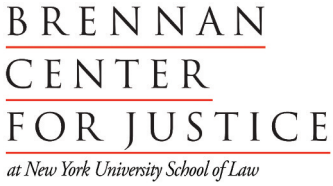

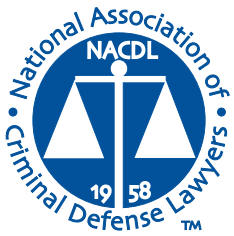

Criminal Justice in the 21st Century:

Eliminating Racial and Ethnic Disparities in the Criminal Justice System

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The views expressed herein by conference participants do not necessarily reflect the views of the participating organizations.

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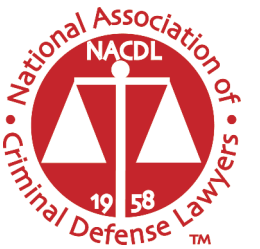

Criminal Justice in the 21st Century:
Eliminating Racial and Ethnic Disparities In the Criminal Justice System

Conference Report By
Tanya E. Coke

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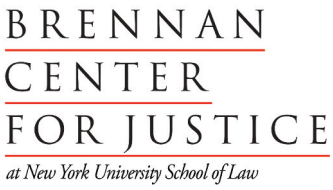
ABOUT THE CONTRIBUTING ORGANIZATIONS

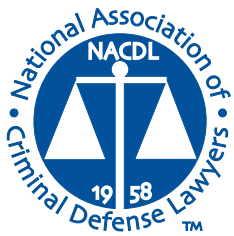
The **Association of Prosecuting Attorneys (APA)** was founded as a national "think tank" to represent all prosecutors and provide additional resources such as training and technical assistance in an effort to develop proactive innovative prosecutorial practices that prevent crime, ensure equal justice and make communities safer. APA is the only national organization to represent and support all prosecutors, including both appointed and elected prosecutors, as well as their deputies and assistants, whether they work as city attorneys, tribal prosecutors, district attorneys, state's attorneys, attorneys general or U.S. attorneys. The association's activities include acting as a global forum for the exchange of ideas, allowing prosecutors to collaborate with all criminal justice partners, conducting timely and effective technical assistance and providing access to technology for the enhancement of the prosecutorial function.



The **Brennan Center for Justice** at the New York University School of Law is a nonpartisan law and policy institute that seeks to improve systems of democracy and justice. The Center works to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all, exemplified by a campaign to reduce mass incarceration. The Center's work ranges from voting rights to campaign finance reform, from racial justice in criminal law to constitutional protection in the fight against terrorism. A singular institution — part think tank, part public interest law firm, part advocacy group, part communications hub — the Brennan Center seeks meaningful, measurable change in the systems by which the nation is governed.

The **Center for NuLeadership on Urban Solutions** is a twelve-year-old independent, activist, public policy think tank and advocacy training center, formerly at Medgar Evers College in the City University of New York. Its staff is comprised of academic professionals who have had experiences within the criminal punishment system. It is the first and only center of its kind in the country. It was created to reduce reliance on prisons and mass incarceration as solutions to the problems of economic inequality and poverty in under-served urban communities. The Center is dedicated to creating new and innovative paradigms for solving community-development and related public-safety challenges that move from criminal justice to human justice. It serves as a platform to advocate for and give voice to the huge emerging constituency of citizens recently released from correctional supervision and returning to local jurisdictions after paying their debts to society. It seeks to achieve systemic change through increased transparency and accountability; community empowerment through targeted advocacy, network development and civic engagement; and individual transformation through motivated education and activist training.

The **Foundation for Criminal Justice (FCJ)** preserves and promotes the core values of the National Association of Criminal Defense Lawyers and the American criminal justice system. Ongoing and recent projects supported by the FCJ include an unprecedented study of obstacles to the restoration of rights and status after conviction; a conference to identify concrete and easily achieved solutions to racial disparities in the criminal justice system; an ongoing series of events to celebrate the 50th anniversary of the Supreme Court's landmark *Gideon v. Wainwright* decision; free trainings for lawyers on a variety of topics including representing juveniles accused of wrongdoing and individuals facing immigration-related collateral consequences of conviction; and efforts to improve indigent defense in federal and state courts.



The **National Association of Criminal Defense Lawyers (NACDL)** is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries — and 90 state, provincial and local affiliate organizations totaling up to 40,000 attorneys — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

The **New York County Lawyers' Association (NYCLA),** founded in 1908, was the first major bar association open to all lawyers admitted to the bar regardless of race, gender, religion or ethnicity. Throughout its history, NYCLA has promoted the public interest by advocating for access to justice and reforms in the law, providing pro bono services for those in need, and encouraging diversity in the bench and bar. With 9,000 members today, NYCLA continues to be in the forefront of most legal debates, ranging from criminal justice to consumer rights.

Criminal Justice in the 21st Century:
Eliminating Racial and Ethnic Disparities In the Criminal Justice System

Introductory Statement

One only has to step into a typical courtroom in the United States to see that profound racial and ethnic disparities persist in the American criminal justice system. On October 17-19, 2012, the National Association of Criminal Defense Lawyers (NACDL), the Foundation for Criminal Justice (FCJ), the New York County Lawyers' Association (NYCLA), the Brennan Center for Justice at New York University School of Law, the Association of Prosecuting Attorneys (APA), and the Center for NuLeadership on Urban Solutions together co-sponsored a conference designed to bring to light concrete ideas for remedying racial disparities. The conference was convened in lower Manhattan in the shadow of the World Trade Center site at the New York County Lawyers' Association's historic Home of Law. This report summarizes the candid, sometimes painful panel discussions, and identifies a panoply of remedies that may advance the goal of purging disparate impact from America's criminal justice system.

I. Conference Mission and Overview

The conference assembled a distinguished group of criminal justice experts — prosecutors, defense attorneys, judges, scholars, community leaders, and formerly incarcerated advocates — to identify critical points of intervention and concrete, practical reforms to redress racial disproportionality at every stage of criminal proceedings. Rather than belabor what has gone wrong or has not worked, participants shared innovative disparity-reduction practices from around the country, as well as new ideas for reforming policies that produce mass incarceration.

The conference focused on the criminal justice system in New York City, but the recommendations put forward by participants have broad implications for reform nationally. A number of academic articles on race and the criminal justice system prepared for the conference will be published in a supplement to the *New York University Journal of Legislation and Public Policy.*

The conference included a town hall panel that presented the major issues, as well as roundtables that explored in greater depth what system actors could do to reduce bias and disparities at charging, in pretrial detention and motions practice, at jury selection, and in sentencing. The discussion also explored emerging models of community justice in New York City.

Rather than belabor what has gone wrong or has not worked, participants shared innovative disparity-reduction practices from around the country, as well as new ideas for reforming policies that produce mass incarceration.

II. What Is the Scope of Racial Disparities?

The conference sponsors opened the proceedings by emphasizing the unparalleled size, cost and scope of the U.S. criminal justice system: 2.2 million people incarcerated as of 2012,[1] many for non-violent offenses, at a cost of 70 billion dollars. Millions more are under some form of restraint or supervision, either while the case is pending or as component of the final sentence. A staggering 65 million adults in the United States — approximately one in four — now have a criminal record, and live with the increasing public exposure, civil disabilities and other consequences that flow from a criminal record.[2]

The Hon. Marcy Friedman, a judge on the New York State Supreme Court, New York County, and former NYCLA Justice Center board member, noted that according to one study as of 2007, some 69 percent of arrests in New York City's criminal justice system are for misdemeanor offenses or lesser violations.

"Never before have so many been arrested for so little."

"Never before have so many been arrested for so little," she remarked, citing a scholarly article.[3] Despite the minor nature of most offenses processed through the system, a large number of defendants will be too poor to post bail, will plead guilty to time served to get out of jail, and then will suffer one or more of the collateral consequences of criminal conviction: deportation from the United States, the inability to get or keep a job, the loss of housing, student loan disqualification, and/or the denial of the right to vote.

Norman Reimer, executive director of NACDL, remarked that the "criminal justice system is a window into a society's soul." If this is true, what are we to make of harsher outcomes for people of color at every stage of the criminal justice system: from arrest to decisions about bail and pretrial detention and from adjudication to sentencing? What is the role of prosecutors, defenders, judges, and police in propagating racial disparities in the system, even if unintentionally? More important, what can system actors do to reduce or eliminate disparities?

III. Town Hall Meeting

Panelists: Theodore Shaw (moderator), Columbia University School of Law; Eddie Ellis, Center for NuLeadership on Urban Solutions; Hon. George Bundy Smith, former associate judge on the New York Court of Appeals, NYCLA Justice Center; Zachary Carter, former U.S. Attorney and partner, Dorsey & Whitney; Lisa Wayne, past president, NACDL; Vanita Gupta, American Civil Liberties Union; Glenn Martin, Fortune Society; Rick Jones, Neighborhood Defender Service of Harlem; Leroy Frazer, Manhattan District Attorney's Office.

The Brennan Center's Nicole Austin-Hillery kicked off the Town Hall Meeting, describing the vast racial disparities in the criminal justice system and their impact on the fundamental values underlying that system.

A. Differing Perspectives

Disparity vs. Mass Incarceration. Conference panelists expressed differing views as to whether the problem we seek to address is one of disparate treatment between minority and white defendants, or the larger phenomenon of mass incarceration that has consigned 1.3 million African American and Hispanics to prison. According to the latest available figures, these two groups comprise 58 percent of all inmates, even though they make up only one quarter of the U.S. population.[4]

Responsibility. At several points throughout the three-day conference, some prosecutors, defense attorneys and judges insisted that their practice is blind to race. Prosecutors said that they often do not know the race of the defendant until arraignment or the grand jury. Some judges equated the discussion of disproportionality in the criminal system with an accusation of personal racism.

Societal Factors. Others endorsed the argument of Michelle Alexander, author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010), that the criminal justice system operates like a modern-day system of social control, and ought to be addressed as the urgent civil and human rights issue of the century.

Role of Bias. Most panelists and attendees agreed that both systemic and individual bias — often unconscious and unintentional — are at work, and combine to produce jails and prisons that are largely filled with black and brown men and women. Whether that bias originates from "animus or an absence of empathy or indifference doesn't really matter," said Zachary Carter, a partner at Dorsey and Whitney and former U.S. Attorney for the Eastern District of New York. "From the point of view of those stopped, the insult to personal dignity is the same, regardless of the motive of the officer who makes the stop."

Raising the Issue in the Courtroom. Change, concluded most conference participants, will require prosecutors, defense attorneys and judges to recognize the influence of race in the criminal justice system, and for defense attorneys in particular

to call it out in court. "If the defense lawyer isn't comfortable talking about race, no one else in the courtroom will understand or confront it," said Lisa Wayne, a criminal defense attorney and past president of NACDL. Ensuring that there are leaders of color in bar associations, public defender and district attorneys offices who are willing to raise the issue of racial bias is important, she said.

Economic Status. While race is an important determinant of outcomes, money also matters. Wayne and other defense attorneys who had transitioned from government offices to private practice observed that black and Latino defendants with the means to hire their own attorney command greater attention and leniency from prosecutors and judges. Poor defendants, by contrast, are at a disadvantage both at disposition and on probation, where they risk being violated and returned to prison if they lack the means to pay for monthly GPS-monitoring, drug-testing and other probation fees and requirements that have proliferated in recent years.

Individual Services vs. Systemic Reform. The conference also addressed the unresolved tension between solutions that focus on individuals versus those that focus on structural reforms. Barry Campbell, a special assistant at the Fortune Society, an organization that serves and advocates on behalf of former prisoners, emphasized the importance of mentors who can reform the ways of young people involved in crime. "When I was younger, what I needed most of all was someone who looked like me, talked like me, knew me, who could help me get on a better direction . . . someone who lived in my neighborhood and who did something positive."

Others challenged the predisposition to fix people rather than institutions. "We need to distinguish between those who have chosen a life of crime, and those innocent people who the system has chosen to criminalize," said Deborah Small of Break the Chains, a drug policy reform organization, referring to the thousands of young men of color arrested each year for putting their feet on a bus or subway seat, or carrying an open container of alcohol — behaviors that are routinely ignored in white communities. "I understand that institutional change is harder, slower, more difficult to quantify, and not nearly as personally fulfilling. Nonetheless, you cannot fix structural or institutional racism by fixing people; you can only do it by fixing the institutions and structures that continue to generate racially disparate results."

Policing. Although conference organizers intentionally left the topic of policing off the agenda — a subject they said could consume an entire three-day conference of its own — panelists largely agreed that the best way to reduce racial disparities in the criminal justice system was to focus on the point of entry, i.e., racially disparate arrest practices by police. Participants called for political organizing and litigation to challenge policing practices that disproportionately target people of color in poor neighborhoods, as well as policies that use the criminal justice system to deal with a host of social ills, such as deficient public education, and a lack of employment opportunities and mental health services. Defenders and several prosecutors agreed that more must be done to challenge the escalation of "broken windows" policing that has flooded the justice system with misdemeanor arrests for criminal trespass, marijuana possession and disorderly conduct in New York and other cities. "Prosecutors should be reviewing these kind of arrests for credibility and dismiss the charges in cases where they can't be proven," said Irwin Shaw of the Legal Aid Society, "and defenders should examine them very carefully before pleading them."

B. What Would Systemic Reform Require?

Panelists debated whether the goal ought to be to eradicate racial disparities or, perhaps more realistically, to simply reduce them. Most current reform efforts to address racial bias and disparity have been "piecemeal efforts, tinkering around the edges, and never addressing the roots of racism," observed Eddie Ellis, founder and president of the Center for NuLeadership on Urban Solutions. Ellis invoked the late Professor Derrick Bell's Critical Race Theory, which states that racism is a permanent fixture in the justice system, and an inevitable reflection of racism in the larger society. "But there is nevertheless a moral imperative for us to challenge and change it," said Ellis.

Nonetheless you cannot fix structural or institutional racism by fixing people; you can only do it by fixing the institutions and structures that continue to generate racially disparate results.

Participants across the spectrum considered, and generally sympathized, with the view that systemic change would require bold reforms and identified several key policies that fuel racial disproportionality:

- ***Stop-and-frisk policing***, particularly in New York City, where the police department has sharply escalated the use of this tactic in poor neighborhoods.

- ***Coercive use of cash bail.*** The presumptive imposition of cash bail, particularly in misdemeanor cases, which un-

necessarily incarcerates minority defendants and is used implicitly to coerce guilty pleas.

- ***Mass incarceration for non-violent offenses***. Rather than using incarceration as a response to failures of the education, mental health, immigration, and child welfare systems, prison should be used as a last resort reserved for truly dangerous offenders.

- ***Marijuana arrests***. Many conference participants — including judges and prosecutors — voiced their personal (if not institutional) view that possession of small amounts of marijuana fuels unnecessary arrests and ought to be decriminalized.

C. Litigation

Panelists also concurred that criminal and civil litigation is a necessary, but insufficient, tool to combat racial disparities. "The law can be an instrument of social change, but is not inherently so," said Ted Shaw, a professor of law at Columbia University and former director of the NAACP Legal Defense and Educational Fund. "Progressive lawyers and activists have bent the law against its natural inherent conservatism and its inclination to maintain the *status quo*."

Rick Jones of the Neighborhood Defender Service of Harlem closed the opening town hall with a provocative statement: that the surest path to reform would be to arrest more white people.

D. Legislation

Some of the best reform opportunities now lie in the legislatures, said some, where fiscal conservatives are coming to the realization that states can no longer afford to incarcerate so many people. Advocates must unapologetically embrace economic arguments that speak to policymakers, even if these do not always acknowledge the inherent injustices of the current system, argued Vanita Gupta, director of the ACLU's Center for Justice. Similarly, advocates must be clear-eyed about the fact that the prison and justice systems have become powerful, self-perpetuating industries. Glenn E. Martin, Vice President of Development and Public Affairs of the Fortune Society, argued that the *status quo* benefits not only private prison corporations, but also a host of criminal justice actors whose employment depends upon a steady stream of arrestees: police, prosecutors, corrections officers, defense attorneys, social service counselors, companies that contract with corrections departments, and communities that benefit from free prison labor.

E. The Role of Interest Convergence

Rick Jones of the Neighborhood Defender Service of Harlem closed the opening town hall with a provocative statement: the surest path to reform would be to arrest more white people. Jones reasoned that, if white people were arrested in numbers anywhere near their percentages in the overall population, the system would, overnight, become less punitive and tendencies towards overcriminalization and mass incarceration would be relaxed. Lisa Wayne and others agreed with the truth, if not the practicality, of this position, noting that it took the controversy surrounding the conviction of Alaska Senator Ted Stevens to motivate a serious discussion of reforming the federal rules of discovery. Nkechi Taifa, a criminal justice policy analyst for the Open Society Foundations in Washington, observed that the most effective criminal justice reformers in recent years have been conservative white elites, such as Pat Nolan and Chuck Colson, who went to prison and emerged as reformers. But is arresting more white people a practical solution? Deborah Small of Break the Chains, a drug policy reform organization, suggested that this might not make much difference, as those whites most likely to be incarcerated would be poor, undereducated and unemployed, and not the middle-class people whose criminalization would spark controversy or debate.

IV. Charging, Plea Bargains And Diversion

Panelists: Thomas Giovanni (moderator), Brennan Center for Justice; Lance Ogiste, Office of the Brooklyn District Attorney; Irwin Shaw, Legal Aid Society, Manhattan; Wayne McKenzie, New York City Department of Probation.

Conference participants examined the role of prosecutors and defense attorneys in charging, plea bargains and alternatives to incarceration, with an emphasis on the role that implicit biases play in their activities.

A. The Role of Implicit Bias in Prosecution

Current or former district attorneys on the panel emphasized that the business of prosecution in large, urban offices, where upwards of 300 cases a day are processed, is largely a "paper practice." In a fast-paced system, line prosecutors focus on the police complaint and the reliability of victims' statements, they said, and often do not even know the race of the defendant or victim until the case is presented to the grand jury. Similarly, Irwin Shaw, Attorney-in-Charge of the Legal Aid Society, New York County, stated that most defenders do not consciously or unconsciously "bring their A game to white clients, and B game to clients of color."

Wayne McKenzie, General Counsel for the New York City Department of Probation and former director of the Vera Institute's Project on Race and Prosecution, characterized this as a common refrain. "We are processing cases so fast and don't even know the race of defendants; how could we be biased?" But this stance fails to acknowledge the all-important role of implicit bias, said McKenzie. "If you accept that there are disparities, you must accept reality that we all have prejudices learned from birth. We should also accept that not every disparity is the result of bias."

Advances in neuroscience have shown that people can consciously believe in equality while simultaneously acting on subconscious prejudices of which they may not be aware. Unconscious bias results from subconscious mental shortcuts our brains make to process information and make decisions quickly.[5] "Implicit bias" is thus a universal response in all people of all races, although we are more susceptible to it when considering people different from ourselves. Because of racial images that saturate the media and social sphere, explained McKenzie, prosecutors who are processing cases may readily assume the 18-year-old defendant from Brooklyn with the truancy charge is a black male, and the embezzlement charge against a middle-aged man from Long Island involves a white person. These often unconscious assumptions ultimately influence our actions and reactions to others.

The good news, said McKenzie, is that the research shows that unconscious biases can be effectively reduced when people are made aware of them and commit to changing practice.

Recommendations for Reducing Prosecutorial Bias

The good news, said McKenzie, is that the research shows that unconscious biases can be effectively reduced when people are made aware of them and commit to changing practice.[6] 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.

All system actors will need guidance to help them analyze disparities and confront racial bias in their practice. Essential components of an effective intervention to reduce implicit bias are:

- **Data collection.** Accurate information to help prosecutors track decisions in their offices is critical. The data must then be used to ground a discussion of strategies to address disparities. "You can't manage what you can't measure," warned McKenzie. "Overall rates of prosecution may look similar, but it is necessary to dig deeper to see which offenses generate disparity." For example, in Milwaukee, Wisconsin, the Vera Institute found that while the *overall* likelihood of prosecution was virtually the same for black and white defendants, two subcategories — drug crimes and public order offenses — were generating large racial disparities.

- **Fresh eyes.** An outside consultant or other expert can help to analyze patterns of decision-making and facilitate a conversation with staff about issues presenting in the data.

- **Courageous leadership**. Chief district attorneys and chief defenders must be willing to raise the issue of race and create a safe space to collaborate with their staff and outside agencies. Panelists described an example of a prosecutor in Philadelphia who, alarmed at the disparate rate of arrests of minorities for marijuana offenses, worked with judges and defense attorneys to divert many of the city's 7,000 prosecutions annually to a weekend program.

- **Focus on inexperienced prosecutors**. McKenzie recalled working with one office in which the largest racial disparities appeared in the charging of first-time possession of marijuana and cocaine. Among white defendants, there was a 67 percent chance of dismissal. Among black defendants, however, only 27 percent of the cases were rejected. Further discussion with staff revealed that young prosecutors viewed the presence of drug paraphernalia such as crack pipes as more serious in urban neighborhoods than needles and bongs in suburban ones.

Panelists also called for structural reforms that would constrain the prosecution of very low-level misdemeanors where racial disproportionality is most prevalent. Specific suggestions were to:

- **Change prosecutorial performance incentives.** "Generally, the lower a DA's dismissal rate, the higher your office is regarded," said McKenzie. However, this may not be appropriate when police are making disproportionate arrests. Others suggested that, instead of evaluating prosecutors by conviction rate, they should be assessed based on "appropriate charging" — i.e., the alignment between the original charge and the final charge of conviction. This would discourage the practice of overcharging. McKenzie and other current and former prosecutors warned, however, that such a change requires including legislators and community members in the conversation. "When a DA's dismissal rate goes up, he or she will be attacked and need political cover," said McKenzie.

- **Raise the standard for charging**. Others suggested that DA offices shift the standard for charging from "probable cause" to "likelihood of conviction," or alternatively, make an office-wide decision not to prosecute certain low-level offenses. The Milwaukee district attorney's office, for example, made non-prosecution of first-time arrests for drug paraphernalia the default position, and made a decision to divert second offenses to an alternative-to-incarceration program. Any decision to override office policy requires approval from the chief.

B. The Role of Defenders in Combating Racial Disparities

Jonathan Rapping, founder and director of the Southern Public Defender Training Center (now Gideon's Promise), described the journey from arrest to incarceration as a pipeline, with the role of the defender "to provide friction." In truth, said Rapping, "there are two pipelines: one for white folks, and a second for black and brown people, with more points of entry and more WD 40 lubrication, that generally fails to provide the same level of defense attorney friction."

Rapping suggested that implicit bias affects defenders as well as prosecutors and other actors in the system: "All of us harbor implicit racial bias, and as a result of our socialization tend to equate aggressiveness and other negative qualities [to black people]. As defenders, many of our clients are black and brown and wear an orange jumpsuit. I am just as guilty of saying, 'What's going on here?' when I see the rare white defendant in a court-issued jumpsuit."

Accurate information to help prosecutors track decisions in their offices is critical. The data must then be used to ground a discussion of strategies to address disparities.

Recommendations for Reducing Defender Bias

Rapping and other conference participants described several steps to more effective, less racially disparate outcomes:

- **Self-awareness**. Educate defenders about implicit bias so they can be more conscious and effective in combating it.

- **Patience**. Realize that we are not going to fix the problem overnight, but that it is important to fight nonetheless. "Rather than focus on all the clients who may be falling through the cracks, focus on those you can save through zealous representation," said Rapping.

- **Prevent pretrial detention, and fight zealously against cash bail and detention in misdemeanor cases.** At bail hearings, defenders must zealously advocate for release pending trial, given the clear evidence that pretrial detention increases the likelihood of conviction and longer sentences.[7] Defenders must inject into the discussion the damning statistics showing disparity in the release of similarly situated whites.

- **Education**. Educate other actors about their implicit biases at different stages of proceedings.

- ***Voir dire***. At trial, defenders should make motions and present experts to educate courts about implicit bias. The question "Can you be fair and impartial?" is not sufficient, said Rapping. "All jurors harbor racial biases and we need to get at these in *voir dire* to understand their experiences, not simply their aspirations."

- **Trial**. Call experts to testify at trial or sentencing on the social science of implicit bias, which shows that jurors are more likely to associate a black or dark-skinned defendant with guilt. "Even if you aren't granted the request, the judge will have read the papers and have been educated about the role of unconscious bias," said Rapping.

- **Out of court judicial interactions.** Engage with judges both in and out of court, to raise issues of racial disparities in situations where the clients will not bear the brunt of any animosity generated by the confrontation.

- **Familiarize judges and district attorneys with alternative-to-incarceration programs**. First-year DAs should visit jails and community diversion/release programs, suggested Barry Campbell of the Fortune Society. Seeing defendants of color in alternate settings run by well-regarded providers makes prosecutors more amenable to diversion programs. Campbell noted that the Fortune Society also encourages newly appointed parole commissioners to visit halfway houses and release programs. This has helped to persuade commissioners to release more prisoners with histories of violence.

- **Minimize economic burdens to clients sentenced to incarceration**. Defenders should argue for suspension of child support payments for prisoners when they have no resources to pay during their term of incarceration, said Divine Pryor of the Center for NuLeadership on Urban Solutions.

"Most clients would rather plead and go home than stay in jail while discovery proceeds."

Conference participants debated, without agreeing, whether defenders should take more cases to trial rather than engage in routine plea bargaining. Some formerly incarcerated panelists said defense attorneys pressure clients to accept a plea deal. Irwin Shaw of the Legal Aid Society explained that, to the great frustration of many defense lawyers, the imposition of excessive monetary bail and the lack of discovery put many clients in the quandary of passing up freedom in order to go to trial. "Most clients would rather plead and go home than stay in jail while discovery proceeds." This also frustrates lawyers' ability to bring systemic litigation challenging disparities because clients are eager to take a deal that will enable them to go home. However, Shaw and others pointed to a number of things defenders can do to root out bias and affirm the humanity of their clients:

- **Include clients as presenters in legal training programs** to talk about the indifferent treatment they have received at the hands of defense attorneys and other criminal justice system personnel.

- **Oppose the criminalization of clients who themselves are victims**, such as female defendants in prostitution and human trafficking cases.

- **Employ social workers to assist clients who have mental health or other needs**, and work to get these defendants out of the criminal justice system.

C. The Role of the Judge and Racial Bias

Some conferees agreed that white defendants were easier to humanize in court, and judges more likely to view them as victims, or simply worthy of a break.

Research shows that one of the greatest determinants of outcomes in misdemeanor and felony cases is whether the defendant was detained pretrial. Those who are detained pretrial serve on average two weeks in jail, and often plead quickly out of desire to go home.

Thomas Giovanni, director of the Community-Oriented Defender Network at the Brennan Center for Justice at New York University School of Law, related his experiences that white clients charged with prostitution were much easier to characterize as victims of sex trafficking than black females. As a result, prosecutors and judges were more likely to dismiss these cases. "The same case and facts with a black female defendant means 'more work to do,'" said Giovanni.

Wayne McKenzie, a former prosecutor, related an illustrative story about disparate treatment of white and black defendants charged with Christmas tree theft in a large midwestern city. Each Christmas, white fraternities at the local university competed to see who could steal the most trees from outdoor lots. Black defendants were generally young men reselling the trees for Christmas spending money.

When arrested, white college students would appear at arraignment with private counsel — often in tears, as they imagined their career prospects spiraling down the drain. They would often appear before a judge who graduated from the same local university and who was inclined to view the incident as a youthful indiscretion. Invariably, the case would be dismissed. Young black males, by contrast, would appear at arraignment represented by a public defender. They would stand stoically before the bench with a blank look ("because I can't cry and look like a punk.") These cases would end with a misdemeanor conviction. "Both sets of young men were scared out of their mind," said McKenzie, but would evoke different reactions, and ultimately results, from judges.

Strategies for Reducing Judicial Bias

Conferees offered a number of suggestions as to how judges could reduce racially disparate outcomes in the criminal justice system:

- **Refuse to set monetary bail in misdemeanor cases**. System officials agreed that the criminal justice system discourages litigation by offering to send pretrial detainees home in exchange for a guilty plea. Clients face a loss of employment, childcare and housing if they don't plead quickly. If defendants are truly presumed innocent, there ought to be a presumption against requiring monetary bail in misdemeanor cases, argued several defense attorneys.

- **Pre-conviction diversion for misdemeanors**. The current model emphasizes alternative-to-incarceration programs following conviction. But several conferees said that more could be done to suspend prosecution and divert cases prior to conviction (in New York, this is called an adjournment in contemplation of dismissal, or ACD). Cases are typically adjourned for six months; if the defendant does not get into further trouble during this time, the court dismisses the case.

V. Pretrial Incarceration

Panelists: Thomas Giovanni (moderator), Brennan Center for Justice; Marika Meis, Bronx Defenders; Hon. Melissa Jackson, Criminal Court, New York County; Tim Koller, Staten Island District Attorney's Office; Barry Campbell, the Fortune Society.

Research shows that one of the greatest determinants of outcomes in misdemeanor and felony cases is whether the defendant was detained pretrial. Those who are detained pretrial serve on average two weeks in jail, and often plead quickly out of desire to go home. Some conferees suggested that in high-volume criminal justice systems that depend on plea bargains to process cases, bail is used — whether consciously or unconsciously — as a bargaining chip to coerce pleas, especially in low-level offenses that likely carry little, if any, jail time.

Marika Meis of the Bronx Defenders reminded participants that the New York State bail statute, which was enacted as part of the 1970 criminal procedure law, was actually intended to *reduce* rates of pretrial detention. The statute strongly favors pretrial release, with the setting of monetary bail as the exception and only when required to ensure an accused returns to court. Yet the reality of courtroom practice is far different: In New York City, nearly one-third of the over 370,000 defendants arraigned annually are detained pretrial, even though 80 percent of their cases involve low-level misdemeanors or violations like turnstile jumping, marijuana possession, or fighting in public.[8] One result is that nearly half of New York City's jail beds are occupied by those charged with low-level offenses who, despite the presumption of innocence, are incarcerated for days or weeks because they cannot make cash bail.[9]

Meis questioned why so many defendants are held pretrial, when nearly a quarter of arrestees who have bail set in their cases are charged with misdemeanors and do not pose a threat to public safety.

The racial impact of setting bail in so many cases is stark, with blacks and Latinos comprising 90 percent of those detained in the city's central jail on Riker's Island.[10] Meis questioned why so many defendants are held pretrial, when nearly a quarter of arrestees who have bail set in their cases are charged with misdemeanors and do not pose a threat to public safety.[11] Moreover, research conducted by the Bronx Defenders and the Criminal Justice Agency[12] indicates that most defendants would return to court even without posting bail:

- More than 80 percent of those accused of crimes who are released without bail return for their court appearances. In 2009, the failure to appear rate in NYC was only 16 percent for those released on their own recognizance.[13] More appear voluntarily within 30 days of their second court date, dropping the warrant rate further to 6 percent.[14]
- The difference between the return rate of those released on their own recognizance (RORs) and those with cash bail was only 3 percent.[15]
- The difference in return rates between cases involving bail set at $500 and bail set at up to $7,500 is slight — no more than 2 percent.[16] Yet in cases where bail is set at $1,000 or less, 48 percent of defendants remain incarcerated for an average of 15.7 days until their case is resolved.
- Judges are setting bail at levels that impoverished defendants cannot meet, resulting in unjust, unnecessary and costly incarcerations. When bail is set at $500 or less, only 13 percent of those charged with misdemeanors are able to post bail at arraignment. By the time of disposition, 44 percent are still detained,[17] even though most will receive dismissals, no jail time, or a jail sentence less than time served in pretrial detention.[18]

A. Recommendations

What can system actors do to reduce pretrial detention for poor defendants of color? Panelists offered several ideas for judges, defenders and legislators.

Judges. The Hon. Melissa Jackson, Supervising Judge in the New York County Criminal Court, and Tim Koller, an assistant district attorney from Staten Island, argued that disparities in bail outcomes are driven by economics more than race: poor people simply do not have the money to make bail. There is little that judges or prosecutors can do, they suggested, given that New York's bail statute requires the imposition of monetary bail.

The Hon. Melissa Jackson, Supervising Judge in the New York County Criminal Court, and Tim Koller, an assistant district attorney from Staten Island, argued that disparities in bail outcomes are driven by economics more than race: poor people simply do not have the money to make bail.

Marika Meis and others disputed the requirement of monetary bail as a misreading of the statute,[19] and pointed to several things that judges can do to reduce the disproportionate impact of pretrial detention on defendants of color:

- **Use the alternatives to cash bail** set forth in the statute. The New York bail statute includes nine forms of bail, including unsecured bond, which is a personal appearance bond that does not require any money to be posted, and a partially secured bond, which requires a posting of up to 10 percent of the full amount. A 1986 amendment also allows for bail to be secured with a credit card, but has never been fully implemented.[20]

- **Lower the bail to a token amount that actually takes into account the finances of the accused**. For unemployed or working poor people scrambling to make ends meet on a minimum wage salary of $1,000 per month, a $500 bail "might as well be a million dollar ransom," said Meis. Yet only 6 percent of defendants in New York City courts had bail set under $500.[21] Seventy percent of non-felony cases had bail set between $500 and $1,000, and a staggering 9 out of 10 of those who had bail set below $1,000 were unable to post it at arraignment.[22] "Whether the barrier is race or poverty," said Tracy Velazquez of the Justice Policy Institute, "setting bail at a level that the poor cannot pay is a violation of civil rights." Why not set it at $1 or even a penny to satisfy the statute? This would "send a message to legislators," said Lisa Wayne, past president of NACDL.

- **Calibrate the consequences for failure to appear**. Judges, defenders and prosecutors use risk assessments prepared by the Criminal Justice Agency at every arraignment. These assessments provide the same negative evaluation of a person for a failure to appear, regardless of whether a defendant voluntarily appears in court one day late, or is brought in on a new arrest after five years on the run. Some conference participants argued for greater calibration in the penalties for failing to appear.

Defenders. Defense attorneys agreed that they could do more to:

- **Make zealous bail applications,** and cite the above research showing the high rate of return of those released on their own recognizance.

- **Ask for alternative forms of bail**. Panelists urged defenders and judges to closely read the New York State bail statute, and to consider and request creative alternatives to cash bail.

- **Sensitize system actors to the jail experience**, through jail tours for district attorneys, judges and defense attorneys. Seeing and talking with prisoners who are clearly mentally ill can be a transformative experience, said one conference participant.

Legislators. Judges, prosecutors and defenders largely agreed that what was most needed was legislative reform of the New York State bail statute. Specifically, participants recommended that legislators:

- **Change the statute to abolish cash bail.** If 80 percent come back on RORs, why set bail on misdemeanors? Several panelists observed that the statute already creates a presumption of release, with bail the exception.

- **Abolish bail in misdemeanor cases**. Participants agreed that there were too many misdemeanants held pretrial for low-level offenses, and a statutory waiver of bail in these cases would be appropriate. One audience member worried whether abolishing bail would lead legislators to felonize more misdemeanors, or prosecutors to charge cases more harshly. Prosecutors said that a move to upgrade charges was unlikely in low-level cases, such as subway fare evasion, but might well happen in misdemeanor domestic violence and other assault cases, where danger to the community is at issue.

- **Create a pretrial services office** that would provide background assessments and supervision in misdemeanor as well as felony cases. Supervision and services would help assure courts that defendants will appear, said several judges and prosecutors. However, some defenders questioned whether pretrial supervision was necessary in misdemeanor cases, especially when the statistics indicate that most people will return of their own accord.

Participants agreed that there were too many misdemeanants held pretrial for low-level offenses, and a statutory waiver of bail in these cases would be appropriate.

VI. Jury Selection

Panelists: Darryl Stallworth, defense attorney and former prosecutor (moderator); Justice Ruth Pickholz, New York State Supreme Court, New York County; Abbe Smith, Professor, Georgetown University Law Center; Deanna Rodriguez, Kings County (Brooklyn) District Attorney's Office Gang Bureau; Cathleen Price, the Equal Justice Initiative (EJI).

The Constitution does not require a racially representative jury, only an impartial "jury of one's peers." Panelists grappled with whether, in the 21st century, race should be considered a proxy for partiality. Deanna Rodriguez, an assistant district attorney from Brooklyn, observed: "People are people, and one shouldn't assume alignment between ethnicity and views on criminal justice. I have encountered some Latinos who are 'Hang 'em high,' while others are very suspicious of the criminal justice system." Others agreed that a juror's life experiences are probably the most important factor in selection. Abbe Smith, a professor at Georgetown University Law Center, argued that race continues to be a relevant factor in at least two respects:

- **Research shows some continuing evidence of same-race favoritism**. When jurors sit in judgment of an accused they can relate to, they more easily extend the presumption of innocence.

- **Attitudes about police diverge sharply between African Americans and whites**. Whites tend to regard police officers as "friendly helpers," whereas African Americans approach police with greater skepticism. According to a 2007 survey by the Pew Research Center, 58 percent of whites but only 23 percent of blacks believe that police enforce the law without excessive force and while treating all races equally.[23]

Rodriguez argued that "judicially controlled time limits on *voir dire* are ridiculous when you're talking about somebody's freedom and a victim who has suffered a loss. You simply can't pick fair jurors in 10 minutes."

Racially representative juries may not be difficult to seat in a culturally diverse location like New York, but diverse pools remain elusive in the South and other regions of the country, said Cathleen Price, a capital defense lawyer with the Equal Justice Initiative in Montgomery, Alabama. Traditional jury composition mechanisms, such as voter rolls and driver license lists, tend to underrepresent racial minorities. Racially motivated challenges for cause or peremptory strikes may further reduce the diversity of juries. In a recent report, EJI found that over 80 percent of African Americans qualified for jury service in Houston County, Alabama, were struck in death penalty cases. In Jefferson Parish, Louisiana, there has been little or no representation of racial minorities in 80 percent of criminal trial juries.[24]

A. Uncovering Bias and Preserving a Diverse Panel in Jury Selection

Voir Dire. Panelists vigorously debated who should control juror questioning during jury selection. The Honorable Ruth Pickholz, a justice on the New York State Supreme Court for New York County, argued that judge-conducted *voir dire* is better, faster and more honest than when questioning is conducted by defense counsel or the prosecutor. DAs and defense attorneys countered that judges are less likely to elicit honest admissions of bias, and that they may be overly inclined to rehabilitate questionable jurors. Professor Abbe Smith cited jury research suggesting that: "People act differently with authority figures. Judges too often say, 'I know you were a victim of crime and have some feelings about the charge here, but you're a fair-minded person, aren't you? If I instruct you that the government bears the burden of proof, you can follow that instruction, can't you ma'am?' It is a rare juror who will say no."

Defense attorneys and prosecutors also objected to the strict time limits that judges often impose on *voir dire*. ADA Rodriguez argued that "judicially controlled time limits on *voir dire* are ridiculous when you're talking about somebody's freedom and a victim who has suffered a loss. You simply can't pick fair jurors in 10 minutes."

Racially Based Peremptory Challenges. Over 25 years ago, the Supreme Court declared race-based peremptory challenges by prosecutors illegal in *Batson v. Kentucky,* 476 U.S. 79 (1986). Several years later, the Court extended the *Batson* rule to

defense counsel in *Georgia v. McCollum*, 505 U.S. 42 (1992). Panelists agreed that *Batson* and *McCollum* had largely failed to constrain racially motivated strikes, for several reasons. First, defense attorneys are often less than vigilant about tracking racial patterns of peremptory challenges and often hesitant to accuse prosecutors of acting with racial motives. Second, it is all too easy for prosecutors to offer pretextual reasons for strikes.

Panelists debated, but did not reach agreement, on whether peremptory challenges should be outlawed altogether. "I'll give up my peremptories when you give up your unanimous juries," said ADA Rodriguez to defense attorneys on the panel, to laughter in the hall.

Justice Pickholz conceded that *Batson* was an imperfect remedy: "But once the challenge is made, it tends to chill the party, and they do not exercise many peremptory challenges against jurors of color after that."

Jury pools composed only of registered voters exclude many people of color who may not vote in numbers representative of their population, or who have felony convictions that in some states disqualify them from voting.

B. Recommendations

Panelists offered several suggestions for what judges and trial counsel can do to maximize the participation of jurors of color:

- **Offer hardship accommodations for jury service**. Jurors of color are more likely to experience financial or logistical hardship from jury service, and may be more likely to request recusals. Courts should routinely offer childcare at the courthouse and public transportation passes or mileage reimbursement, said panelists. For courts that do not routinely offer these accommodations, defense attorneys and prosecutors should move the court for funds for jurors who state they lack the financial resources to serve. Panelists debated whether courts should excuse people who do not want to serve, with some favoring dismissal, and others, like ADA Rodriguez, emphasizing the civic duty to serve. "Even initially resistant jurors sometimes change their minds and make them open to serving, if the importance of their service is explained," observed Rodriguez.

- **Challenge the pro forma exclusion of jurors with personal or family exposure to the criminal justice system**. Professor Abbe Smith counseled defense attorneys to challenge the routine use of the question: "Has anyone in your family been caught up in the criminal justice system?" Similarly, counsel should object to strikes based on the ground that the juror lives in a "high-crime community." The unprecedented scale of mass incarceration in America today — with one out of every three black men expected to serve time in prison during his lifetime — means that a question about criminal justice contact can no longer be treated as a race-neutral question or strike for cause.[25] ADA Rodriguez agreed with this assessment: "The mere fact that a family member has contact is irrelevant. What's relevant is their *view* on that experience. Many people of color with family members who have been arrested or sent to jail will tell you, 'He deserved it.' My interest as a prosecutor is knowing whether there is anything about that experience that made you feel that your loved one did not get a fair trial."

- **Restore party-controlled *voir dire***. Thorough questioning by the parties allows counsel to obtain sufficient information about jurors' life experiences so that they do not have to resort to race and gender as proxies. Both counsel must have adequate time, although all of the experts on the panel emphasized that good *voir dire* is about *effective* questions more than the number of questions. (Here, prosecutors and defense attorneys observed that, as more judges take control of questioning jurors, younger lawyers are not learning how to conduct skillful *voir dires*.) Panelists recommended the following time-saving compromise: Counsel should be allowed at least 30-40 minutes to question the first *venire* of jurors. Less time could be allowed in subsequent rounds, as newly seated jurors will have heard the previous questions and parties can move through interviews more quickly.

- **Advocate for alternatives to voter-based jury rolls**. Jury pools composed only of registered voters exclude many people of color who may not vote in numbers representative of their population, or who have felony convictions that in some states disqualify them from voting. Even those disenfranchised through a felony conviction still have a right to serve on juries, said Cathleen Price of the Equal Justice Initiative. Price urged trial counsel to consider litigation challenging the exclusion of felons on

the basis that former prisoners qualify as a cognizable group under "fair cross-section" jurisprudence. While this argument has not been firmly established in the case law, bringing these kinds of challenges forces courts to articulate why ex-offenders should be disqualified from jury service.[26] Price also urged defense counsel and prosecutors to work with court clerks to expand their jury pool sources. Utility bill rosters are broader, more representative sources than either drivers' licenses or voter rolls, said Price.

VII. Search, Seizure And Identification Issues

Panelists: Lexer Quamie, Leadership Conference on Civil and Human Rights (moderator); Hon. Mark Dwyer, New York State Supreme Court, Kings County; Rodney Mitchell, REentry Legal Services; Donna Lieberman, New York Civil Liberties Union (NYCLU); William Gibney, Director of Special Litigation Unit, Legal Aid Society; Delores Jones-Brown, Center on Race, Crime and Justice, John Jay College of Criminal Justice; David LaBahn, Association of Prosecuting Attorneys.

"Any program that targets 90 percent innocent people cannot be an effective crime fighting tool."

— Professor Delores Jones-Brown

A. Stop-and-Frisk Policing in New York City

Delores Jones-Brown, a professor at the John Jay College of Criminal Justice, painted a disturbing picture of search and seizure practices in New York City. Over the past 10 years, under the leadership of Mayor Michael Bloomberg and Police Commissioner Raymond Kelly, the New York Police Department has aggressively escalated its use of stop-and-frisk policing, a move it credits with maintaining a historic drop in violent crime. In 2011, New York City police officers made 684,330 stops across the five boroughs — a 14 percent increase over the previous year and more than double the number of stops under the administration of Mayor Rudolph Giuliani, a pioneer of the "broken windows" theory of policing.

But stop and frisks are a very localized experience, largely confined to the 10 precincts in the city that are predominantly populated by blacks and Hispanics. Of the 684,330 stops by police in 2011, 87 percent were of blacks or Hispanics; only 9 percent were of whites. Blacks comprised 62 percent of stops and 52 percent of arrests, although only 25.5 percent of the city's population is black.[27]

Most arrests following a stop and frisk are for misdemeanors. Misdemeanor arrests for marijuana possession in New York City have skyrocketed — with about 350,000 arrests over the past 10 years, a nearly twelve-fold increase over the 30,000 total arrests in the preceding decade.[28] Of particular concern, said some conference panelists, was the common practice of ordering suspects to empty their pockets in a stop and frisk, and then making an arrest for marijuana under a city ordinance prohibiting the possession of marijuana "in public view." (The possession of small amounts of marijuana in pockets or outside of public view was essentially downgraded to a violation in the 1970s.) The commissioner of police ordered officers to cease arrests for "manufactured" plain view arrests in 2011, but after dropping for a short time, such arrests have risen to previous levels.

Of particular concern, said some conference panelists, was the common practice of ordering suspects to empty their pockets in a stop-and-frisk, and then making an arrest for marijuana under a city ordinance prohibiting the possession of marijuana "in public view."

This targeting of minority communities for drug enforcement is the principal driver of racial disparities in the city's criminal justice system, said many conference participants: blacks and Hispanics comprise 50 percent of NYC's population, but 88 percent of all arrests.

Perhaps most disturbing, in the view of some panelists, is that the NYPD's aggressive use of stop-and-frisk policing produces little evidence of crime. Guns are uncovered in roughly .11 percent of stops; contraband in only 2 percent of stops;

and summonses and arrests or summons are issued in less than 12 percent of all cases.[29] This means that nearly 90 percent of all stop and frisks are conducted against innocent persons, said Jones-Brown.

Reasons proffered by police for stops are highly subjective, leaving room for racial bias. The leading reason for stops cited in police reports is "furtive movement" — a justification that appears more than three times as often as identity-based stops, such as "suspect fits the description of a perpetrator." Professor Jones-Brown concluded that young men of color in New York City are subjected to police contact based largely on their attire (e.g., saggy pants, hoodies or suspected gang colors), and cited evidence suggesting that lesbian, gay, bisexual and transgender youth and adults of color are also frequent targets of police harassment.

The Honorable Mark Dwyer, an acting justice on the Kings County (Brooklyn) Supreme Court — but speaking purely in an individual capacity — agreed that the practice of making stops and frisks without the articulable reasonable suspicion required in *Terry v. Ohio,* 392 U.S. 1 (1968) must end. Those practices not only conflict with relevant case law, but also alienate members of minority communities and make it harder for police to elicit their cooperation to prevent and solve crime. But he questioned whether it was possible to address crime and public disorder in New York City without alternatives to overly robust use of stop-and-frisk that rely upon additional assistance from residents of crime-prone neighborhoods. Neighborhoods with higher crime need different, more aggressive policing strategies, said Dwyer. And community assistance to the police is central to potentially successful strategies. If residents of high crime neighborhoods want change, they must be part of what changes, he said.

Professor Jones-Brown disagreed with the proposition that policing strategies must differ between neighborhoods, citing research showing that a small number of repeat offenders are responsible for the majority of criminal offenses. "Crime is down across the city, including in 'high crime' neighborhoods where aggressive stop-and-frisk policing has escalated. It is a violation of civil liberties to subject a majority of law-abiding residents to oppressive policing in order to capture or deter a few," said Jones-Brown.

Panelists discussed a range of interventions needed to address the abuse of stop-and-frisk policing in New York City and elsewhere.

B. The Role of Civil Litigation

Some conferees agreed that post-arrest litigation in individual cases is inadequate to address the problem of racially disparate policing practices because district attorneys, defense counsel and judges see only the small percentage of cases in which contraband was found — not the majority of cases where innocents were unnecessarily and unjustly stopped.

For this reason, several defender and public interest legal organizations have brought civil lawsuits to challenge these practices. The Center for Constitutional Rights is litigating a class action case, *Floyd v. City of New York,* challenging the racial profiling and unconstitutional stop and frisks by the NYPD. The Legal Aid Society of New York, the NAACP Legal Defense and Educational Fund and a private law firm (Paul, Weiss, Rifkin, Wharton, & Garrison LLP) have filed a pattern-and-practice case, *Davis v. City of New York,* challenging abusive arrests for criminal trespass in New York City Public Housing Authority (NYCHA) buildings. The suit alleges that police officers routinely arrest residents and their guests who are legitimately on the property.

Separate litigation filed by the NYCLU, the Bronx Defenders and Latino Justice/PRLDEF challenges a sister program called Operation Clean Halls, in which police conduct "vertical patrols" in private buildings. Advocates have challenged the validity of the program based upon the large number of trespassing arrests subsequently thrown out in court. "Untold numbers of people have been wrongly arrested for trespassing because they had the audacity to leave their apartments without IDs or visit friends and family who live in Clean Halls buildings," said Donna Lieberman, director of the NYCLU. Recently, the federal judge presiding over the three cases described above issued a preliminary ruling calling trespass policing "a longstanding unconstitutional practice."

"Untold numbers of people have been wrongly arrested for trespassing because they had the audacity to leave their apartments without IDs or visit friends and family who live in Clean Halls buildings."

These lawsuits are supported by a growing coalition represented by Communities United for Police Reform (CPR), which works to end discriminatory policing practices and build a movement to promote public safety approaches based on cooperation and respect. Among the remedies being sought by coalition members are:

- **Better police management** (specifically, reform of performance measures for police officers). Although the NYPD denies enforcing arrest quotas, police department performance evaluations still refer to the numbers of arrests in assessing officers' effectiveness, said reform advocates.

- **Education and training for officers on implicit bias**.

- **Orientation toward problem solving and community building**.

". . . . Training police on the proper legal standard for stop-and-frisk will do little unless we change the performance criteria upon which they're judged. Stop-and-frisk quotas are fundamentally inconsistent with the legal standard predicated on individualized suspicion [*Terry v. Ohio*]."

C. Education vs. Structural Approaches to Reform

Conferees engaged in a vigorous debate as to whether training and education to increase the cultural competence of police are effective in reducing racial disparities, or whether structural changes that focus on oversight and reform of police accountability measures provide the greater impact.

Professor Jones-Brown described a course she teaches at John Jay called "Perspectives on Race and Crime in America." The students include "a lot of well-intentioned officers who are learning about their own implicit biases. They see non-white, poor people, dressed in ways they think are inappropriate, and decide this non-criminal behavior signals someone who should be stopped."

Others emphasized the importance of cultural competence for new officers, who may view people hanging out on stoops and street corners in poor neighborhoods as troublemakers, when in fact this may be the norm in communities where residents live in crowded apartments and may lack the resources to frequent restaurants or other indoor social spaces. Rodney Mitchell, founder of REentry Legal Services in Washington, D.C., concurred. A beat officer's relationship with the community will determine his effectiveness in resolving crime, said Mitchell. Accordingly, Mitchell's program focuses on building relationships among police, clergy and young people in the neighborhood, and familiarizing police with social networks and clubs in their service area.

A defense attorney in the audience insisted that the larger problems are structural ones — in particular, arrest quotas that encourage officers to make excessive numbers of arrests. "If you want to make detective, you have to make the collars," he said. He and others emphasized the need for performance reforms that would reward officers based on the quality rather than quantity of arrests.

Donna Lieberman, director of the NYCLU, weighed in on the question of differential policing strategies and the role of police training versus performance measures: "The Compstat data are helpful, and police should be responding to crime hotspots. But the NYPD has abused the data to impose quotas on line officers. Training police on the proper legal standard for stop-and-frisk will do little unless we change the performance criteria upon which they're judged. Stop-and-frisk quotas are fundamentally inconsistent with the legal standard predicated on individualized suspicion [*Terry v. Ohio*]."

D. Legislative Reforms

Advocates are working with several members of the New York City Council on a package of four bills that they believe would curtail abusive stop-and-search practices.[30] The legislation includes:

- **A bill that would outlaw racial profiling and strengthen its definition**, as well as provide a private right of action for innocent victims of profiling.

- **A bill creating an Office of the Inspector General**, an independent office that would review the civil rights and liberties impact of police policies and practices and make recommendations for reform. (The NYPD has its own Office of Internal Affairs, but proponents of the measure say that an independent agency would provide greater oversight and accountability.)

- **A bill requiring that police give the equivalent of *Miranda* warnings before a "consensual" search**. This measure is considered important to counter an atmosphere in which police leadership have counseled young people to consent to search — whether or not probable cause exists — if they want to avoid arrest.

- **A bill requiring that police state their name and badge number** when conducting a stop and frisk.

"We have a good system — but it's the one that white kids get . . . ."

E. Criminal Litigation Challenging Stop-and-Frisk Arrests

Despite the fact that post-arrest suppression motions in criminal court will never address the majority of cases in which police may have overreached, some conferees agreed that there were several things that prosecutors and defense attorneys can do once a defendant is arrested for trespass or contraband arising from a questionable stop and frisk:

- **Bring greater prosecutorial scrutiny of "plain view" cases**. DAs should refuse to prosecute marijuana possession cases (particularly for marijuana in "plain view" following an order to empty pockets). The Association of Prosecuting Attorneys 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.

- **Demand routine interviews with police officers**. DAs should require interviews with arresting officers in cases involving questionable stops and searches. So many trespass arrests in Bronx public housing complexes were thrown out in recent years that in September 2012, Bronx District Attorney Robert Johnson announced that his office would no longer prosecute such cases based on a paper complaint alone. Going forward, DAs will be required to conduct face-to-face interviews with arresting officers.[31] This move is widely expected to reduce the number of arrests.

- **Bring motions to suppress.** Defense attorneys should move to suppress the fruits of illegal stops and searches. Motions give defense counsel an opportunity to challenge what is going on behind the scenes, said panelists.

VIII. Sentencing And Community Corrections — A Tale Of Two Systems

Panelists: Nkechi Taifa, Open Society Foundations (moderator); Dr. Divine Pryor, Center for NuLeadership on Urban Solutions; Clinton Lacey, New York City Department of Probation; Jonathan Rapping, the Southern Public Defender Training Center; Mike Randle, Cuyahoga County, Ohio Community-Based Correctional Facility.

In New York City, one-third of all probationers are 16-24 years old. The vast majority are young men of color. These levels of disparity are even starker in the juvenile justice system. Vincent Schiraldi, Commissioner of Probation in New York City, observed that there was little discussion of racial disparities, or the need to address them, within corrections bureaucracies. Why? "The opposite of love is often apathy," he said. "We've become inured to amazing levels of disparity in our systems."

"We have a good system — but it's the one that white kids get, which diverts kids out of the system and retains the few who really need to be in prison," said Schiraldi to a hushed room.

Dr. Divine Pryor, Executive Director of the NuLeadership Center for Urban Solutions, concurred: "There is an unwritten understanding among police that you don't arrest white kids and put them in the system, because you don't want them to get a record. Young people of color in poor neighborhoods have an entirely different experience of the criminal justice system," said Pryor. "Communities are being traumatized by these [policing] practices when 700,000 are stopped and searched per year. . . . High schoolers assume the position, and drop their backpacks when they see police roll up. Whole generations have already accepted prison as the norm. This is the destructive effect of mass incarceration on community consciousness and personal aspirations."

A. The Role of Probation in Reducing Racial Disparities

Clinton Lacey, Deputy Commissioner for Adult Services in the New York City Department of Probation, described three core approaches that his agency is using to minimize the impact of the criminal justice system on poor communities of color:

- **Reduced reliance on incarceration**. Under Schiraldi's leadership, the NYC Probation Department is using several means to minimize defendants' exposure to prison. First, the Department is using risk and needs assessments to develop sentencing recommendations to judges. These are designed to distinguish between defendants who are high risk and defendants who are merely high need. On the back end, the Department has cut the rate of violations by 40-50 percent in recent years by being more thoughtful, creative and patient. "Our approach is to exhaust other options before violating a probationer and sending him to prison," said Lacey. Finally, the Department has significantly increased its requests to court for early discharge from probation for many people in its caseload. "The literature is clear that after 18 months, probation supervision brings diminishing returns, despite the fact that misdemeanor charges carry a three-year term of probation, and felony charges five years. Courts often agree with us."

- **More services.** The Department has shifted its focus during the probationary period from supervision and monitoring to providing services and lifting barriers to employment and housing.

- **Do it in the community**. Probationers now report to neighborhood-based centers, part of the Department's Neighborhood Opportunity Network, rather than to department headquarters. This encourages greater knowledge of community context, risks and services among probation officers, and "gives them a different view of the community where the client lives," said Lacey. "Communities of color are not just venues of pathology, but places with assets where solutions will be made." Some probation officers are even embedded in community-based organizations that provide resources and services. A community-based setting also brings advantages to probationers and parolees, who no longer have to miss work or other obligations to travel to faraway offices to report.

B. The Role of Corrections in Reducing Disparities

Mike Randle, a long-time corrections executive from Ohio, observed that many people are surprised to learn that over half of state prisoners serve only 12 months or less. "Prison should be reserved for serious, violent predatory offenders, yet our prisons are clogged with people serving short terms for less serious offenses."

Now more than ever, said Randle, there is a new interest among policymakers in reducing incarceration rates in order to reduce pressure on state budgets. Although "no politician ever won election arguing for rehabilitation rather than prison," in the words of one conference participant, there is a willingness to talk about alternatives to incarceration that reduce reoffending.

"The literature is clear that after 18 months, probation supervision brings diminishing returns, despite the fact that misdemeanor charges carry a three-year term of probation . . . ."

After more than 23 years working in state prison facilities, Randle now runs a new initiative that provides front-end diversion from prison. The Community-Based Correctional Facility (CBCF) is a secure institution in the heart of Cleveland, the largest "sending" community to state penitentiaries in Ohio. The program targets offenders with low-level felonies who are at high risk to reoffend without intervention. Placement in CBCF is based upon risk level, with residents otherwise falling somewhere between electronic monitoring and prison.

The goals, according to Randle, are to give judges another option short of prison and to help offenders become productive members of the community. Offenders serve up to 6 months with substance abuse counseling, cognitive behavioral treatment, anger management, and employment or other activities that maintain their ties to the local community. Residents earn the opportunity to leave the facility after some period of time. Staff interaction with residents is rooted in evidence-based cognitive practices — as well as the expectation that they will succeed. "We help offenders recognize risky behavior, engage in more effective de-

cision-making, and reward positive behavior IMMEDIATELY," said Randle.

C. Sentencing Reform

Some conferees suggested that tight budgets across the country and within the federal government have created a policy window for sentencing reforms that promote crime prevention, shorter prison terms, and services or other programming to reduce reoffending. Nkechi Taifa, a policy analyst with the Open Society Foundations in Washington, D.C., noted that two major pieces of federal legislation have passed Congress in recent years. Both have improved outcomes for people of color in the criminal justice system:

- **Second Chance Act** — Signed into law on April 9, 2008, the Second Chance Act (P.L. 110-199) was designed to improve outcomes for people returning to communities from prisons and jails. The legislation authorizes federal grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victims support and other services that can help reduce recidivism. In 2012, 58 million dollars was appropriated toward re-entry services.

- **Fair Sentencing Act** — Signed into law in 2010 by President Obama, the Fair Sentencing Act (P.L. 111-220) reduced the 100:1 sentencing disparity between crack and powder cocaine to 18:1. The legislation also eliminated the five-year mandatory minimum sentence for simple possession of crack cocaine.

David LaBahn of the APA described a recent effort in California to downgrade certain misdemeanors to a $250 fine.

Notably, each of these pieces of legislation passed with strong bipartisan support. Advocates of reform included state prosecutors and former U.S. Attorneys, who testified before the U.S. Sentencing Commission.

At the same time, sentencing reform continues to face stiff opposition from the private prison industry, which makes its profit on a per prisoner basis and therefore depends on continued high prison commitments. Private prisons have won contracts largely on the argument that their operational costs are lower; however, contracts are financed entirely by the taxpayer, and private operators have no incentive to save bed space, noted several panelists. While some states have barred private prison contractors after poor experiences with them, other states are actively considering privatizing state facilities.

Conference participants called for additional sentencing reform efforts on the state and local level that would:

- **Reduce certain misdemeanors to infractions**, such as walking between subway cars, fare beating and disorderly conduct. David LaBahn of the APA described a recent effort in California to downgrade certain misdemeanors to a $250 fine. Sponsors ultimately could not get it through the legislature, but district attorneys in some jurisdictions subsequently worked with judges and the defense bar to create a diversion process that took those cases out of the system. In 2010, the California legislature approved the downgrade of simple marijuana possession to a fine of $100.

- **Reinvest justice savings in community programs that prevent crime and recidivism**. Justice Reinvestment is a reform initiative that seeks to reinvest savings from prison commitments into non-incarceration alternatives and community resources in high-crime neighborhoods.

- **Restrict the use of conspiracy laws**. Karen Garrison, a criminal justice reform activist from Washington, D.C., whose twin sons were wrongfully convicted of drug conspiracy, lamented the long reach of conspiracy laws. Conspiracy charges — which under federal law carry significant sentencing consequences — are too often brought against peripheral actors in order to compel them to inform on others.

D. Networks for Sharing Best Practices

Some conferees agreed that more should be done to ensure the sharing of best practices that reduce racial disparities. Among other resources, conferees mentioned the following professional networks that help systems reduce the use of incarceration, detention and disproportionate minority confinement:

- **The Juvenile Detention Alternatives Initiative (JDAI)** of the Annie E. Casey Foundation. JDAI networks juvenile justice system stakeholders around the country and focuses on reducing disproportionate minority confinement, as well as overall detention rates of young people. *See* www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx for more information and resources.

- **The Haywood Burns Institute** focuses on strategies to reduce racial disparities in the juvenile justice system. *See* www.burnsinstitute.org for more information and resources.

IX. Community Justice

Panelists: Brett Taylor, Center for Court Innovation (moderator); Anne Swern, Brooklyn District Attorney's Office; Dennis Lawrence, AmeriCorps; Robin Steinberg, Bronx Defenders; James Brodick, Brownsville Community Justice Center and NYC Community Cleanup.

For more than 15 years, New York City has been the locus of several pioneering community justice initiatives developed by innovative defender, prosecution and court offices. This panel explored the role and potential of community justice models in addressing racial disparities.

Panelists agreed that the core features of a "community justice" approach are: 1) consultation with local residents — including youth, local businesses, offenders and crime victims — about community needs and priorities; and 2) services or advocacy to address the underlying causes of crime or criminal justice involvement.

A. Defender-led Community Justice: The Bronx Defenders

Robin Steinberg is the executive director of the Bronx Defenders, a 15-year-old public defender agency located in the poorest congressional district in the nation. Steinberg described her office's model of "holistic defense" as one that seeks solutions to the underlying issues driving clients into the criminal justice system. The Bronx Defenders also seeks to mitigate the collateral consequences flowing from involvement in the criminal justice system. This process is "informed by, and responsive to community voices," said Steinberg. "Public defense is not the solution," she cautioned, "but how we practice defense can have an impact on racial disparity." Steinberg outlined several community-oriented practices that the Bronx Defenders developed to do so:

"Public defense is not the solution," she cautioned, "but how we practice defense can have impact on racial disparity."

- **Create structures and mechanisms to capture community voices regarding advocacy needs**. The Bronx Defenders has a client advisory board, convenes regular town hall meetings and conducts open, walk-in intake. It also conducts collaborative information sessions and Know-Your-Rights workshops with other community-based organizations and city agencies. These efforts "help us develop responses to larger issues that are surfacing," said Steinberg.

In response to client input, staff at the Bronx Defenders developed several initiatives:

- **A voter registration project** at the city's largest jail to counteract the "urban myth" (one often propagated by misinformed corrections and probation officers) that people with arrest or conviction records cannot vote in New York State.

- **Civil litigation challenging stop-and-frisk policies** in New York City public housing developments, as well as a class action lawsuit, successfully settled with the NYPD, challenging illegal arrests for loitering.

- **A data collection and public education project on marijuana arrests**. Bronx Defenders staff heard repeatedly from community members that police were routinely throwing young men of color against the nearest wall, going into their socks and pockets, pulling out (non-criminal amounts of) marijuana, and then charging the youth for marijuana possession "in plain view." This policing practice is illegal, but had remained little more than anecdotal. The Bronx Defenders began to collect and publish data that educated the public about racial disparities in marijuana arrests. The initiative has helped spur a statewide debate and a legislative proposal from Governor Andrew Cuomo to decriminalize public possession of small amounts of marijuana, lowering the penalty from a misdemeanor to a non-criminal violation.

- **A bail initiative** that educates defense attorneys and judges about alternatives to cash bail authorized by the New York State bail statute. "We do not need pretrial supervision to throw a wider net of supervision over clients," argued Steinberg. "What we need are alternatives to cash that will assure their appearance in court." The Bronx Defenders also created its own revolving bail fund that helps clients meet bails of $1,000 or less.

B. Community Prosecution in Brooklyn

Anne Swern, First Assistant District Attorney in the Kings County (Brooklyn) District Attorney's Office, described community prosecution simply as "community justice delivered by the prosecutor's office." "My boss is an elected official, so the community must have a role in all I do," emphasized Swern. For prosecutors, building relationships with the community is critical to generating confidence in the criminal justice system. Without that confidence, witnesses will not come forward and people will be afraid to report crime. For all of these reasons, explained Swern, the Brooklyn DA's office "is known as the office of 'yes.' We initiate projects based on what the community tells us is important." Swern described some of the needs they heard over the years and the community justice programs that emerged in response:

The Bronx Defenders began to collect and publish data that educated the public about racial disparities in marijuana arrests.

- **Alternatives to jail and prison** that would keep those charged with less serious crimes close to their homes and families, while also ensuring accountability and public safety. The Brooklyn DA's office became the first prosecutor's office in the nation to develop a drug treatment alternative program (called DTAP in New York City, for Drug Treatment Alternatives to Prison) for putative felons who normally would have served at least 2-4 years in prison. "We took seriously the notion that this is a medical problem," said Swern.

- **The need for support for re-entering prisoners**. The Brooklyn DA's office created a re-entry partnership called ComALERT (Community and Law Enforcement Resources Together). With on-site drug treatment, job development, public health testing, and GED instruction, ComALERT connects re-entering residents with community services all in one venue. The DA's office used its own resources to fund the program, which was later evaluated by a researcher at Harvard University.

- **Education for over-age students.** The Brooklyn DA's office collaborated with the city's Department of Education to launch a program in Brownsville called "Restart" for 13-14 year olds who have been held back a grade or more, but who are too mature physically or emotionally to join a classroom of 6th graders. The project, located in a neighborhood with a high drop-out rate, has had a 100 percent graduation rate in its first year of operation. Swern described the collaboration as an example of how prosecutors can leverage their credibility as crime fighters to "connect the dots between public safety and community initiatives."

The Brooklyn DA's office was also instrumental in bringing a community court to Red Hook, an impoverished neighborhood in Brooklyn reeling from the shooting of a popular school principal. Swern recounted, "We wanted a community court that would be transparent, accessible and accountable to the community. We didn't want to limit the kinds of cases it could hear but wanted to think expansively." Hence the Red Hook Community Justice Center was born to address the needs of the community, not just the litigants in court.

Community Courts: The Red Hook and Brownsville Examples

James Brodick, a project director with the Center for Court Innovation, described the skepticism that greeted the initial proposal to build a community court in Red Hook, a geographically isolated neighborhood that lies along the Gowanus Canal in northern Brooklyn. "No one is standing up and clapping at the prospect of a court coming to the neighborhood. When people go to court, it's never for a

good reason," said Brodick. Bringing "early deliverables" to the neighborhood is a key to getting buy-in for a community court. Recognizing that most crime results from a lack of opportunity, the first priority was a community-wide survey, conducted door to door, to understand what people saw as the biggest issues in the neighborhood. "Job developers, educators and social workers are all part of the equation, not just lawyers and judges," said Brodick. Several initiatives — as well as unintended benefits — flowed from the survey process:

Brodick said that the community court model had helped to reduce crime recidivism by 10 percent among adults and by 20 percent among young people.

- **The launch of an AmeriCorps program and teen court.** Instead of the usual model, in which privileged people come from afar to help a blighted neighborhood, the court launched an AmeriCorps program with young people from the Red Hook and Brownsville neighborhoods who serve their own community. The program has trained young people as organizers and community leaders. Among the initiatives is a teen court, in which youth trained as mediators help to resolve cases involving other young people. "This is an empowering experience that gives them a different lens on the criminal justice system," said Brodick. "It teaches accountability, fairness and getting people on the right track." Dennis Lawrence, a lifelong Brownsville resident and AmeriCorps volunteer, praised the program's interventions as literally life saving. "Brownsville is in a state of genocide — we have young people who are killing each other. We help to mediate between their current situation and future incarceration."

- **Pretrial supervision**. The community court model houses a pretrial services office on site. The pretrial investigation and monitoring services have given judges greater confidence that defendants will appear in court. As a result, community courts are 14 times less likely to require bail than traditional courts, said Brodick. "It will mean more conditions, but no cash."

- **One-stop services**. The community court offers drug treatment, a job center and other services, all at the courthouse site. Job training programs include driving instruction, culinary arts classes and GED training.

Brodick said that the community court model had helped to reduce crime recidivism by 10 percent among adults and by 20 percent among young people. Red Hook is now one of safest places in Brooklyn, he said, and has attracted new stores/employers like Ikea and Fairway to the neighborhood.

Another positive, although unintended, consequence of the community court model was greater system accountability, said Brodick. "The culture changes when cases go in front of the same judge, prosecutor and Legal Aid attorney every week" in a small court, he said, because officials more readily see patterns of injustice and act on them. Brodick gave as an example a judge who heard repeatedly from young defendants coming before him that a certain police officer was harassing them. That judge called on Brodick, as the court administrator, to contact the precinct chief and investigate. "Downtown, when you're working cases in front of different judges, you're less likely to worry about what's best for this person or the community, and more concerned about moving the docket," said Brodick. Anne Swern agreed. She noted that the Brooklyn DA's office had also adopted a catchment zone model that divided staff among 23 police precincts of heterogeneous crime rates that better allows prosecutors to identify troublesome patterns and hotspots and develop local relationships. "It's not as comprehensive as a community court with everything and everyone under one roof, but it requires far fewer resources, and thus can address the remaining 20 police precincts that do not have community justice centers with a similar philosophical approach," said Swern.

The Center for Court Innovation is now taking its community court model to Brownsville, a two-square-mile Brooklyn neighborhood of 115,000 people, 40 percent of whom live in public housing. Brownsville has a serious drug and crime problem. As part of its start-up effort, the court has launched a joint program with the Department of Probation, which targets 16-to-24-year-olds for job training. Enrollees participate in classes for six months and even receive a stipend.

The court is also trying to ease the tension between young people and police in the neighborhood. Brodick described a typical dynamic in which young rookies — wary of Brownsville's reputation as a tough neighborhood — were getting into ego-fueled altercations with young neighborhood men that frequently spiraled out of control. The rookies would "go in with their guard up, not willing to nod and smile at residents, or look people in the eye. Given how young people in those neighborhoods already view cops, you can guess how those interactions end up," said Brodick. As court officials, "We walk the line of keeping good relations with the police and community, which is not always easy. We say to the local captain — whether this is an impact zone, or whether you do stop-and-frisk policing is not

Ann Swern of the Brooklyn DA's office added mental illness and insufficient mental health services to the list of problems that are deposited on the doorstep of a criminal justice system neither designed nor equipped to handle them.

our call. But we can help introduce your officers to the neighborhood." The community court began to arrange community tours with teams of young people from the neighborhood. The community walks have helped to "get both parties to see eye to eye. The truth is that both the rookie cops and young people in Brownsville are scared."

Brodick summed up by saying, "Engaging communities in the planning process, and using the right professionals to come up with good outcomes to cases, helps to hold systems accountable."

C. Do Community Justice Models Really Impact Racial Disparities?

Robin Steinberg challenged the element of complacency underlying the presentations. Community justice programs in courts, prosecution and defender offices, "while interesting, innovative and an improvement over traditional models," are essentially "palliative care" that fails to address the larger issues of racism, poverty and lack of opportunity that went "unaddressed long before anyone hits the courthouse steps." Steinberg also said:

> *We have decided that rather than solve those problems of racism and poverty, we will cede them to the criminal justice system. It shouldn't be the case that the biggest building and most resourced entity in a poor neighborhood is the courthouse — not the schools, hospitals or conflict resolution organizations, but the courthouse. . . . Criminal justice agencies aren't really addressing the larger issues of racialized policing and how we respond to poor versus wealthy communities. . . . [O]ur agencies need to be pushing and asking the larger questions. It's not good enough to say to police, "How you do your stop and frisk — that's your call." It's NOT their call, it's OUR call [as officers of the court]. We should be calling that out as a problem.*

Steinberg also questioned the value of offering services after arrest, because "people needed those services long before they got arrested into the criminal justice system." She also refuted the assumption of therapeutic justice models that every defendant needs to get "back on track":

> *In New York City a majority of people being hauled into the criminal justice system — almost all of them poor people of color — are coming in on low-level misdemeanors. These are not [offenses] that actually require 'getting back on track.' We have to question why we are using the long arm of the criminal justice system to arrest young people who write on their desk, or black and Latino men who write their name on a wall, or why we arrest kids for pot in a pocket when we don't arrest other kids for pot. This has less to do with lives off track, and more to do with how we define crime, whom we target, and how we police certain communities.*

Like earlier panelists, Steinberg argued that "we'd resolve most race disparity if you either policed evenly, or made the decision that we shouldn't be criminalizing non-violent, non-victim crimes. The impact of this policing model is to further victimize and disenfranchise people who, together with their families, suffer horrible consequences that flow from even a marijuana arrest." Community justice models and criminal justice agencies, she concluded, are "too late in the game" to eliminate racial disparity in the criminal justice system.

Ann Swern of the Brooklyn DA's office added mental illness and insufficient mental health services to the list of problems that are deposited on the doorstep of a criminal justice system neither designed nor equipped to handle them. But Swern argued that the system must still hold people accountable for less serious offenses in order to create a livable society. "Don't talk to me about decriminalization unless you have a plan and some details about how you're going to do it and provide resources to hold people accountable. I don't need a bicyclist riding on the sidewalk in the criminal justice system, but I don't want him mowing down an old woman either."

In these less serious cases, Swern suggested that agencies do have a duty to reduce the harm of criminal arrests. "I can separate out those cases that are serious and victimizing the community. As for the other, far larger group of cases — I have to ask myself whether there is anything I can do to make the trip to the courthouse less than a complete harm or waste of time."

Swern explained that the Brooklyn DA focuses on jail and prison diversion, particularly for drug crimes, as a strategy for minimizing racial disparity, because "we understand that incarceration undermines family and economic support relationships." Her office was one of the first in the country to create a drug treatment alternative for both felony and misdemeanor drug offenders. In the face of criticism from defense attorneys, who argued that the year-long program widened the net of surveillance for clients who would otherwise face a limited or suspended jail sentence, the parties compromised upon a policy that requires drug treatment, but only after the 12th misdemeanor drug arrest.

Even though these approaches cannot completely address the full range of problems steering cases to the courthouse, "we can remediate what we see," concluded Swern.

James Brodick argued that strategies undertaken by community courts, like community-police walks, build relationships that can in fact reduce racial bias. "Officers should know who the young people are in the communities they police. It's problematic that young people run when they see cops," he argued. "If we can identify a police captain and young people who are willing to put themselves out there [to build relationships], that's good," he said. AmeriCorps volunteer Dennis Lawrence agreed. "Ego can get in the way of patience and courtesy. It's important [for police officers] to show some respect, and know your name."

Brodick also argued that by reducing crime, community justice initiatives lay the groundwork for economic development in poor neighborhoods. Pointing to the transformation of Red Hook as an example, Brodick noted, "Fairway and Ikea aren't willing to put businesses into neighborhoods they do not view as safe. Economic development and jobs depend on public safety." He also suggested that hope and motivation were essential ingredients in a community-transformation strategy. AmeriCorps and other youth development programs show young people that they are "worth more than jail, and that with patience and concern, I can become somebody."

"Officers should know who the young people are in the communities they police. It's problematic that young people run when they see cops."

X. Recommendations For Moving Forward

The conference ended with a call for advocacy on two fronts to reduce the race-related harms of the criminal justice system:

1. **Structural reform at points of entry and sentencing,** by ensuring fair and equal law enforcement across socio-economic and geographic groups and/or repealing policies and practices that drive racial disparities (e.g., racially disproportionate policing and excessive drug and other sentences); and

2. **Fair administration of justice reforms to minimize the impact of existing racial and economic disparities,** through periodic monitoring, assessment and review of racial outcomes in bail decisions; prosecutorial charging and diversion; post-arrest service programs; and post-release programs that help ex-offenders lead productive lives.

The conference focused mainly on the second set of strategies — assessment, diversion and provision of services — that reduce the worst impacts of the criminal justice system on racial minorities. The discussions spotlighted a host of innovative strategies being developed by forward-thinking prosecutors, defenders and judges to reduce the disparate impact of the criminal justice system on people of color. While more can and should be done to replicate these best practices, most participants urged greater efforts to address the structural factors that funnel so many blacks and Latinos into the criminal justice system in the first place. Some conferees especially called for changes in policing practices that disproportionately target poor people of color and other policies that use law enforcement to address social and economic problems. Without greater efforts to address harsh policing and sentencing policies, initiatives aimed at the fair administration of justice in courts will be insufficient to eliminate the racial disproportionality that currently defines the U.S. criminal justice system.

A recurring theme in the conference was a call for greater public debate and conversation about what are — and what should be — our priorities for the criminal justice system. *Do our laws, policies and practices reflect public consensus on these priorities? If not, what needs to change? How do we move the system away from a paradigm focused on arrest, punishment and social control of communities of color to one that focuses on healing and restoration? How do we avoid using courts as the dumping ground for difficult or seemingly intractable social problems?*

Conference participants underscored the need to bring police, mayors and elected officials — as well as members of the public to whom they respond — into the conversation about the need for deeper structural reform. Specifically, some conferees called for more vocal advocacy to reform the wide-ranging policies and practices that drive racial disparities. These include:

- outlawing racial profiling practices by police;
- strengthening civilian review and control of local police departments;
- reforming bail policies to make release for non-violent offenders the default, and reducing or eliminating the requirement of cash bail;
- bringing transparency and accountability to prosecutorial decisions — especially charging and plea bargains;
- decriminalizing more non-violent drug offenses;
- ending the practice of adjudicating juveniles in adult courts;
- repealing mandatory minimum sentencing schemes;
- repealing zero-tolerance school discipline policies that funnel youth into the criminal justice system;
- reforming "truth-in-sentencing" laws that prevent or delay the consideration of parole;
- repealing post-conviction consequences that impede the successful re-entry of those with criminal histories; and
- assessing the impact of political fund-raising and corporate contributions on sentencing.

This is, no doubt, an ambitious agenda. Deborah Small, a conference advisor and leader in the drug policy reform movement, encouraged bold goals and bold thinking:

> *"Our vision and goals should be ones that future generations will believe were sufficient to the problem. We would not remember the Montgomery Bus Boycott if its demand was limited to two or three extra rows to sit on in a segregated bus. It is because they demanded and fought for dismantling legal segregation that they sparked a national movement and achieved historical significance. Given the magnitude of mass criminalization in the United States and its continuing devastating impact on African American and Latino families and communities, our goals should be equally ambitious and our methods equally committed."*

"Our vision and goals should be ones that future generations will believe were sufficient to the problem . . . "

ENDNOTES

1. Sentencing Project, Incarceration, at http://www.sentencingproject.org/template/page.cfm?id=107.

2. National Employment Law Center, 65 Million Need Not Apply: the Case for Reforming Criminal Background Checks (2011).

3. Steven Zeidman, *Time to End Violation Pleas*, N.Y.L.J., April 1, 2008.

4. NAACP Criminal Justice Fact Sheet, at http://www.naacp.org/pages/criminal-justice-fact-sheet.

5. Jerry Kang, National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Implicit Bias — A Primer for Courts (Aug. 2009).

6. The American Bar Association offers a toolbox of research and resources on implicit bias, and strategies for "debiasing," available at http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/implicit-bias-toolbox.html.

7. Mary T. Phillips, New York City Criminal Justice Agency, A Decade of Bail Research in New York City (2012).

8. Mary T. Phillips, New York City Criminal Justice Agency, 2008 Annual Report at 16 (reflecting a total of 369,440 arraignments of which bail was set in 32 percent of the continued cases); Human Rights Watch, The Price of Freedom at 35 and Figure 5 (Dec. 2010).

9. *See* Human Rights Watch, The Price of Freedom at 21 (Dec. 2010) (reporting that in 2009 there were 98,980 total admissions to New York City's jails, 51,047 of which were pretrial detainees incarcerated solely because they had not posted bail).

10. *Id.* Blacks and Hispanics account for 89 percent of all pretrial detainees held on bail of $1,000 or less.

11. *Id.* Of the city's 98,980 jail admissions in 2009, 23 percent (22,846) were being held for misdemeanor cases.

12. The New York City Criminal Justice Agency (CJA) is a private, non-profit corporation providing pretrial release services in New York City's Criminal Courts. CJA's Research Department conducts studies on a variety of criminal justice policy issues.

13. Mary T. Phillips, New York City Criminal Justice Agency, Research Brief No. 27, How Release Type Affects Failure To Appear at 3 (Sept. 2011) (demonstrating that the failure to appear (FTA) rate for all cases with a defendant who was released pretrial for the combined boroughs was 16 percent).

14. *Id.*

15. Mary T. Phillips, New York City Criminal Justice Agency, 2008 Annual Report at 27, 40 (Dec. 2009).

16. Mary T. Phillips, Research Brief No. 27 at 5, 7 (asserting that "bail at the lower end of this range is just as effective as higher amounts in assuring return to court"); New York City Criminal Justice Agency, Inc. Effects of Release Type on Failure to Appear (October 2011) at 55 ("the FTA rate was 17 percent for ROR compared to 14 percent for bail"; "Very low bail had nearly the same probability of FTA as higher bail: 12 percent among cases with bail amounts from $50 to $500, dropping below 10 percent only when bail rose to amounts over $7,500.").

17. Human Rights Watch at 13 (In 48 percent of the cases in which a person arrested in 2008 had bail set at $1000 or less, the person charged was never able to post bail); New York Criminal Justice Agency, Inc., Pretrial Detention and Case Outcomes, Part 1: Nonfelony Cases Final Report (November 2007) at 22. These numbers remain consistent with bail amounts from $500 to over $4,000. *Id.* (reflecting a total percentage of people who made bail at arraignment when bail was set as ranging from 6 percent to 14 percent and a percentage of those held to disposition when bail is set ranging from a low of 42 percent (where bail was set between $500 and $749) to a high of 58 percent (where bail was set between $2,000 and $3,999)).

18. Human Rights Watch at 30 (In 2009, the average length of pretrial incarceration for people charged with misdemeanors was 15 days; yet in 48 percent of such cases resulting in a conviction and jail sentence, the sentence was less than 15 days).

19. Criminal Procedure Law § 510.30(2)(a) requires a judge to consider various factors, including the accused's "employment and financial resources" as set forth in subdivision (ii). The preface to this provision states that "the court must consider the kind and degree of control or restriction that is necessary to secure [an accused's] court attendance when required." *Id.* According to Meis of the Bronx Defenders, "a fair reading of the statute requires a judge to consider an accused's finances but only insofar as a financial restriction would be necessary to ensure return to court. Where an accused has limited finances, no, or a very low financial restriction would adequately ensure return to court."

20. Beginning on January 28, 2013, this provision became effective in all five boroughs in New York City for amounts up to $2,500.

21. Human Rights Watch at 13 (Where bail is set, judges set bail below $500 in only 6 percent of cases, at $500 to $749 in 6.1 percent of cases and at $750 to $999 in 2.7 percent of cases).

22. Jamie Fellner, *Bail Shouldn't Mean Jail for Poor Nonfelony Defendants*, New York Law Journal, Feb. 9, 2011.

23. Pew Research Center, "Optimism about Black Progress Declines" at 9 (Nov. 13, 2007).

24. Equal Justice Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy (Aug. 2010).

25. Thomas P. Bonczar, Bureau of Justice Statistics, Prevalence of Imprisonment in the U.S. Population, 1974-2001 at 8 (2003).

26. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, American University Law Review 53:1 (Oct. 2003).

27. U.S. Census Bureau, State and County Quick Facts, at http://quickfacts.census.gov/qfd/states/36/3651000.html.

28. Alice Speri, *2010 Marijuana Arrests Top 1978-96 Total*, New York Times, Feb. 11, 2011.

29. *NYPD Finds Most Guns Outside of Stop-and-Frisk Hotspots*, WNYC, July 16, 2012 (Out of more than 685,000 stops in 2011, about 770 guns were recovered, with most of these in areas outside those most heavily policed by stop-and-frisk hot spots).

30. Known together as "The Community Safety Act," the first two bills passed the New York City Council with veto-proof majorities on June 27, 2013, and remained unsigned by Mayor Bloomberg as of this report's publication date.

31. Graham Rayman, *Robert Johnson, Bronx DA, to NYPD: No More Frivolous Stop and Frisk Trespassing Arrests*, Village Voice Blogs, Sept. 26, 2012.

APPENDIX A: BIOGRAPHIES

STEWART D. AARON is a partner and head of the New York Office of Arnold & Porter LLP. Mr. Aaron practices commercial litigation with an emphasis on securities law matters. His practice involves the representation of clients in litigated matters in state and federal courts, and before regulatory bodies and self-regulatory organizations. He is also a past president of the New York County Lawyers' Association.

NICOLE AUSTIN-HILLERY is the first director and counsel of the Washington, D.C. office of the Brennan Center for Justice at New York University School of Law, which she opened in March 2008. In her role, Ms. Austin-Hillery serves as the chief advocate for the Brennan Center on a host of justice and democracy issues in D.C. Before beginning her career at the Brennan Center, Ms. Austin-Hillery practiced with the law firm of Mehri & Skalet, PLLC where she focused primarily on the firm's civil rights employment class action litigation practice.

STEVEN D. BENJAMIN is an attorney in private practice with the firm of Benjamin & DesPortes, based in Richmond, Virginia. In addition, he serves as special counsel to the Virginia Senate Courts of Justice Committee. Mr. Benjamin is also the 54th president of the National Association of Criminal Defense Lawyers (NACDL).

BARRY CAMPBELL came to the Fortune Society in 1992 after his release from incarceration. While an intern at the Fortune Society, he impressed everyone with his ability to relate to various people from very diverse walks of life. He was hired as staff in 1993. He left briefly but returned in January 2004 to work as the special assistant to the President & CEO Joanne Page ever since.

ZACHARY CARTER is a partner and co-chair of Dorsey & Whitney LLP's White Collar Crime and Civil Fraud practice. Mr. Carter served as U.S. Attorney for the Eastern District of New York from 1993 to 1999. Mr. Carter practices in the areas of white collar criminal defense and securities and other complex civil litigation, representing government contractors and companies in government regulated industries.

INIMAI M. CHETTIAR is the director of the Brennan Center's Justice Program, which focuses on reducing mass incarceration. Prior to her work at the Brennan Center, Ms. Chettiar helped start up the American Civil Liberties Union's Initiative to End Overincarceration. Her reform efforts and publications have been featured in *The New York Times*, *The Wall Street Journal*, *The Hill*, *Politico*, NBC.com, NPR, *The Huffington Post* and many others.

TANYA COKE is a program development consultant for major foundations and social justice nonprofits. From 1998 to 2002, she was a director of the Criminal Justice Initiative and later Counsel to the Open Society Institute's (OSI) U.S. Programs, where she designed the foundation's signature initiative to reduce incarceration in the United States. She began her career as an anti-death penalty advocate with the NAACP Legal Defense Fund, and later served as Acting Director of the Poverty and Race Research Action Council (PRRAC). After law school, she clerked for the Honorable Pierre N. Laval on the Second Circuit Court of Appeals and practiced as a trial attorney in the Federal Defender Division of the Legal Aid Society in Manhattan.

HON. MARK DWYER is a judge in the New York State Court of Claims and an acting justice of the New York State Supreme Court. He is also the chair of the ABA Criminal Justice Standards Committee and the Chair of the New York State Bar Association's Criminal Justice Section. He is one of the five authors of *West's New York Pretrial Criminal Procedure* and is the treasurer of the Eastern District Civil Litigation Fund, a non-profit group that arranges for pro bono representation of indigent persons in federal civil litigation.

EDWIN (EDDIE) ELLIS is the founder and president of the Center for NuLeadership on Urban Solutions. Under his leadership, the Center developed several innovative projects, including: Institute for Juvenile Justice Reform and Alternatives (IJJRA), the Full Employment Opportunities Campaign, NuLeadership Training Institute, NuUrban Marshall Plan, Criminal Justice Practitioner Training Program, and Project ReNu. He is also the host and executive producer of "On the Count: The Prison and Criminal Justice Report," a weekly public affairs program broadcast over Radio Station WBAI (99.5 FM) in New York City.

HON. FERN FISHER serves as Deputy Chief Administrative Judge for New York City Courts and is also charged with statewide responsibility for access to justice issues. As part of her responsibilities, Justice Fisher also handles the city-wide administration of the Civil Court. Justice Fisher contributes the views from the bench in *Residential Landlord-Tenant Law in New York*, a practice guide by Lawyers Cooperative Publishing.

LEROY FRAZER, JR., serves as Executive Assistant District Attorney for External Affairs at the New York County District Attorney's Office. In May 2009, Mr. Frazer was appointed to the position of First Assistant District Attorney, which he held until he assumed his current post on January 1, 2010. In his current position, Mr. Frazer also serves as coordinator of the New York State Law Enforcement Council and Attorney-in-Charge of the District Attorney's Northern Manhattan Office.

HON. MARCY FRIEDMAN is a justice of the Supreme Court, New York County, Civil Term, and was recently named to the Commercial Division of that court where she presides largely over complex commercial cases. She continues to hear arraignments four times a year in Criminal Court, New York County.

WILLIAM GIBNEY has been with the Legal Aid Society Criminal Practice Special Litigation Unit since 1999 and has been the director of the unit since 2007. He has conducted class action litigation against the New York City and New York State regarding (i) conditions in the pre-arraignment holding pens, (ii) jail time credit for mentally ill prisoners, and (iii) improper arrests resulting from police sweeps in public housing.

THOMAS GIOVANNI is counsel to the Justice Program at the Brennan Center, and director of the Community-Oriented Defender Network, a national network of defender offices housed in the Brennan Center's Justice Program. Before coming to the Brennan Center, Mr. Giovanni was a public defender for a decade at the Neighborhood Defender Service of Harlem. And he has collaborated extensively with clinical law programs at Cardozo and Fordham.

VANITA GUPTA is the deputy legal director of the American Civil Liberties Union and director of the ACLU's Center for Justice, which houses the organization's criminal justice reform, prisoners' rights, and capital punishment work. She directs the ACLU's National Campaign to End Overincarceration. In addition, Ms. Gupta is an adjunct clinical professor at NYU School of Law, where she teaches and oversees a racial justice litigation clinic.

HON. MELISSA C. JACKSON is a judge for the New York City Criminal Court of New York County, New York. Her current term expires in 2017. Judge Jackson formerly served with the Kings County District Attorney's Office for nearly 22 years where she rose to become Deputy District Attorney of the Major Frauds/Rackets Bureau.

RICK JONES is the executive director and a founding member of the Neighborhood Defender Service of Harlem (NDS). He is a distinguished trial lawyer with more than 20 years of experience in complex multi-forum litigation. Rick is a lecturer in law at Columbia Law School, where he teaches a criminal defense externship and a trial practice course. He is also on the faculty of the National Criminal Defense College (NCDC) in Macon, Georgia, and is frequently invited to lecture on criminal justice issues throughout the country.

DR. DELORES JONES-BROWN, PH.D. is a former assistant prosecutor in Monmouth County, New Jersey and is currently a professor in the Department of Law, Police Science and Criminal Justice Administration at John Jay College of Criminal Justice, City University of New York. She is the founding director of the John Jay College Center on Race, Crime and Justice and its current faculty research fellow.

HON. BARRY KAMINS is Administrative Judge of the Criminal Court of the City of New York and Administrative Judge for Criminal Matters, Second Judicial District. Judge Kamins is the former President of the Association of the Bar of the City of New York. He is the author of *New York Search and Seizure*, a leading treatise on the Fourth Amendment.

TIMOTHY KOLLER Appointed as Assistant District Attorney in Richmond County in 1980, Koller has served there for 32 years as a misdemeanor prosecutor, Chief of the Career Criminal Unit, Chief of the Investigations Bureau, Chief of the Supreme Court, and Executive Assistant District Attorney, a position that he currently holds where he oversees the day-to-day operations of that office. Koller has lectured at the NYPD Police Academy, the New York State Division of Criminal Justice Services Basic Prosecutors' Course, as well as numerous continuing legal education presentations.

CLINTON LACEY recently joined the New York City Department of Probation as the Deputy Commissioner for adult operations. In this capacity he is responsible for oversight of a division that supervises some 27,000 clients on probation and is leading a series of innovative initiatives to designed to reform the Probation Department's key policies and practices. Previously, Clinton served as the director of the Youth Justice Program at Vera Institute of Justice, where he oversaw a technical assistance project focused on the reform of New York State's juvenile justice policies.

DENNIS LAWRENCE is currently serving as an AmeriCorps volunteer with the Brownsville Community Justice Center, a demonstration project of the Center for Court Innovation. He is working in conjunction with the Department of Probation on a project called Justice Community that focuses on adult male probationers ages 16-24.

DONNA LIEBERMAN has been executive director of the New York Civil Liberties Union since December 2001. Under Lieberman's leadership, the NYCLU has expanded the scope and depth of its work, supplementing the pursuit of litigation with an aggressive legislative advocacy and a field organizing program. As a result, the organization is widely recognized as the state's leading voice for freedom, justice and equality, advocating for those whose rights and liberties have been denied, especially for those most marginalized by society.

GLENN MARTIN is the vice president of development and public affairs and director of the David Rothenberg Center for Public Policy at the Fortune Society, Inc., a social service and advocacy organization devoted to the successful re-entry and reintegration of individuals with criminal histories. Mr. Martin is responsible for developing and advancing Fortune's criminal justice policy advocacy agenda and providing leadership over the agency's Development and Communication Units.

WAYNE S. MCKENZIE is general counsel for the NYC Department of Probation (DOP). He is the primary advisor to the commissioner on all legal matters; ensures that the DOP is operating within the law at all times; provides direction and administrative review to all agency attorneys; and as a cabinet member participates in the formulation and administration of city policies, programs and legislative promulgation/review relating to adult and juvenile crime. Prior to joining DOP, Wayne was the founding director of the Prosecution & Racial Justice Program at the Vera Institute of Justice.

MARIKA MEIS has been a public defender for over 10 years. She joined the Bronx Defenders in 2004 and has served as legal director since 2008. As legal director, Ms. Meis supervises de novo bail applications and bail writs for the Bronx Defenders and trains lawyers on alternative forms of bail and bail advocacy.

RODNEY MITCHELL, a native Washingtonian and formerly incarcerated citizen, is currently a practicing attorney and an advocate for the formerly incarcerated in the D.C. metro area. Recently, he was appointed by D.C. Congresswoman Eleanor Holmes Norton to serve as a commissioner on the D.C. Commission on Black Men and Boys. Mr. Mitchell currently serves as the Re-entry Coordinator for the D.C. Department of Corrections.

LANCE PATRICK OGISTE is the counsel to the Kings County District Attorney Charles J. Hynes. Presently, among his many duties, Mr. Ogiste oversees the Appeals Bureau, the Major Narcotics Investigations Bureau, the Gangs Bureau and the ComALERT Program, which is a program to aid ex-offenders by helping them avoid returning to a life of crime by referring them to services offering job assistance, education, health/mental health treatment and housing assistance.

HON. RUTH PICKHOLZ presides in Criminal Term of New York Supreme Court, New York County. Previously, she held various posts in the New York City Mayor's Office, including Arson Strike Force Coordinator, Counsel to the Criminal Justice Coordinator, and Acting Criminal Justice Coordinator. She became a judge in 1990, when Mayor David Dinkins appointed her to the Criminal Court of the City of New York. Judge Pickholz currently presides over criminal trials and hearings in Manhattan.

CATHLEEN PRICE is a senior attorney with the Equal Justice Initiative, a non-profit law office that addresses problems in the criminal justice system. Since 1997, she has worked on behalf of death-sentenced prisoners, other offenders subject to excessively harsh punishments, and communities marginalized by poverty and chronic discrimination. She litigates on behalf of individuals, advocates before legislators and other policymakers, and serves as faculty at training seminars on the death penalty and related topics.

DIVINE PRYOR, PH.D. is a social scientist who has extensive knowledge and experience in the health and social service fields, having spent over half his career administrating youth development, domestic violence, prison re-entry, substance abuse, and other social service non-profit organizations. He is currently the executive director of the Center for NuLeadership on Urban Solutions, the world's first and only public policy, research, advocacy, and training center created and administered by formerly incarcerated professionals.

LEXER QUAMIE is a policy counsel with the Leadership Conference on Civil and Human Rights and the Leadership Conference Education Fund. There, she helps facilitate the development of a federal policy agenda for a broad coalition of civil and human rights groups and analyzes federal current civil rights issues and legislation in the areas of racial profiling and criminal justice, transportation equity, workers' rights, and equal opportunity. Prior to joining the Leadership Conference, Ms. Quamie was a policy analyst with the Center for Law and Social Policy, where she provided policy guidance on job quality and work life issues.

MICHAEL P. RANDLE began his career with the Ohio Department of Rehabilitation and Correction (ODCR) in 1990 as case manager and later was promoted to unit manager at the Ohio Reformatory for Women. Since then, he served in a number of positions including, mental health administrator for three female institutions of ODRC; deputy warden at Ross Correctional Institution; warden at Chillicothe Correctional Institution; and others. He is currently the program director of the Judge Nancy R. McDonnell Community Based Correctional Facility.

JONATHAN RAPPING teaches criminal law and criminal procedure at Atlanta's John Marshall Law School and is the executive director of the Southern Public Defender Training Center (now Gideon's Promise). Prior to joining the JMLS faculty, Professor Rapping was the chief of training for the Orleans Public Defenders and has been instrumental in the rebuilding of that office in the wake of Hurricane Katrina.

NORMAN L. REIMER is the executive director of the National Association of Criminal Defense Lawyers (NACDL), the nation's preeminent criminal defense bar association. Since joining NACDL, Mr. Reimer has overseen a significant expansion of the Association's educational programming and policy initiatives, cultivated external support and launched a major capital campaign. Mr. Reimer also serves as publisher of NACDL's acclaimed magazine, *The Champion*. Prior to assuming this position he practiced law as a criminal defense lawyer based in New York City for 28 years.

DEANNA RODRIGUEZ is the chief of the Gang Bureau in the King's County DA's Office, which she created in 1994 and which is the only specialized bureau of its kind in New York State. Ms. Rodriguez is considered an expert in her field. She speaks at conferences across the nation, including the National District Attorney's Association, and has testified before the New York State Legislature and the New York City Council regarding legislation and policy issues.

IRWIN SHAW, attorney-in-charge, Criminal Defense Practice of the New York County Office of the Legal Aid Society, has spent his entire 42-year legal career as an attorney with The Legal Aid Society's Criminal Defense Practice. As a staff attorney he represented thousands of indigent people accused of crimes in the New York State Supreme Court and New York City Criminal Court. In 2005 he was a recipient of NYCLA's award for outstanding public service.

THEODORE M. SHAW is professor of Professional Practice at Columbia University School of Law. He is also Of Counsel to Fulbright & Jaworski LLP. Mr. Shaw was an attorney with the NAACP Legal Defense and Educational Fund for 23 years, where he also served as director-counsel and president.

ABBE SMITH is the director of the Criminal Defense and Prisoner Advocacy Clinic, co-director of the E. Barrett Prettyman Fellowship Program, and professor of law at Georgetown University. Prior to coming to Georgetown, Professor Smith was deputy director of the Criminal Justice Institute, clinical instructor, and Lecturer at Law at Harvard Law School. Professor Smith teaches and writes on criminal defense, juvenile justice, legal ethics, and clinical legal education.

HON. GEORGE BUNDY SMITH served for 31 years as a judge in the courts of New York State, the last 14 on the New York State Court of Appeals, New York's highest state court. Following his retirement in 2006, he became a partner in the national and international law firm of Chadbourne & Parke, LLP. He now has his own firm, George Bundy Smith, Senior and Associates, LLP.

DARRYL STALLWORTH is an attorney specializing in the area of criminal defense. Prior to becoming a defense attorney and opening his own practice, Mr. Stallworth served for 15 years in the Alameda County District Attorney's Office, where he tried over 50 cases and resolved over 10,000 cases during his tenure. Mr. Stallworth has also lectured internationally on effective forms of case resolution.

ROBIN STEINBERG is a leader and a pioneer in the field of indigent defense. Starting as a criminal trial lawyer with the Legal Aid Society, continuing her career as a founding member and deputy director of the Neighborhood Defender Service of Harlem, and ultimately creating the Bronx Defenders in 1997, Robin has extensive experience in every aspect of public defense — from representing individual clients to creating a non-profit organization. Today, Robin advocates nationally and internationally for holistic representation, delivering papers, conducting trainings, providing technical assistance to defender offices moving towards holistic defense, and hosting visitors from around the world.

ANNE J. SWERN, the First Assistant District Attorney to Charles J. Hynes, District Attorney of Kings County (Brooklyn), has served as a prosecutor for 32 years. She supervises more than 1,000 attorneys and support staff members in their prosecutorial and administrative functions. She is the District Attorney's Office's senior executive for alternative sentencing policy and programming and is the executive in charge of the nationally acclaimed Drug Treatment Alternative-to-Prison (DTAP) Program, dedicated to diverting prison-bound non-violent predicate felons into residential substance abuse treatment. She supervises Brooklyn's three substance abuse treatment courts, the Red Hook Community Justice Center, the Mental Health Court and the Treatment Alternatives for the Dually Diagnosed (TADD) Program, which divert mentally ill defendants into treatment.

NKECHI TAIFA is a senior policy analyst at the Open Society Foundations and Open Society Policy Center, working to influence federal public policy in support of comprehensive justice reform. Ms. Taifa focuses on issues involving sentencing reform, law enforcement accountability, re-entry of previously incarcerated persons, prison reform, and racial justice. She has played a major role in raising the visibility of issues involving unequal justice. Ms. Taifa also convenes the Justice Roundtable, a Washington-based advocacy network advancing federal criminal justice policy reforms.

BRETT TAYLOR is deputy director of national technical assistance at the Center for Court Innovation. He has also been deputy director of the Center's Tribal Justice Exchange program since its inception in 2008. Before joining the Center in 2007, Mr. Taylor served as the senior defense attorney for six years at the Red Hook Community Justice Center in Brooklyn, New York. Mr. Taylor has presented at numerous national conferences on community courts, tribal courts, community prosecution, and other community justice topics.

WHITNEY TYMAS is the director of the Prosecution and Racial Justice Program at the Vera Institute of Justice. This is a groundbreaking initiative that is piloting internal assessment and management procedures to help chief prosecutors identify evidence of racial or ethnic bias in prosecutorial decision making and respond appropriately when it is found. Ms. Tymas came to Vera from the National District Attorneys Association, where she ran that organization's Gun and Gang Violence Program and its Southwest Border Crime Program — both of which delivered training, support, and technical assistance to prosecutors and allied members of law enforcement nationwide.

MICHAEL WALDMAN is president of the Brennan Center for Justice at NYU School of Law, a non-partisan law and policy institute that focuses on fundamental issues of democracy and justice. Previously, Mr. Waldman was director of speechwriting for President Bill Clinton from 1995-99, serving as assistant to the president. As the top White House policy aide on campaign finance reform, he drafted the Clinton administration's public financing proposal.

LISA MONET WAYNE is the immediate past president of the National Association of Criminal Defense Lawyers (NACDL). She represents individuals and corporations accused of crime at all stages in both federal and state courts around the country. She is a frequent national lecturer, a lecturer in law at the University of Colorado law school in Boulder, a television commentator for national media outlets, and was a Colorado State Public Defender for 13 years.

APPENDIX B: AGENDA

The goal of the conference is to assemble a distinguished group of participants in the criminal justice system — judges, prosecutors, defense attorneys, scholars, community leaders, law enforcement officials, and formerly incarcerated advocates — who will collaborate to develop a menu of practical reforms to reduce race and ethnicity as a negative factor in the criminal justice system.

WEDNESDAY, OCTOBER 17, 2012

2:00 p.m. — 2:45 p.m. ***Registration***

2:45 p.m. — 3:00 p.m. ***Welcome***

Steve Benjamin, President, National Association of Criminal Defense Lawyers

Michael Waldman, President, Brennan Center

3:00 p.m. — 3:30 p.m. ***Opening Remarks***

Norman L. Reimer, Executive Director, NACDL

Hon. Marcy Friedman, Justice, Supreme Court, New York County, Civil Term.

3:30 p.m. — 5:00 p.m. **Introduction of "Town Hall Panel" Nicole Austin-Hillery,** Director and Counsel, Brennan Center Washington Office

Roundtable 1 — Stakeholders

Moderator: **Ted Shaw,** Professor of Professional Practice in Law, Columbia Law School

Panelists: **Eddie Ellis,** President, Center for NuLeadership on Urban Solutions

Hon. George Bundy Smith, Chair, NYCLA Justice Center, Former Associate Judge New York State Court of Appeals

Zachary Carter, Partner, Dorsey & Whitney LLP; Board Member, Brennan Center

Lisa Wayne, Immediate Past President, NACDL

Vanita Gupta, Deputy Legal Director, ACLU

Glenn Martin, Vice President of Development & Public Affairs, The Fortune Society

Rick Jones, Executive Director, Neighborhood Defender Service

Leroy Frazer, Jr., Executive Assistant District Attorney for External Affairs, Office of the Manhattan District Attorney

5:00 p.m. ***Closing Remarks***

Nicole Austin-Hillery, Director and Counsel, Brennan Center Washington Office

Reception to Follow

THURSDAY, OCTOBER 18, 2012

8:00 a.m. — 8:45 a.m.	***Registration/Breakfast***
8:30 a.m. — 9:00 a.m.	***Welcome***
	Stewart D. Aaron, President, NYCLA
	Opening Remarks
	Hon. Fern Fisher, Deputy Chief Administrative Judge, New York City Courts
	Inimai Chettiar, Director, Justice Program at Brennan Center for Justice
9:00 a.m. — 10:15 a.m.	**Roundtable 2 — Charging, Plea Bargains, Diversion**
	Moderator: **Thomas Giovanni,** Community-Oriented Defender Network Director (CODN), Brennan Center
	Panelists: **Lance Ogiste,** Counsel, Office of the Brooklyn District Attorney
	Irwin Shaw, Attorney-in-Charge, Legal Aid Society Manhattan Office of the Criminal Practice
	Wayne S. McKenzie, General Counsel, New York City Department of Probation
10:15 a.m. — 10:30 a.m.	***Break***
10:30 a.m. –11:45 a.m.	**Roundtable 3 — Pretrial Incarceration**
	Moderator: **Thomas Giovanni,** CODN Director, Brennan Center
	Panelists: **Marika Meis,** Legal Director, The Bronx Defenders
	Tim Koller, Executive Assistant DA, Staten Island
	Hon. Melissa Jackson, Supervising Judge, Criminal Court New York County
	Barry Campbell, Special Assistant to the President & CEO, The Fortune Society
11:45 a.m. — 12:00 p.m.	***Break***
12:00 p.m. — 1:15 p.m.	**Working Group for Roundtables 2 and 3**
1:15 p.m. — 2:00 p.m.	***Lunch***
2:00 p.m. — 3:15 p.m.	**Roundtable 4 — Jury Selection**
	Moderator: **Darryl Stallworth,** Defense Attorney, Oakland, California
	Panelists: **Cathleen Price,** Cooperating Senior Attorney, Equal Justice Initiative, Seminar Lecturer, Columbia University
	Hon. Ruth Pickholz, Acting Justice, New York County Supreme Court, Criminal Term
	Abbe Smith, Director, Criminal Defense & Prisoner Advocacy Clinic and Professor of Law at Georgetown Law
	Deanna Rodriguez, Chief, Brooklyn District Attorney's Gang Bureau
3:15 p.m. — 3:30 p.m.	***Break***
3:30 p.m. — 4:15 p.m.	**Working Group for Roundtable 4**
4:15 p.m. — 4:30 p.m.	***Closing Remarks***

FRIDAY, OCTOBER 19, 2012

8:15 a.m. — 8:45 a.m.	***Breakfast***
8:45 a.m. — 9:00 a.m.	***Opening Remarks***
9:00 a.m. — 10:15 a.m.	**Roundtable 5 — Pretrial Litigation on Search and Seizure and Identification Issues** *Moderator:* **Lexer Quamie,** Counsel, The Leadership Conference on Civil and Human Rights *Panelists:* **Hon. Mark Dwyer,** Acting Justice, Supreme Court, Kings County, Criminal Term **Donna Lieberman,** Executive Director, New York Civil Liberties Union **William Gibney,** Director, Criminal Practice Special Litigation Unit, The Legal Aid Society **Delores Jones-Brown,** Faculty Research Fellow, Center on Race, Crime and Justice at John Jay College of the City University of New York **Rodney Mitchell,** Founder, REentry Legal Services
10:15 a.m. — 10:30 a.m.	***Break***
10:30 a.m. — 11:45 a.m.	**Roundtable 6 — Sentencing and Community Corrections** *Moderator:* **Nkechi Taifa,** Senior Policy Analyst, Open Society Foundations *Panelists:* **Dr. Divine Pryor,** Executive Director, Center for NuLeadership on Urban Solutions **Clinton Lacey,** Deputy Commissioner for Adult Services, New York Department of Probation **Jonathan Rapping,** Founder and CEO, Southern Public Defender Training Center **Mike Randle,** Program Director, Cuyahoga County Ohio Community Based Correctional Facility
11:45 a.m. — 12:00 p.m.	***Break***
12:00 p.m. — 1:00 p.m.	**Working Groups for Roundtables 5 and 6**
1:00 p.m. — 1:45 p.m.	***Lunch***
1:45 p.m. — 3:00 p.m.	**Roundtable 7& Discussion — Community Justice** *Moderator:* **Brett Taylor,** Deputy Director, Center for Court Innovation *Panelists:* **Anne Swern,** First Assistant District Attorney, Office of the Brooklyn DA **Robin Steinberg,** Executive Director, The Bronx Defenders **Dennis Lawrence,** AmeriCorps Member
3:00 p.m. — 3:15	***Closing Remarks***

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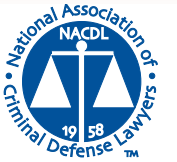
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