission to the United Nations Universal Periodic Review of United States of America (2015), <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=1632&file=EnglishTranslation>.

606 See *Padilla v. Kentucky*, 559 U.S. 356, 130 (2010).

# TRANSFORMING THE SYSTEM

2010 *Padilla* ruling by the Supreme Court, criminal defense attorneys must advise noncitizen clients about the potential immigration consequences of accepting a guilty plea. Failure to do so, the Court held, constitutes a violation of the Sixth Amendment guarantee of effective counsel.<sup>607</sup>

## Customs and Border Patrol (CBP) should:

- ▶ Implement nationwide data collection and public reporting of all Border Patrol roving patrol<sup>608</sup> and checkpoint activities including stops, referrals to secondary inspection, and searches aggregated by demographics to include perceived and actual race, ethnicity, and immigration status;
- ▶ Reduce the zone of CBP operations from 100 to 25 miles from the border for boarding vehicles, and from 25 to 10 miles for entering private property. CBP should conduct sector-by-sector analysis as required by existing regulations to determine whether a shorter distance would be reasonable;<sup>609</sup>
- ▶ Exclude urban and sensitive areas, and all other areas not within three miles of the border from drone and additional invasive surveillance;<sup>610</sup>
- ▶ Equip all CBP officers and agents who interact with the public with body-worn cameras paired with privacy protections;

607 Muzaffar Chishti and Claire Bergeron, "Supreme Court Rules that Attorneys Must Inform Criminal Defendants of the Immigration Consequences of Pleading Guilty," *Migration Policy Institute* (April 2010), <http://www.migrationpolicy.org/article/supreme-court-rules-attorneys-must-inform-criminal-defendants-immigration-consequences>; see also *What We Do*, Immigrant Defense Project (IDP), <http://www.immdefense.org/what-we-do/defender-support/>: Since the Supreme Court's landmark *Padilla v. Kentucky* decision, IDP has focused on training public defenders. IDP also provides the Padilla Support Center, which is a regional assistance center offering legal support to defense attorneys representing immigrants in New York City. Guilty pleas to even minor, nonviolent offenses can have major ramifications for immigrants who are lawful permanent residents, have lived and worked in the city for years, and are responsible for supporting families that may include U.S. citizens. The Padilla Support Center will ensure that attorneys have access to information on these legal repercussions, to ensure that each New Yorker has a fair day in court, regardless of immigration status.

608 Ruth Maurice, *When Can Roving Border Patrols Stop and Question You?*, NOLO, <http://www.nolo.com/legal-encyclopedia/when-can-roving-border-patrols-stop-question.html>; see also "Border Agency's Roving Patrol Tactics Questioned," *Washington Times* (Nov. 2014), <http://www.washingtontimes.com/news/2014/nov/2/border-agencys-roving-patrol-tactics-questioned/> ("Roving patrols, operated by foot, bicycle, or vehicle, can be set up within 100 miles of the U.S. border to supplement checkpoints. Border Patrol agents can stop and search vehicles without a warrant").

609 American Civil Liberties Union of New Mexico: Regional Center for Border Rights, *Guilty Until Proven Innocent: Living in New Mexico's 100-Mile Zone* (May 2015), <https://www.aclu-nm.org/wp-content/uploads/2015/05/ACLU-NM-GuiltyUntilProvenInnocentFinal5-15-2015-21.pdf>.

610 *Senate Deal Threatens Communities*, Southern Border Communities Coalition (SBCC) (Dec. 2015), <http://www.alliancesd.org/senate-deal-threatens-communities/>; see also Jay Stanley, Up to 20% of Border Patrol Drone Flights are Inside the United States, ACLU (Oct. 2 2014), <https://www.aclu.org/blog/20-border-patrol-drone-flights-are-inside-united-states?redirect=blog/technology-and-liberty-immigrants-rights/20-border-patrol-drone-flights-are-inside-united>: There have been many instances of the CBP loaning out their drones to other federal and local agencies for use. The technology used by the CBP drones allows for the persistent reconnaissance, surveillance, tracking, and targeting of evasive vehicles and people moving on foot in cluttered environments. Due to the fact that the border consists of any land within 100 miles of the geographical border of the US, drones can operate well into actual U.S. territory.



# TRANSFORMING THE SYSTEM

- ▶ Scale back military-type training tactics and equipment of CBP officers and agents;<sup>611</sup>
- ▶ Provide annual training for CBP agents on Fourth Amendment protections against illegal searches and seizures, Fourteenth Amendment prohibitions on racial profiling, and on stereotyping and implicit bias;
- ▶ Enhance de-escalation training and improve language skill training for new officers and agents;
- ▶ Disband and prosecute border paramilitary vigilante organizations;<sup>612</sup>
- ▶ Implement public and enforceable short-term custody standards to ensure that DHS short-term holding facilities meet basic humanitarian standards. There are serious violations at CBP short-term holding facilities, specifically that they are neither safe nor sanitary;<sup>613</sup>
- ▶ Provide additional training to CBP officers and agents about their obligation to protect and provide due process to potential victims of crimes, trafficking, and domestic violence, or people in need of asylum.

## The Department of Homeland Security (DHS) should:

- ▶ Clarify to their agents? to the public? to immigrants in detention? or? that immigration laws are enforced solely by federal immigration officials;
- ▶ Create a transparent, uniform DHS process for receiving, processing, and investigating all complaints in multiple languages, to align with best practices and joint recommendations submitted recently by NGOs;<sup>614</sup>

611 SBCC, *An Uneasy Coexistence: Security and Migration Along the El Paso-Ciudad Juarez Border* (Jan. 2012), <http://southernborder.org/an-uneasy-coexistence-security-and-migration-along-the-el-paso-ciudad-juarez-border/>; "There is a culture of cruelty against migrants by Border Patrol and other law enforcement agents. The Border Patrol sits on a blurry line between military and police: charged with defending a border against external threats (a military mission) but also charged with protecting and serving civilians in regions near the border (a police mission). Border Patrol officials occasionally refer to the agency as a "paramilitary" organization, and local activists criticize Border Patrol for evolving in a more military direction. They refer not just to the weapons that agents carry or the training they receive, but to the allegedly heavy-handed nature of their tactics."

612 *The Nativists: Profiles of 20 Anti-immigration Leaders*, Southern Poverty Law Center (Spring 2008), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2008/spring/the-nativists?page=0,3>.

613 Jessica Jones and Katharina Obser, *Family Detention and the Flores Settlement Agreement*, Women's Refugee Commission and Lutheran Immigration Refugee Service (July 2015), <https://www.womensrefugeecommission.org/images/zdocs/Flores-Settlement-and-Family-Detention-July-2015.pdf>.

614 American Civil Liberties Union, *Recommendations to DHS to Improve Complaint Processing* (2014), [https://www.aclu.org/files/assets/14\\_5\\_5\\_recommendations\\_to\\_dhs\\_to\\_improve\\_complaint\\_processing\\_final.pdf](https://www.aclu.org/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing_final.pdf).



# TRANSFORMING THE SYSTEM

- ▶ Inform complainants of the status of their complaint and the outcome of the investigation in a timely manner;
- ▶ Prohibit DHS personnel, including CBP agents, from using race, ethnicity, and other protected characteristics as a factor in routine investigatory stops, detentions, and searches except where a reliable, current suspect description or affirmatively required statutory determination like asylum eligibility exists;<sup>615</sup>
- ▶ Move away from wasteful spending projects like drones, fences,<sup>616</sup> and Operation Stonegarden (a federal grant program that funds state, local, and tribal law enforcement agencies to enhance their capabilities to jointly secure U.S. borders and territories;<sup>617</sup>
- ▶ Deploy 1,000 rescue beacons, transmission towers with an emergency button that sends out a distress signal to CBP when activated, with water drums, radio call buttons, and 911 cell relay in the desert, including throughout Arizona, the Lower Rio Grande Valley, Imperial County in California, and the New Mexico Bootheel region, to save migrants and others who fall into distress because of heat and other circumstances;<sup>618</sup>
- ▶ Extend federal aid programs aimed at preventing migrant deaths to include areas in the South Texas interior that have CBP checkpoints but are ineligible for funding under current rules;
- ▶ End the use of dangerous repatriations, such as the Alien Transfer Exit Program and night deportations. Before the Alien Transfer Exit Program, immigrants were deported across the border from where they were caught, but under the transfer program immigrants that are caught in California are flown to Texas border cities to cross the border back and

615 American Civil Liberties Union of New Mexico: Regional Center for Border Rights, *Guilty Until Proven Innocent: Living in New Mexico's 100-Mile Zone* (May 2015), <https://www.aclu-nm.org/wp-content/uploads/2015/05/ACLU-NM-GuiltyUntilProvenInnocentFinal5-15-2015-21.pdf>.

616 *Securing the Border: Fencing, Infrastructure and Technology Force Multiplier: Statement for the Record to the Senate Homeland Security and Government Affairs Committee* (May 2015), <https://immigrationforum.org/wp-content/uploads/2015/05/051115-Statement-for-Record-HSGAC-Border-Technology-Final.pdf> (statement by Joshua Briesblatt of the National Immigration Forum); see also *An Agency Out of Control: Widespread Border Patrol Abuses in Southwest Border Communities*, Congressional Ad-Hoc Hearing on Redefining Border Security: *Border Communities Demand to be Heard in the Comprehensive Immigration Debate* (Sept. 2013), (statement by James Duff Lyall, American Civil Liberties Union), <http://www.acluaz.org/sites/default/files/documents/ACLU%20Testimony%20-%20Redefining%20Border%20Security%20-%20James%20Lyall%20-%20Sept%202013,%202013.pdf>.

617 *Factsheet: Operation Stonegarden*, National Immigration Forum (Feb. 2010), <https://immigrationforum.org/blog/operation-stonegarden/>, ("Funds are to be used for additional law enforcement personnel, overtime pay, and travel and lodging for deployment of state and local personnel to further increase our presence along the borders.").

618 Ibid.

# TRANSFORMING THE SYSTEM

those caught in Texas are flown west to cross the border in California.<sup>619</sup> The timing of deportations has important implications for the security and protection of migrants;<sup>620</sup>

- ▶ Ensure that individuals' personal belongings (cash, IDs, phones, etc.) are returned prior to repatriation;
- ▶ Create a right to counsel in all stages of immigration enforcement actions and proceedings and permit phone and in-person access by attorneys and child advocates;<sup>621</sup>
- ▶ Provide access to independent human rights and nongovernmental organization monitoring and include permit interviewing of immigrants who are detained in CPB custody;
- ▶ Mandate an independent and thorough investigation for all allegations of excessive and deadly force;
- ▶ Place CBP under increased oversight by an independent DHS Border Oversight Task Force comprised of border stakeholders, in addition to the DHS's Office of Inspector General and the Office of Civil Rights and Civil Liberties. Any Border Oversight Task Force should have subpoena power so that it can hold accountable agents who abuse their power and have accurate accounting for taxpayer resources;
- ▶ The DHS Secretary should be required to report to Congress on the use of force, including compliance with its own policies, incidents causing serious injury or death, and review and disciplinary measures.

619 Richard Marosi, "U.S. Makes Deported Immigrants Take the Long Way Home," *The Los Angeles Times* (Sept. 29, 2011), <http://articles.latimes.com/2011/sep/29/local/la-me-immigrant-deport-20110930>; "The Alien Transfer Exit Program breaks up families and deports immigrants into lawless border cities where they are preyed on by criminal gangs. Gangs in those regions monitor the border crossings, waiting to pounce on deportees, according to some immigrants and advocacy groups."

620 Jesuits and Kino Border Initiative, *Our Values on the Line: Migrant Abuse and Family Separation at the Border* (Sept. 2015), [http://jesuits.org/Assets/Publications/File/REPORT\\_2015\\_Our\\_Values\\_on\\_the\\_Line.pdf](http://jesuits.org/Assets/Publications/File/REPORT_2015_Our_Values_on_the_Line.pdf); "Mexican border cities like Nogales tend to have high levels of violence and migrants are particularly vulnerable to abuse by criminals and corrupt police and other public officials in Mexico. This vulnerability is greater after the civic and religious organizations that provide shelter to migrants have closed their doors for the night. As such, migrants deported after dark are at greater risk, and this is a practice that should be largely limited or eliminated altogether, whenever possible."

621 The American Bar Association recently passed a resolution advocating that "[c]ounsel should be appointed for unaccompanied children at government expense at all stages of the immigration process...." ABA, House of Delegates, Resolution 113 (February 2015), [http://www.americanbar.org/content/dam/aba/images/abanews/2015mm\\_hodres/113.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2015mm_hodres/113.pdf); see also Ingrid V. Eagly and Steven Shafer, "A National Study of Access to Counsel in Immigration Court" 164 *U. of Penn. L. Rev.* 1 (Dec. 2015), [http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn\\_law\\_review](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9502&context=penn_law_review).

# TRANSFORMING THE SYSTEM

## Resolving the inconsistency between the definitions of “conviction” and “aggravated felony” under immigration and criminal law, and related consequences

Increasingly over the last two decades, Congress has arbitrarily expanded the categories of people subject to deportation and exclusion, sweeping up families, workers, and others with deep roots in our country, substantial contributions to our society, and long records of lawful behavior. Under immigration law, the definition of “conviction” is considerably more expansive than under comparable state criminal law. An immigrant can be found “convicted” even when a criminal court has withheld adjudication of guilt or vacated the conviction after the individual has successfully completed a rehabilitation program.<sup>622</sup> Many of these laws stem from policy shifts during the 1990s. In New York State, for example, there is often a preference for participation in deferred adjudication programs. However, participation in these programs usually requires an initial plea of guilty. For purposes of immigration law, a deferred adjudication program that results in the dismissal of all charges is still considered a “conviction” if the defendant had pled guilty.<sup>623</sup> These individuals would then face mandatory removal, even though under criminal law their charges have been dismissed.<sup>624</sup>

An immigrant convicted of an “aggravated felony” faces mandatory detention and likely deportation. Aggravated felonies permanently bar lawful permanent residents and non-lawful permanent residents from applying for asylum, naturalization, cancellation of removal, and voluntary departure. Over the years, the definition of “aggravated felony” has been greatly expanded to include offenses that are neither felonies nor aggravated under criminal law definitions.<sup>625</sup> As initially enacted in 1988, the term “aggravated felony” referred only to murder, federal drug trafficking, and illicit trafficking of certain firearms and destructive devices. Congress has since expanded the definition of “aggravated felony” on numerous occasions, but

<sup>622</sup> Also note that under INA § 101(a)(48)(A), the definition of “conviction” includes any offense for which a person is found “guilty”—including when a person pleads guilty in a deferred adjudication proceeding; see also Bryan Lonagan, The Legal Aid Society, *Immigration Detention and Removal: A Guide for Detainees and their Families* 9 (rev. June 2007), [http://www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center/Immigration%20Detention%20and%20Removal%20-%20A%20Guide%20for%20Detainees%20and%20Their%20Families%20\\_English\\_.pdf](http://www.aclu-tn.org/pdfs/Immigrant%20Resource%20Center/Immigration%20Detention%20and%20Removal%20-%20A%20Guide%20for%20Detainees%20and%20Their%20Families%20_English_.pdf) (definition of conviction includes deferred adjudications and no contest pleas).

<sup>623</sup> Lonagan *supra* note 522.

<sup>624</sup> *Ibid.*

<sup>625</sup> See *United States v. Pacheco*, 225 F.3d 148 (holding that a misdemeanor conviction with a suspended sentence of more than one year is an “aggravated felony” within the meaning of 8 U.S.C. § 1101(a)(43)(F)&(G)).

# TRANSFORMING THE SYSTEM

has never removed a crime from the list. Today, the definition of “aggravated felony” covers more than 30 types of offenses, including simple battery, theft, filing a false tax return, and failing to appear in court.<sup>626</sup> It is imperative that the Immigration and Nationality Act reflect our common understanding of fairness under the criminal justice system and that both the criminal laws and the immigration laws be used to protect all of our rights to due process, dignity, and fair treatment.

To restore due process in the immigration system, **Congress** should:

- ▶ Change the definitions of “conviction” and “aggravated felony” in the immigration law to be consistent with current federal and state criminal laws;
- ▶ De-criminalize the immigration system by repealing the 1996 laws;<sup>627</sup>
- ▶ End the retroactive application of the 1996 laws;<sup>628</sup>
- ▶ Only allow bars to entry based on “moral character” in exceptional cases;
- ▶ All bars to entry based on prostitution should be eliminated;<sup>629</sup>
- ▶ Restore discretion and due process for all individuals who come into contact with the criminal justice and immigration systems;<sup>630</sup>
- ▶ End permanent deportation.<sup>631</sup>

626 *Aggravated Felonies: An Overview*, Immigration Policy Center (Mar. 2012), <http://www.immigrationpolicy.org/sites/default/files/docs/aggravated-felony-fact-sheet-march-2012.pdf>, (“In most federal courts, a conviction for any offense listed as an “aggravated felony” is grounds for deportation, even if the crime was not considered an “aggravated felony” at the time of conviction”).

627 *A Call to Decriminalize the U.S. Immigration System—#Fix96 Statement Sign-on Form*, Families for Freedom (May 24 2016), <http://familiesforfreedom.org/organizing/alerts/call-decriminalize-us-immigration-system-fix96-statement-sign-form>; see also *#Fix96: End the Mass Criminalization of Immigrants*, Immigrant Justice Network, <http://immigrantjusticenetwork.org/resources/fix96/> (last visited July 8, 2016)

628 Ibid.

629 Immigrant Defense Project, *Representing Noncitizen Criminal Defendants: A National Guide* (2008) 36 (noting that “[i]f there is evidence of ... prostitution ... inadmissibility may be found even where there is no conviction or admission.”).

630 Ibid. *Matthews v. Eldridge*, 424 U.S. 319 (1976) (holding that due process right extends to all “persons” in the United States).

631 Ibid.

# TRANSFORMING THE SYSTEM

## Ending collaborations between state criminal and federal immigration systems

Over the past 10 years, the federal government has enforced federal immigration laws with the assistance of local law enforcement officers through such programs as Secure Communities and its most recent iteration, the Priority Enforcement Program (PEP). These programs require that biometric data such as fingerprints transmitted by state and local law enforcement agencies to the FBI are automatically shared with the DHS. Not only does this take away resources from local police organizations, it also destabilizes the relationship between the police and immigrant communities.<sup>632</sup> Such enforcement programs also lead to racial profiling, the targeting of Latino residents, and the erroneous arrests of U.S. citizens by ICE.<sup>633</sup> A growing number of states and municipalities have declined to participate in these programs due to these concerns,<sup>634</sup> and the Presidential Commission on 21st Century Policing recommended that local law enforcement activities be “decoupled” from immigration enforcement.<sup>635</sup>

To further the policy objective of encouraging the cooperation of communities in maintaining public safety, the Administration should:

- ▶ Terminate the Priority Enforcement Program;<sup>636</sup>
- ▶ Continue demanding that law enforcement work with the community, not with ICE;

632 Immigration Policy Center, *Balancing Federal, State, and Local Priorities in Police-Immigrant Relations: Lessons from Muslim, Arab, and South Asian Communities Since 9/11* 9 (June 2008), <http://www.immigrationpolicy.org/sites/default/files/docs/Police-ImmigRelations05-08.pdf>; see also H.R. 100, 112<sup>th</sup> Cong., Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, (2011), [http://www.opencongress.org/bill/112-h100/text\(requireing local police to enforce federal immigration laws\); Border Network For Human Rights, Behind Every Abuse is a Community 10-14 \(June 2006\), http://www.borderaction.org/PDFs/BNHR\\_Report\\_to\\_HRC.pdf](http://www.opencongress.org/bill/112-h100/text(requireing local police to enforce federal immigration laws); Border Network For Human Rights, Behind Every Abuse is a Community 10-14 (June 2006), http://www.borderaction.org/PDFs/BNHR_Report_to_HRC.pdf).

633 Aarti Kohli, Peter L. Markowitz & Lisa Chavez, The Chief Justice Earl Warren Institute On Law And Social Policy, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* (Oct. 2011), [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf).

634 See Press Release Federal Secure Communities Program, Office of New York Governor Andrew M. Cuomo, *Governor Cuomo Suspends Participation in Federal Secure Communities Act* (June 2011), <http://www.governor.ny.gov/press/06012011FederalSecureCommunitiesProgram>; see also Julia Preston, “States Resisting Program Central to Obama’s Immigration Strategy,” *The New York Times*, (May 6, 2011), <http://www.nytimes.com/2011/05/06/us/06immigration.html>; Maria Sacchetti & Noah Bierman, “Patrick Says He Won’t Sign The Secure Communities Act,” *Boston Globe* (June 2011), <http://www.boston.com/Boston/metrodesk/2011/06/secure-communities/fU45XhhjsoGSGWYxVg2N8O/index.html>; Ordinance, Policy for Responding to ICE Detainers, Cook County Board of Commissioners (Sept. 2011), <http://altopolimigra.com/wp-content/uploads/2011/12/CookCountyDetainers.pdf>.

635 *Final Report of the President’s Task Force on 21st Century Policing*, President’s Task Force on 21st Century Policing (2015), [http://www.cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf).

636 Immigrant Legal Resource Center, *Ending Local Collaboration with ICE: A Toolkit for Immigrant Advocates* (Aug. 2015), [http://www.ilrc.org/files/documents/toolkit\\_final.compressed.pdf](http://www.ilrc.org/files/documents/toolkit_final.compressed.pdf).

# TRANSFORMING THE SYSTEM

- ▶ End 287(g) agreements, which allow for local law enforcement to agree to enforce immigration matters.<sup>637</sup>

Immigration enforcement practices should not be transformed into a criminal justice matter. Immigration enforcement is a civil process and demands civil enforcement. Criminalizing immigration exposes it to the many biases in the criminal justice system that have been discussed in this document. Moreover, it is imperative that local law enforcement does not inject itself into the area of immigration enforcement in order for the United States to comply with its international treaty and human rights obligation.

To this end, the **Administration** and the **Department of Homeland Security** should prohibit local law enforcement from collaborating with ICE.<sup>638</sup>

<sup>637</sup> Ibid.

<sup>638</sup> See CPD, *supra* note 90, at 12.

# TRANSFORMING THE SYSTEM

## CONCLUSION



As we discuss in our related 2016 Criminal Justice Public Opinion report, most Americans agree that many of our criminal justice policies are not working. There is a consensus that our policies need to be less punitive and reflective of evidence-backed approaches that actually reduce crime.

What Americans do not want to hear is the message that current policies do not work and should be discarded—without an accompanying solution. The good news is that criminal justice advocates have many positive solutions in mind, which reflect the full breadth and diverse experiences that individuals have had with the criminal justice system. It is important that we remember to share these positive approaches as broadly as we share our critiques to make it possible to move towards fully transforming the system.

The Opportunity Agenda is proud to be part of the movement towards building a criminal justice system that promotes fairness and safety, and is based on smart incentives and alternatives to incarceration. In order to realize this promise, we must continuously strive to ensure that our judicial, administrative, and enforcement processes are fair; that they treat all people with humanity and respect; that they prohibit all forms of discrimination and bias; that they allow for the consideration of personal circumstances, contributions, and debts already paid in determining how people in the criminal justice systems are treated; and that they both support and create realistic pathways for all people to learn, grow, and be productive members of our society.