

**DELAWARE ACCESS TO JUSTICE COMMISSION'S COMMITTEE ON  
FAIRNESS IN THE CRIMINAL JUSTICE SYSTEM**

A Report on Alternatives to Incarceration

Prepared By The

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*Access to Justice Commission's Committee on  
Fairness in the Criminal Justice System:  
Equal Justice Initiative—Report on Alternatives to Incarceration*

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## **I. EXECUTIVE SUMMARY**

The Equal Justice Initiative is a private, nonprofit organization that provides legal representation to indigent defendants and prisoners who have been denied fair and just treatment in the legal system. EJI litigates on behalf of juvenile offenders, condemned prisoners, the wrongfully convicted, poor people who were denied adequate representation, and others whose trials were impacted by racial bias or prosecutorial misconduct.

The history of racial inequality and economic injustice in the United States has created continuing challenges for all Americans and we believe more must be done to advance our collective goal of equal justice for all. EJI works to confront the history of racial inequality and economic injustice in the United States. EJI works with communities that have been marginalized by poverty and discouraged by unequal treatment. Additionally, EJI prepares reports, newsletters, and manuals to assist advocates and policymakers in the critically important work of reforming the administration of criminal justice.

EJI is excited to have been invited by the Delaware Access to Justice Commission's Committee on Fairness in the Criminal Justice System to evaluate best practices that jurisdictions have employed to help address issues of racial disparities and economic injustice. EJI was also asked to remain sensitive to the collateral impact on public safety, while still addressing ways Delaware's criminal justice system could be reformed to reduce the disproportionate impact on people of color and the economically disadvantaged.

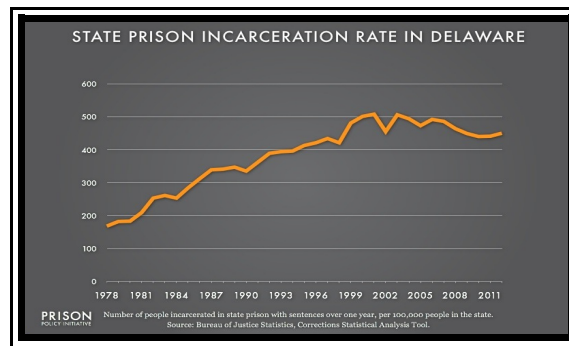
In this paper, EJI has recommended reforms and new approaches to Delaware's current system of alternatives to incarceration. EJI has studied academic papers and considered the progress that has been made by other jurisdiction's reform efforts. This included the history, approaches, administration, funding and goals of such efforts. Further, we examined the effects of various alternatives on the men and women in such programs, as well as their families and communities.

## **II. THE URGENCY FOR ALTERNATIVES TO INCARCERATION**

In the past four decades, the incarceration rate in the United States more than quadrupled—rising steadily from nearly 200,000 to 1.5 million—and disproportionately affecting people of color. Delaware, the second smallest state, has a prison population that has steadily grown, with a current incarceration rate of nearly 450 people incarcerated per

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100,000 people, a rate that is higher than the national average.<sup>1</sup> In 2010, for example, Delaware incarcerated over 6,500 individuals.<sup>2</sup> As is true across the country, the increase in the incarceration rate also has disproportionately impacted communities of color. Although African Americans represent around 20 percent of the Delaware's population, they comprise around 60% of the prison population.<sup>3</sup>



Data Source: Bureau of Justice Statistics, Corrections  
Statistics Analysis Tool. (Graph: Peter Wagner, May 2014)

Since the 1970s, when the U.S. prison population was only 250,000, advocacy groups have called attention to the overuse of incarceration and recommended the use of alternative “[p]rograms or procedures that move away from the notion of imprisonment as a response to lawbreaking.”<sup>4</sup> Alternative programs were viewed as embedded within communities and options that offered prospects for reconciliation and community empowerment, in addition to alternative ways to achieve accountability.<sup>5</sup> Programs such as community service and drug treatment were among the first attempted. Once proven successful, judges, prosecutors, and other stakeholders began showing support, and alternatives to incarceration moved from fringe recommendations to widespread use. Now more than thirty years later, most jurisdictions around the country offer a variety of alternative programs.<sup>6</sup>

Today, we are at a critical moment in this country. There is a broad consensus amongst judges, lawyers, policy makers, sociologists, and the general public that we incarcerate too many people, especially people of color.<sup>7</sup> Commentators across a broad political spectrum recognize that alternatives to incarceration are necessary, and also achieve better individual and social outcomes.<sup>8</sup> There is also general agreement that states can protect the public while resorting to less costly alternatives to incarceration.<sup>9</sup> We have a unique opportunity to take this moment and create more alternatives to incarceration, interventions

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which typically occur post-arrest, but pre-sentencing. In order to do so, we should consider reforming our existing alternative courts, increasing community-based options, and implementing nontraditional approaches.

### **III. DELAWARE'S EXISTING ALTERNATIVE COURTS**

#### **A. Pre-adjudication Interventions**

The Delaware's strategy currently empowers the judicial branch to leverage a host of interventions, namely treatment courts and juvenile intervention programs, at the pre-adjudication phase. Once an offender is arrested, and charged, he or she may be assigned to an alternative. The alternatives are generally based on the type of offense she is accused of committing, and/or the offender class she occupies. Intervening before an offender is adjudicated is extremely beneficial because alternative programs can more effectively serve as mechanisms to reduce the prison population, reduce unnecessary resource expenditures, hold offenders accountable for their actions, and provide them with adequate rehabilitation. Despite the theoretical effectiveness of alternatives, there is still much work to be done in Delaware, with positive reforms to existing alternative court systems that have the potential to increase participation, reduce racial and economic disparities, and reduce costs in Delaware's criminal justice administration.

#### **B. Treatment Courts: Drug, Mental Health, and Veterans**

The 2014 Annual Report of the Delaware Judiciary Branch articulates how each court plans to meet the incarceration challenges of the future. One of the major challenges confronting courts is how to manage large, and growing caseloads, with already-limited resources.<sup>10</sup> The Criminal Justice Council (CJC) for the Judiciary was established in order to assist courts in managing these resources more effectively by creating consistent, statewide standards for operations in problem-solving courts based on objective criteria.<sup>11</sup> The information provided by the CJC is intended to be used as recommendations for how to effectively deploy scarce treatment resources in order to reduce recidivism. Delaware leverages the CJC's assistance to make management decisions about its drug, mental health, and veterans courts—the three (3) major problem-solving apparatuses the Judiciary Branch relies on for its alternatives program. Despite the design of these alternatives, and their application at the pre-adjudication phase, Delaware's criminal justice system has struggled

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to curb recidivism, significantly reduce the prison population, and reverse its disproportionate impact on low-income communities of color.

### **1. Drug Courts**

Research shows that drug courts are the most cost-effective programs for dealing with drug-addicted offenders in our criminal justice system. Drug courts allow offenders to avoid incarceration, remain in their communities, support their families, and pay taxes.<sup>12</sup> These programs typically lower the recidivism rate, as 75 percent of drug court graduates remain arrest free. They also save costs. Statistics show that \$27 is saved for every \$1 invested in a drug court. Estimates show that in 2009 drug courts throughout the U.S. saved taxpayers \$8.3 billion in federal and state funding.<sup>13</sup> Another study by the U.S. Governmental Accountability Office found that drug courts save at least \$6,000 per participant. As a result, states are drawn by the positive results and cost-savings produced by drug courts. Nearly 3,500 of these problem-solving courts have been established throughout the country.<sup>14</sup>

In Delaware, the Court of Common Pleas and the Superior Court are the only courts that hold jurisdiction over drug-related offenses. Both courts supervise the state's drug court programs. The Drug Diversion Program is a collaborative effort between the Court of Common Pleas, the Department of Justice (DOJ), the Office of the Public Defender, the private bar, treatment providers, and the Treatment Research Institute (TRI) at the University of Pennsylvania.<sup>15</sup> This program is exclusively for non-violent offenders. In 1997, the Superior Court's Drug Court became the first statewide drug court in the United States. The Superior Court deals with felonies and drug offenses (except marijuana possession and most felony and drug charges dealing with minors).<sup>16</sup>

Although there were almost 7,000 people arrested for drug related crimes in 2014,<sup>17</sup> the Court of Common Pleas Drug Diversion Program remains voluntary, and the Superior Court's Drug Court program reported only 512 entries, 153 terminations, and 288 graduates. The collateral consequences facing individuals who are not eligible for, or assigned to, Delaware's drug courts are extremely damaging, and disproportionately wrought on low-income communities of color. People who are convicted of a drug felony are banned from receiving Temporary Assistance for Needy Families (TANF), and if any person in the household is convicted of a drug felony the entire household can lose cash assistance. People convicted of drug felonies are not banned from participating in the Supplemental Nutrition



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Assistance Program (SNAP), but if a SNAP recipient trades benefits for drugs, he or she is permanently banned from receiving benefits in the future after the second violation.

Nationwide, there are dramatic racial disparities in drug court participants.<sup>18</sup> Throughout the country, the percentage of African Americans in jails and prisons is nearly double their percentage in drug court.<sup>19</sup> Delaware has similar issues, with recent data indicating that the vast majority of individuals incarcerated for drug offenses are African American, while the majority of admissions to the state's community treatment programs were white.

There are systemic causes that drive these disparities, and an effective drug court program must be designed with an awareness that such disparities exist.<sup>20</sup> Researchers have identified a number of systemic problems that contribute to unequal outcomes for individuals of different races. Differences in plea-bargaining, charging or sentencing practices can have the practical effect of denying drug court and other community-based dispositions to otherwise qualified people of color.<sup>21</sup>

***Case Study: Vera Institute for Justice, Data Tracking in Milwaukee***

While there are a number of factors that contribute to the racial disparities in drug court treatment, there are also tools available for jurisdictions to improve their practices. A recurring factor driving inequity in the criminal justice system is the way is discretion. In terms of drug court, prosecutorial charging decisions can make the difference between an individual's eligibility for the program or a lengthy prison sentence. By better monitoring prosecutorial discretion, prosecutor's offices can do a better job of accounting for, and reacting to, their contribution to disparate outcomes.

Data alone does not provide all answers for policymakers and criminal justice officials. Therefore, it is unlikely that data alone will rid criminal prosecutions of implicit bias and racial inequality. Data will, however, help prosecutors better determine what additional questions should be asked before making important decisions. Developing a structured, recurring way to analyze is central to any program meant to provide alternatives to incarceration.

There are a series of performance indicators that district attorneys can examine to harness unfettered discretion and make the decision making process fairer for potential

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offenders. These statistics provide insight into system operations by focusing on four key discretion points in the prosecutorial process: (1) initial case screening, (2) charging, (3) plea offers, and (4) final disposition.<sup>22</sup>

Considered together, the indicators describe how discretion, at each point of the criminal justice process, aggregates toward a final outcome. The Vera Institute of Justice asserts that “by collecting data about, say, which charges prosecutors decline to pursue, or which sentences they request, supervisors can begin to identify facets of the system that appear to be performing inappropriately and may be in need of attention.”<sup>23</sup> Review of said data could reveal whether prosecutors seek more severe penalties for certain categories of defendants who would normally receive less harsh punishments. This information is helpful when analyzing the availability, efficacy, and impact of existing alternatives programs, particularly as they are applied along racial lines.

Many cities and states use case management systems to provide its attorneys with information to drive decision-making, but most of these systems hinge upon managing paper files, making it difficult to aggregate information within and across cases.<sup>24</sup> Information that may prove useful to prosecutors is usually stored across different agencies as well. For example, information about arrest charges and custody status may be maintained by the sheriff, and pleas and sentencing are recorded by the court.<sup>25</sup> An ideal system that could provide the type of aggregated information necessary would likely be computerized, and heavily managed by technology specialists. While the eradication of racial disparities in criminal prosecutions will not occur overnight, a more comprehensive data-driven approach to internal oversight can enhance public confidence in the fairness of the prosecutorial function.<sup>26</sup>

In Milwaukee, for instance, prosecutors were able to manage criminal justice data maintained by an array of agencies. The state’s prosecutors solicited data from all participating agencies, and incorporated it into a single database. The prosecutors then used case identifiers that were common across all data sets to identify patterns and trends. Putting the data to use, Milwaukee County held meetings to discuss the information. Officials were able to ascertain an unexpected racial disparity in drug cases: the data revealed that the state chose not to prosecute 41 percent of whites charged with possession of drug paraphernalia, while showing only 27 percent of similarly-situated arrestees of color were afforded the same discretionary deference.<sup>27</sup>

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Analyzing the data allowed the team to consider a range of possible explanations for this phenomenon. The meetings also offered opportunities to engage in other substantive discussions to improve practice. The officials examined policing practices, case screening procedures, and unconscious bias based on the character of the drug paraphernalia involved.<sup>28</sup> In the course of their discussions, the team considered whether police were treating people differently, whether prosecutorial staff had a legally relevant reason to press or decline to press charges differently, and whether the disproportion was based on an unconscious racial bias.<sup>29</sup> Through the use of robust data collection and analysis, Milwaukee prosecutors demonstrated how efforts to eliminate racial disparity require a technocratic approach whereby relevant stakeholders gather information, make informed decisions, gather more information, and troubleshoot for improvement. Milwaukee's commitment to tracking this information provided the foundation for possible reforms to combat disparate treatment among similarly situated drug offenders.

## **2. Mental Health Courts**

The deinstitutionalization of America's mental health care system was part of a fundamental shift in the way our nation deals with individuals who struggle with mental illness. The dramatic decrease in the treatment for mentally ill Americans has led to a decline in the number of mentally ill patients in hospitals from approximately 560,000 in 1955 to fewer than 55,000 people today,<sup>30</sup> with many of those incarcerated with mental illness coming from poor families and communities lacking access to treatment. The criminal justice system has absorbed much of the present-day mental health caseload that was once managed by hospitals. This population, with its diverse and varied mental health needs, is disproportionately represented in a criminal system that is not oriented or resourced to address systemic mental health problems.

Mental health courts (MHCs) have emerged as an alternative to incarceration for individuals who suffer from mental illness. MHCs are criminal courts that hear cases of individuals with mental illness charged with crimes. They do not typically operate treatment services; rather, they link participants to treatment services in three main ways: (1) some participants already have established treatment providers in the community; (2) other receive direct referrals to community providers from the MHC team, and (3) enroll in treatment on their own.<sup>31</sup> Treatment services include transportation services, housing, vocational training, group skills training, substance abuse management, and others. Once the treatment services are setup, the monitoring of offenders happens in various ways. Sometimes existing

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community health providers report back to the MHC either when there are difficulties, or simply on a regular basis. Another method is regular administration by dedicated MHC staff (e.g. court monitor, mental health staff) or probation-parole officers.<sup>32</sup> Another option is regular supervision from a combination of probation officers and community or mental health workers. After an offender has completed the treatment program, MHCs may then negotiate away the offender's charges.

Delaware's Superior Court operates MHC program in New Castle, Kent, and Sussex Counties. The program is voluntary and designed to identify people involved in the criminal justice who also struggle with serious mental illness. The MHC is often deployed as an alternative to repeated incarceration for violations of probation or the commission of new offenses. The program provides offenders with intensive services and support to guide them to recovery and self sufficiency; 25 percent of the state's prison population requires mental health treatment.<sup>33</sup> Still, people charged with sex offenses, homicide, domestic violence, weapons offenses, or offenses involving serious bodily injury are not permitted to participate. As a result, in 2014, there were only 570 participants, 181 graduations, 34 neutral terminations, and 81 terminations in the MHC program.<sup>34</sup>

***Case Study: The Bexar County Model***

Through their Mental Health Courts, Delaware has rightfully recognized that individuals who struggle with mental illness present a unique case for the criminal justice system. Despite positive gains, Delaware can take further steps to ensure that individuals with mental illness are treated appropriately by diverting them at the front-end before they are arrested. According to data from the American Jail Association, more than 650,000 bookings each year involve individuals who struggle with mental illness. This population makes up at least 16 to 25 percent of the national jail population. While the vast majority of these individuals are arrested for their behavior, or minor non-violent crimes, they spend an "average of 15 months longer in jail for the same charges as non mentally ill prisoners."<sup>35</sup>

Through appropriate training, law enforcement could play a vital role in helping Delaware's mentally ill citizens get the services they need, while avoiding becoming entangled in the Delaware criminal justice system. In 2002, Bexar County Texas, home to San Antonio, recognized that significant achievements could be made in treating the mentally ill in their community while also saving significant resources.<sup>36</sup> By training law enforcement to recognize and deal with mentally ill individuals, the model developed into an effective pre-

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arrest program that integrates health care with law enforcement, to transform the way mental health services are delivered to individuals with mental illnesses.

Under the model, a specialized unit within the San Antonio Police Department was trained to respond to situations where mental illness may have been at issue. In the first year of the program, nearly 1,000 people with mental illness were diverted from jail to a more appropriate treatment facility.<sup>37</sup> The program has developed to the point where it is now saving the county “at least \$5 million annually for jail costs and \$4 million annually for inappropriate admissions to the emergency room.”<sup>38</sup>

### **3. Veterans Treatment Courts**

Based on a similar model as the drug and mental health courts, Delaware’s Veterans Treatment Court works with veterans referred by the Attorney General’s Office or the Office of the Public Defender. Once a referral is made, the veteran is offered the opportunity to participate in the court on a voluntary basis. Only veterans who are charged with non-violent felony or misdemeanor crimes are eligible for Veterans Treatment Court. After completion, which generally takes up to a year, prosecution for the offense will not proceed, and the charges against the vet will be dismissed. Other requirements include, but may not be limited to: signing a voluntary petition, waiver and agreement; waiving important constitutional rights to enter and take advantage of the program; facts in the police reports are stipulated as accurate for the purpose of these proceedings, and in the event of termination; regular meetings in court, and sanctions may occur; and other requirements standard for diversion courts, such as no violations of the law, attend programs and work or school, etc.<sup>39</sup> Participants must also appear in court pay a civil education fund assessment to the clerk of the court at a value of \$200. Veterans Treatment Court represents a crucial alternative to incarceration, recognizing both that violent crime and post-traumatic stress disorder (“PTSD”) have a strong intersection, and that veterans are at significantly increased risk for PTSD.<sup>40</sup>

### **C. Juvenile Intervention: Civil Citation, Drug Diversion, and Detention Centers**

Delaware also targets alternatives towards juvenile defenders. 85 percent of youth offenders enter the adult criminal system. Between 2010 and 2012, approximately 78 to 82 percent of juveniles released from high security level facilities were re-arrested within 18

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months of being released.<sup>41</sup> Community based alternatives have not only reduced the likelihood of youth going to prison or jail, but have also proven more cost effective. Delaware has adopted the “Community Services Continuum, which provides a variety of services for juveniles who enter the system, including: 1) group supervision through YMCA’s Back on Track program, 2) community supervision and resource connection provided by Wrap Around Delaware, 3) individual supervision by a Department of Youth Rehabilitation Services (DYRS) probation officer; 4) residential services that facilitate rehabilitation programming and address inappropriate sexual behaviors; and 5) an adjunct services unit.<sup>42</sup> African Americans make up only 26 percent of Delaware’s youth population, but make up 76 percent of those in residential treatment in the state’s DYRS.<sup>43</sup>

**1. Juvenile Civil Citation Program**

First-time juvenile misdemeanor offenses for violations of disorderly conduct, loitering, shoplifting, Title IV alcohol offenses (underage consumption and possession), possession of marijuana (less than 1 ounce), and criminal trespass III now all result in citation penalties.<sup>44</sup> This program has been funded with a grant of \$67,745 per year, for three (3) years, to prevent delinquency, and ensure that participating youth will address their offense appropriately without creating a criminal record.<sup>45</sup> This mechanism is meant to provide accountability without the creation of an arrest record by providing a pre-arrest stage intervention for participating youth. Studies have demonstrated that citation programs save substantial state dollars, but also run the risk of disproportionately impacting low-income offenders who, on account of an inability to pay sanctions, might wind up serving the prison time this alternative seeks to avoid.<sup>46</sup>

**2. Juvenile Drug Court Diversion Program**

This program helps first time juvenile misdemeanor drug offenders develop the skills and maturity necessary to prevent further criminal behavior. Similar to its adult counterpart, the Juvenile Drug Court provides case management services from private agency, outpatient drug abuse prevention, intervention, and treatment services. The program treats teens only, administering urine screenings, court reportings, and accompaniment for monthly court reportings. The program asks juveniles to maintain sobriety, attend all school treatment sessions, and refrain from criminal activity. As a result, the recidivism rate is around 26 percent. In 1999, Delaware’s Statistical Analysis Center produced an “Evaluation of the Juvenile Drug Court Diversion Program” and found that the instrument statistically-

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significantly reduced the overall recidivism rate of Delaware's juvenile substance-abuse offenders, the arrest rates of the program's participants, the new offense rates of the program's graduates, and the arrest rates of specific types of offenses.<sup>47</sup> The program's success, despite limited state resources, should encourage practitioners to find ways to expand its reach.

### **3. Juvenile Detention Centers**

DYRS provides case management and community supervision for youth and families when a youth is court-ordered to receive pre-trial or post-adjudicatory supervision. Racial and income disparities in the juvenile justice system prevent most offending youths from affording bail. As a result, most of DYRS's services go towards providing the community services continuum to youth via pre-adjudication detention centers. DYRS uses the Positive Achievement Change Tool (PACT), which is an evidence-based risks, needs, and strength assessment instrument, to (1) determine level of risk to re-offend; (2) identify risks and protective factors linked to behavior; (3) develop a responsible approach to supervise; (4) allow case managers flexibility; and (5) promote positive outcomes and reduces recidivism. The state of Delaware operates six (6) of these facilities, and each has a population overwhelmingly consisting of individuals from low-income backgrounds and communities of color.<sup>48</sup>

#### **D. Recommendations**

Delaware must empower its criminal justice stakeholders to better leverage alternatives as interventions that reduce racial disparities and recidivism. Successfully focusing on these objectives will have positive spill over effects on state budgetary concerns. Delaware can accomplish reform through a number of tools: (1) expanding eligibility requirements for existing alternatives, (2) conducting valid risk/needs assessments at the time of arrest and/or before detention, (3) training of relevant decision-makers, including police and prosecutors; (4) expanding the role defense attorneys play in both developing alternative criteria, and determining whether offenders fit the criteria for existing projects, and (5) thorough data collection. These reforms provide criminal justice officials with the latitude and information necessary to utilize alternatives as an individualized client-centered approach that will yield better outcomes for offenders while keeping the public safe and saving the state money.<sup>49</sup>

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The process of determining proper alternatives for offenders should be a negotiation between the prosecution, the defense, the judge, and—in relevant cases—both the offender and the victim. Imagine the following scenario: an individual is arrested for the commission of a crime, and once immediately charged, a criminal justice expert administers a risks/needs tool that is not a dispositional assessment, but an appraisal of the arrestees circumstances and potential needs vis a vis the purported offense. Alongside expanded eligibility requirements, stakeholders might then be able to utilize the information provided by the risks/needs tool to place individuals in alternatives most suited to their needs.

What is striking about most alternative sentencing regimes is that the discussions do not occur at any particular moment in the legal proceedings. Only occasionally is an offender sent into an alternative program at a straightforward sentencing hearing following a conviction. Instead, offenders enter alternative programs whenever judges order them to do so: before a plea of guilty, after plea but months before formal sentencing, or actually at the sentencing itself. Delaware should continue to focus on pre-adjudicative interventions, and conduct valid risk and needs assessments at the time of arrest and/or before detention. Risk and needs assessments should occur at the time of arrest and alternatives should be rationally-related to the offender, responsive to his or her circumstances, and not generically applied to the offense. In order to accomplish the broad goals of the criminal justice system, sentencing should be focused on the offender and not the offense. Because there are a wide range of factors that influence criminal behavior, sentencing options must include a range of alternatives to incarceration that target criminogenic risks and needs in order to successfully reduce recidivism and encourage rehabilitation.

To target the appropriate client population, we must examine the population in the detention system, the charges, the criminal history, and the sociological and demographic characteristics of people in confinement. Alternatives should avoid program criteria that exclude participants because of their conviction or criminal history. This type of arrangement, may usher more individuals into drug courts and away from serving time in prison, or prevent a juvenile offender who cannot afford to pay a civil citation from eventually being incarcerated.



#### **IV. COMMUNITY-BASED OPTIONS**

We can further reduce the disproportionate amount of people in color in Delaware's prison system by increasing alternative, community-based options. Most jurisdictions around the country now offer a variety of alternative programs, from community courts to restorative justice. EJI has researched the best practices within these alternative programs and case studies, such as the Red Hook Community Justice Center and the Victim Offender Dialogue Program. Delaware can implement these programs while adjusting for the needs of its own residents and communities.

##### **A. Community Courts**

A community court offers Delaware an alternative to traditional downtown court systems. Communities that suffer from high crime levels are often isolated from the wealthy business district in a city, and generally deal with a justice system that has long ignored its citizens and concerns. As a result, legal practitioners have developed new practices known as "community courts," where both the courtroom and other court initiatives are visible and available for the community.<sup>50</sup> Community courts have benefitted other states and could benefit Delaware in the following ways:

Proximity— being situated closer to the community helps to better inform the court of the problems, such as drinking and selling drugs in a specific building, or prostitution on a certain street. As a result, courts are better prepared to offer solutions and ideally address problems before they arise.

Services— defendants will perceive community courts as being fairer than traditional courts, especially because traditional courts are less connected and do not offer the flexible range of services that a community court provides.<sup>51</sup> Unlike treatment courts, community courts strive to adjust their programs continuously to particular crimes and social problems, and outcomes are determined by the community in which the court operates.<sup>52</sup>

Perhaps, the Reed Community Justice Center best exemplifies this approach.

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***Case Study: Red Hook Community Justice Center***

Red Hook is a neighborhood within Brooklyn that was known for having excessive crime and drugs, as well as weak social services and economic institutions.<sup>53</sup> In Red Hook, there was also a history of mistrust for police and the courts.<sup>54</sup> The court system was overloaded and unable to respond effectively to case loads. This further de-legitimized the court system, and created community discontent.

In 2000, the court system decided to reconceptualize itself by establishing a multi-jurisdictional community court in Brooklyn, New York to implement a community court entitled The Red Hood Community Justice Center. Rather than be seen as an arbiter of state power, it would be seen as playing an active role in reducing crime in Red Hook, serving a victimized community that was in need of repair. Therefore, it decided to establish a “community justice center” where the court would be located in the heart of the community, more responsive to the problems that give rise to crime, and be accountable to the community to reduce crime and deliver remedial services.<sup>55</sup> Through the program, a judge hears neighborhood cases from three police precincts and utilizes various community programs and on-site social service professionals to provide services for participants. For example, Red Hook relies heavily on drug treatment to address residents’ complex personal problems that do not easily fall into a simplified medical treatment program.

**B. Community Service**

Community service programs have been used as another alternative to incarceration, and are traditionally administered by probation departments.<sup>56</sup> For example, in the State of Washington, the probation department has run a community service program since 1977, with at least 150 charitable and government agencies.<sup>57</sup> In such programs, the sentencing judge will order community service as a condition of probation, specifying the number of hours to be worked and the time within which to complete the order. Then the case is typically referred to a program coordinator who makes the appropriate placement. If no such program exists, a pre-sentencing report may be given to the judge suggesting community service. In Washington, the typical order requires the offender to perform between 50 and 200 hours of work. If the offender is working with a public business, careful screening must take place to assure the public’s safety. For the most part, non-violent offenders are chosen for community service programs. If the project is not completed, the offender, the community program coordinator, and the probation officer may meet to discuss the reasons and any

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alternative means of completing the order. Sometimes, alterations in the project can be made, such as a transfer to a different business, or the offender may be required to reappear for alternative sentencing.<sup>58</sup>

***Case Study: Bronx Community Solutions***

Launched in 2005, Bronx Community Solutions is an initiative that seeks to provide alternatives to incarceration for non-violent cases. Whereas a community court like the Red Hook Community Justice Center connects one judge to a single neighborhood, Bronx Community Solutions attempts to provide nearly 40 judges with the same kind of sentencing options to manage the entire Bronx population of nearly 1.5 million people.<sup>59</sup> Each year, the program handles more than 11,000 cases.<sup>60</sup>

Although offenders are offered other alternatives to incarceration, the community service alternative has been a staple of the program. First, defendants are not interviewed before they see a judge; instead, project staff members, working with judges, prosecutors, and defense attorneys, identify appropriate candidates for the program by considering the defendant's criminal history.<sup>61</sup> If offenders opt to participate in the program, they report immediately to the intake office where staff conduct a psychosocial assessment to determine the best alternative to incarceration.<sup>62</sup> Offenders who are assigned to community service projects in neighborhoods throughout the Bronx then tailor their projects to the needs of the community, such as shoveling snow, cleaning urban streets and local parks, and painting over graffiti. The local residents also identify local eyesores for community projects, and a neighborhood advisory board selects the projects for offenders. The offenders are rigorously monitored by the program staff, sending the message that community-based sanctions are serious alternatives.

Although there are several obstacles to such an approach, including lack of resources and a need for more judicial education and training, Bronx Community Solutions has been successful and is considered by the U.S. Department of Justice as one of the most innovative criminal justice projects in the country.<sup>63</sup> Each year, offenders contribute thousands of hours of service and the program has helped cut the use of incarceration in the Bronx by nearly 33 percent.<sup>64</sup> Further, the program has been cost-efficient, driven in large part by the high caseload volumes of the Bronx.<sup>65</sup>

### **C. Sex-Offender Treatment**

Sex-offender cases and treatment are often approached in relative isolation to other aspects of the criminal justice system and present challenges to the victims, police who investigate them, district attorneys who prosecute them, judges who adjudicate them, as well as the defendants. According to the Center for Court Innovation, core components of a sex offender program should include the following: keeping victims informed throughout the process, having a trained judge, supervising defendants continuously, building strong relationships with service providers, coordinating with probation departments, convening regular meetings with criminal justice agencies and service providers, and providing court personnel and partners with education and training.<sup>66</sup>

#### ***Case Study: Specialized Sex Offense Courts***

Nassau, Westchester and Oswego Counties in New York have specialized Sex Offense Courts. They were developed through the Center for Court Innovation, which is a nonprofit public-private partner with the New York State Court Systems and serves as the independent research and development arm to the courts. Before launching the Sex Offense Courts, the Center spent several years examining the issues presented by sex offense cases to look for ways of improvement. The Center's staff interviewed judges, probation officers, victim advocates, prosecutors, defense attorneys and sex offense treatment providers. It then reviewed data on sex offense arrests, dispositions and sentencing, and made recommendations based on their analysis. It suggested that the court increase uniformity in how sex offense cases were handled by the court.<sup>67</sup> It also encouraged more coordination and communication among agencies in sex offense cases.<sup>68</sup> Based on these suggestions the Center and the Office of Court Administration joined to launch specialized Sex Offense Courts. The mission is to increase sex offender accountability, enhance community safety, and ensure victim safety.

The Center also provides hands-on, expert assistance to various jurisdictions, including judges, attorneys, justice officials, community organizations, and others to train them in a comprehensive planning process to implement sex offender programs. Their assistance took many forms, including help with analyzing data, facilitating planning sessions, and hosting site visits to their operating programs in the New York City area. Qualifying jurisdictions may be eligible for assistance free of charge or on a fee-for-service basis.

#### **D. Halfway Houses**

One of the first considerations in a halfway house administration is whether the house will be public or private. Nonetheless, the far greater question is the competence and integrity of the center's staff and the correctional agencies that use the resource. Administratively, the more important variables are the relationships between the halfway house and other stakeholders in the criminal justice system. For example, there must be a good relationship with the referring agencies to ensure that both the physical transition and the treatment transition of the releasee to the house are not disjointed. In addition, the house needs the support of community agencies, since it is inefficient to have house staff provide all services rather than utilizing existing community resources.<sup>69</sup>

For most private houses, there is a Board of Directors whose members will tend to represent the community within which the house is located. The exact role of the board may vary, but it is generally task with providing statements about policy in areas like funding, personnel, services, and referral sources. Under the Board, there is a house director who actually administers house operation on a day-to-day basis. The director's task is to implement the general policy statements of the Board. The house staff, which may include counselors, security personnel, clerical personnel, and housekeeping personnel, then report to the directors.<sup>70</sup>

Publicly operated houses seldom have a Board of Directors, but there will typically be an official in the parent agency who performs a policy-making function similar to the Board. The public houses inherit this body of administrative policy from the parent agency, and utilize it for initial operating purposes.<sup>71</sup>

The provision of adequate funds for the operation of a halfway house is the great challenge for most administrators. This includes the uncertainty of grant funding, the difficulty in maintaining cash flow, and adjusting programs due to less-than anticipated grants. Private houses, in particular, suffer from funding problems and report them twice as often as houses operated by state departments of corrections, while federally operated houses had reported no funding problems.<sup>72</sup>

The administrator of a private halfway house has a number of funding sources—both public and private. In the public sector, funding may come from the Law Enforcement Assistance Administration, the National Institute of Mental Health, the Office of Economic

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Opportunity, the U.S. Department of Health, Education, and Welfare, the U.S. Department of Labor, special titles under the Social Security Act, as well as state and local governments. In the private sector, there are Community Chest/United Appeal organizations, private foundations, religious and service organizations, local contributions, and fees for service.<sup>73</sup>

***Case Study: Fortune Society***

The Fortune Society was founded in 1967 as a nonprofit aimed at supporting former prisoners' as they re-acclimated into society. It is located in New York City and provides various services on a voluntary basis to both offenders who have been previously incarcerated and those attempted to avoid incarceration.<sup>74</sup> The Fortune Society's programs have helped participants avoid over 88,000 days of jail and prison in one year, saving the city and state of New York \$8 million.<sup>75</sup> Operating at an average cost (in 2005) of about \$3,265 per client, over the past 20 years, the organization's annual budget has grown from \$700,000 to about \$16 million; and its staff has grown alongside its coffers, from 16 at founding to more than 200 today.

A 1997 study conducted by Charles Bahn PhD & James R. Davis PhD on the Fortune Society's confirmed why the organization has been heralded as such a success story, suggesting other states should look toward its model for best practices. Although our model of criminal justice is based on the right to a fair trial, the overwhelming majority of cases are resolved via plea bargaining. Fewer than 5 percent of New York City's felony defendants and fewer than 1 percent of those facing misdemeanor charges ever go to trial. The plea bargaining process happens primarily at the judge's bench, with the defendant being the only one excluded from the discussion.<sup>76</sup> The Fortune Society offers an Offender-based Alternative to Incarceration Program which provides court advocacy to intervene where unnecessary plea bargains might occur, and, instead, offers close supervision to adult defendants who would otherwise be serving at least six months of additional incarceration on an indicted felony.<sup>77</sup> By working collaboratively with the district attorney's office, judges, and defendants, individuals are granted an opportunity to prove themselves under community supervision led by the Fortune Society. As a result, the Fortune Society has been successful in obtaining non-prison sentences for individuals who otherwise certainly would have been incarcerated for years.<sup>78</sup>

The study also determined that successful graduates of the Fortune Society's alternatives program had the least serious criminal records and the most positive attitudes

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towards the organization. Successful participants were shown a great deal of individual attention, namely, by being furnished with employment, supported with motivation and cooperation, and encouraged to attend the program.<sup>79</sup> The results of both quantitative and qualitative analysis revealed that employment was an important factor for both success. However, employment only stands out as an instrumental variable in the success of Fortune Society participants because the opportunities are accompanied by job training, education,<sup>80</sup> and a variety of other programs including: (1) individual and group counseling, (2) drug and AIDS counseling and treatment, (3) parenting skills, (4) career counseling, (5) tutoring and GED programs, (6) general topics of interest, and (7) general orientation sessions, among others. It is exceptionally noteworthy that the majority of the Fortune Society's staff are ex-offenders, who serve as successful role models personifying participants' capability of rehabilitation and productive citizenship.<sup>81</sup> Most importantly, the Fortune Society operates with empathy: it is considered "an example of excellent coordination and cooperation among all staff and units. One gets the feeling of help, cooperation, and care from all sources in the organization. Emotional and practical support are important assets. This is indeed a model for other anti-incarceration facilities in corrections."<sup>82</sup>

### **E. Restorative Justice**

Restorative justice focuses on repairing the harm done to the victim. To do so, it holds the offender responsible and accountable to the victim, and uses the community to support the victim as well. Together, all three groups work to examine what caused the crime and find ways to prevent the crime from reoccurring. This is a much more progressive vision of justice than the social exile of the offender.

In the past thirty years, restorative justice has grown into an international movement and has been practiced in countries like Australia, Canada, Japan, New Zealand, South Africa, and much of Western Europe. International organizations such as the United Nations and the European Union have policies promoting restorative justice practices in criminal justice matters. Restorative justice has also begun to influence criminal justice stakeholders in the United States, and today almost all states have some type of restorative justice program.<sup>8384</sup>

A restorative justice system is administered cautiously. For example, in a restorative justice system, the trial is not only about hearing and evaluating the case against the criminal, but it also includes the restorative justice tool of giving space to victims, not as evidence, but

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to make the trial a forum for victims to heal and to confront the individual responsible for causing harm.<sup>85</sup> The trial itself is about more than just proving or disproving guilt and includes attempts to ameliorate the victims' suffering.<sup>86</sup>

Administrators encourage offenders to understand the consequences of their actions and to empathize with victims. It typically begins with the trial, where he or she is encouraged to grapple with the wrongness of their actions.<sup>87</sup> The process continues during incarceration, which is treated less as a form of punishment than state-imposed rehabilitation.<sup>88</sup> The programs administered in the United States to facilitate restorative justice include Victim Offender Dialogue (VOC), Group Conferencing, and Sentencing Circles.

***Case Study: Victim Offender Dialogue Program***

The Victim Offender Dialogue Program is the oldest and most widely developed expression of restorative justice.<sup>89</sup> In 1994, they were endorsed by the American Bar Association.<sup>90</sup> At least twenty-nine states have specific statutes authorizing the use of VOC, and the U.S. Department of Justice distributes its literature as a restorative justice alternative to incarceration.<sup>91</sup>

Administratively, VOC programs provide interested victims of primarily property crimes and minor assaults the opportunity to meet an adult or juvenile offender, in a safe and structured setting, with the goal of holding the offender directly accountable while providing important assistance and compensation to the victim.<sup>92</sup> With the assistance of a trained mediator, the victim is able to let the offender know the impact of the offense, receive answers to questions, and be directly involved in developing a restitution plan for the offender to be accountable for the losses incurred.<sup>93</sup> The offender is also able to take direct responsibility for his or her behavior, to learn the full impact of what was done, and to develop a plan for making amends to the person who was violated.<sup>94</sup> Some VOC programs work with cases involving severe violence, including homicide, which require advanced training and extensive preparation of the parties over many months prior to the first face-to-face meeting.<sup>95</sup> The major structural variations in VOC programs are related to the processing of the cases being handled. Programs may take cases after an offender has been apprehended but prior to any court referral, after court referral but before adjudication or conviction, after adjudication or conviction but before disposition or sentencing, or after disposition or



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sentencing.<sup>96</sup> In some programs, restitution amounts are set by a judge before any dialogue meetings; in others, the restitution agreement is an outcome of the meeting.<sup>97</sup>

## **V. NONTRADITIONAL APPROACHES**

There are additional innovative approaches to diverting people out of the prison system that not only improve outcomes for offenders, but can also have a positive impact on their families. These programs actively combat the risk factors that increase one's likelihood of having contact with the criminal justice system while creating opportunities that mitigate the risks of engaging in criminal activity. Although some of these approaches have yet to be replicated as often as others, they still have the judicial, economic, social and safety benefits that have been observed in the implementation of more traditional diversion programs.

### **A. Diverting Parents out of Prison for Non-payment of Child Support and Reducing Their Eligibility for Prison Based on Failure to Pay**

Child support programs and enforcement help to ensure that parental responsibility is placed more equitably on both parents in the best interests of minor children. While there is no national figure for how many parents have been or are currently incarcerated for failing to pay child support, many states have been pursuing child support collections more aggressively.<sup>98</sup> In addition, the increased rate of incarceration across the country has contributed to a growth in child support arrears.<sup>99</sup> As a result of this practice, parents are susceptible to entering a cycle of prison time that is difficult to break and the children suffer because the ability of these parents to earn enough income is undermined by each arrest.<sup>100</sup>

In 2015, while the statewide unemployment rate in Delaware was 5.8 percent, among African American and Latino populations the rate was 9.5 percent and 9.8 percent respectively.<sup>101</sup> This disparity in unemployment poses the risk that racial minorities, who are also the poorest in the state, will suffer disproportionately under the current child support enforcement laws since the failure to pay child support is often directly related to a lack of income.

Several states have taken steps to make child support enforcement less harmful to parents and children. One method has been to include incarceration as a justification for the modification of child support orders. By doing this, states have been able to reduce the amount of funds that have been accumulated by people who are unable to pay child support

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because they are in prison. Between 2004 and 2006, through Michigan's pilot Prison Support Adjustment Project, support orders were modified for 3,370 parents in prison.<sup>102</sup> On average, monthly payments were reduced from \$220 to \$19, potentially minimizing the possibility that these parents could be incarcerated for failing to pay child support after release.<sup>103</sup>

As well as reducing the number of people eligible for jail penalties, diversion out of the correctional system is also a solution. By focusing on keeping parents out of prison and fostering opportunities for employment, better outcomes for parents, children and the state become possible.

***Case Study: Success Through Employment Program***

Clermont County, Ohio recognized that one of the most common reasons for failing to pay child support was the lack of employment. Instead of sending parents to prison for the non-payment child support, the county focused on connecting people to jobs. Since 2011, through the Success through Employment Program, 132 parents indicted for failing to pay child support were able to find placement in jobs where they were employed for at least 90 days instead of facing criminal penalties.

The program is administered, funded and managed by several agencies, including: Clermont County Ohio Means Jobs Center, Ohio Department of Rehabilitation and Correction, and Clermont Adult Probation. The agencies help participants find jobs based on their own particular profiles and needs.<sup>104</sup> In Clermont and other Ohio counties where the program was implemented, the child support collection rate increased and the number of people sent to prison for non-payment of support decreased.<sup>105</sup> In the first year of the program Clermont reported a 65 percent decrease in the number of people sentenced to prison for non-payment convictions.<sup>106</sup> In 2007, 790 people throughout the state went to prison for non-support; in 2014, only 342 were imprisoned.<sup>107</sup>

**B. Keeping Women with Children out of Prison and Improving Outcomes for Them and Their Children**

Over the last thirty years the number of women in prison has increased by 646 percent.<sup>108</sup> As the number of incarcerated women in America increases, so does the number of children with incarcerated mothers. Although incarceration causes many harms, the impact on children and their mothers is often overlooked.

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The effects are well-documented. Maternal incarceration can cause emotional and psychological damage to children and increase the social risk factors that make children more likely to have future criminal involvement.<sup>109</sup> Furthermore, separation from children has been linked to adult recidivism.<sup>110</sup>

Delaware has already recognized that there is a high number of pregnant women and new mothers facing substance abuse problems that need supportive environments. For example, in the New Expectations program, women live together in group homes and receive support through required group therapy for their addictions.<sup>111</sup> Women with older minor children are also in need of such environments and can benefit immensely from programs that allow them to live with their children and focus on transitioning to a life of independence and stability.

African American and Latina women are much more likely to be incarcerated compared to their white peers, thus increasing the chance that a youth of color will be separated from their mother at some point in their lifetimes. By opening alternatives to incarceration to a wide range of women, the discriminatory impact and ongoing consequences of maternal incarceration faced by families of color can be altered.

***Case Study: Drew House***

Drew House is a supportive housing program and alternative to incarceration for mothers with minor children in Brooklyn, New York. It works with women who have been charged with felonies - including violent felonies - and provides them with stable and safe housing with a nearby public school, counseling, referrals to community services and case management, all while keeping the mothers united with their children. After a successful stay at Drew House, felony charges are dismissed so that the effects of a criminal conviction do not hinder the transition into independent living.

The program is administered by a non-profit organization and is funded by federal and state grants and private foundations. Some participants pay rent to stay in the fully equipped apartment that they and their children live in while in the program. Court monitoring is facilitated by a third-party or a problem-solving court and daily monitoring is done by case and housing managers with social work qualifications.

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During a 15 month period 8 out of 9 participants successfully completed their court mandate or were scheduled for completion.<sup>112</sup> The cohort of women had a history of homelessness, domestic violence, substance abuse and mental health problems and were charged with drugs, property and violent crimes. The Drew House model has shown that non-institutional settings can strengthen families, promote housing stability, and reduce substance abuse without compromising public safety, even among a group of participants charged with violent crimes.<sup>113</sup>

### **C. Reentry Courts**

Finally, while not directly relevant as an alternative to incarceration, it is important to consider re-evaluating reentry models. Given the unique challenges former offenders face, many find themselves homeless and unemployed upon their release from incarceration.<sup>114</sup> In a number of jurisdictions reentry courts have emerged as an option to provide “recently released offenders with access to comprehensive services to promote their successful reintegration into the community.”<sup>115</sup> While not strictly an alternative to incarceration, reentry courts provide valuable services that help former offenders manage a difficult transition at a point when many are at risk of re-offending.

While reentry courts can be structured differently, successful models include facilitating the matching of participants with the individualized services they need. In Indiana, for example, the reentry court model matches participants with case managers who assist them with the challenges of reentry, “which may include enrollment in mental health and substance abuse treatment, anger management classes, and courses in life skills, as well as housing, financial, educational, and employment services.”<sup>116</sup> A crucial part of the Indiana model is an assessment of each individual’s risk and needs, in order to fit the reentry court program requirements to each participant’s specific situation.<sup>117</sup> In recent studies, reentry courts have been demonstrated to be significantly more effective than parole.

#### ***Case Study: The Harlem Parole Reentry Court***

The Harlem Parole Reentry Court was established in 2001. The program works with parolees for a period of 6 to 9 months after release, and has several fundamental elements, including: (1) pre-release engagement, assessment and reentry planning; (2) active judicial oversight; (3) coordination of support services; (4) graduated and parsimonious sanctions; and (5) positive incentives for success.<sup>118</sup> A recent study by the Center for Court Innovation

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compared a randomized group of traditional parolees to those participating in the Harlem Parole Reentry Court. The successes of the parole court were dramatic in a number of areas, causing an increase in the positive impact on the former offender's lives, an improved sense of fairness experienced by the former offenders, an improvement in post-release supervision and monitoring, and an improvement in rates of recidivism.<sup>119</sup>

In nearly every area studied the reentry court participants showed better outcomes than their counterparts in the traditional parole program.<sup>120</sup> One year after release, 75 percent of reentry court parolees were in school or employed, compared to 45 percent in the comparison group.<sup>121</sup> Additionally, reentry court participants had “higher annual incomes and jobs that provided health insurance and paid vacation or sick time.”<sup>122</sup> Additionally, one year after release, reentry court parolees were more successful in their struggles with substance abuse addiction, and had maintained a nearly 50 percent decrease in recidivism rates relative to individuals in the traditional model. Perhaps most critically, individuals in the reentry court program “reported better experiences than those on regular parole” with nearly 96 percent reporting they were “treated with respect, compared to 40 percent of regular parolees.”<sup>123</sup>

## **VI. CONCLUSION**

The Access to Justice Commission is a promising step towards addressing issues of racial disparities and economic injustice in Delaware's criminal justice system. This Commission presents a unique opportunity for the state to reexamine and improve on existing alternative to incarceration options and also to consider new innovations that seek to eliminate disparities. A number of possible innovations have the potential to improve Delaware's criminal justice system while also improving public health, reducing economic inequalities, and saving the state valuable resources.

One final consideration is Delaware's unique position with regards to the private sector. By engaging the State's broad corporate base to invest in a wider base of programs to divert people from prison, Delaware has the potential to become a national model on leveraging public-private partnerships to address systemic problems in the criminal system.

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