

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

A Report on Racial Bias in Prosecutorial Charging Decisions,
Plea-Bargaining, and Sentencing

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Equal Justice Initiative–Report on Charging,
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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 to participate in Delaware's Access to Justice Commission's Committee on Fairness in the Criminal Justice System. EJI was asked to consider a number of topics related to the criminal justice system in order 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 collateral impacts of 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 considered the way that Delaware's criminal procedures, including charging, plea-bargaining, and sentencing, can be reformed to reduce the disparities experienced by indigent defendants and defendants of color. EJI has studied academic papers and considered the progress that has been made by other jurisdiction's reform efforts. Based on our research, EJI proposes the following recommendations in each specific area:

- Charging Reforms:
 - Utilize an early case assessment process to initially screen cases to ensure charges are appropriate;
 - Implement a beyond a reasonable doubt standard of proof for charging

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- decisions;
- Adopt a dedicated charging unit and a horizontal prosecution office structure.
- Plea-Bargaining Reforms:
 - Prohibit plea bargaining prior to the appointment of defense counsel;
 - Involve judges or magistrates in the plea-bargaining process;
 - Implement standard measures by which prosecutors screen and dismiss cases
- Sentencing Reforms:
 - Reduce excessive sentences by abolishing the death penalty, restricting the use of life without parole, and eliminating mandatory minimum sentences;
 - Encourage parole releases and use compassionate release;
 - Adopt Racial Impact Statements to prevent future disparities

II. CHARGING

A. The Potency of the Charging Decision

The decision to charge an individual with a crime is the most important function exercised by a prosecutor.¹ This is because in a lot of instances, the decision to charge a defendant can predetermine the outcome of a criminal case given so many cases culminate with a guilty plea or guilty verdict.² This immense power is given to prosecutors with virtually no “formal constraints on regulatory mechanisms, making it one of the broadest discretionary powers in criminal administration.”³ Even in cases where a charge does not ultimately result in a conviction, “the mere filing of a criminal charge can have a devastating effect upon an individual’s life, including potential pretrial incarceration, loss of employment, embarrassment and loss of reputation, the financial cost of a criminal defense, and the emotional stress and anxiety incident to awaiting a final disposition of the charges.”⁴ Given its potency, the decision making power of a prosecutor is one should be wielded judiciously.

Therefore, it is imperative that those who wield it do so without racial animus or bias. Unfortunately, that is often not the case. As former Supreme Court Justice Harry Blackmun put it in the Supreme Court case *Rose v. Mitchell*, “we cannot deny that 114 years after the

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close of the War between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination remain a fact of life, in the administration of justice as in our society as a whole.”⁵ As one prosecutor put it, “the impact of racism, when present in a [prosecutor’s] decision as to whom to charge, at what level to charge, and whether to negotiate a lower charge, cannot be exaggerated.”⁶

B. Racial Bias in Charging Decisions

Legal scholars and practitioners are not alone in this assertion. Multiple studies conducted in the recent past backup their claims. Studies have shown that ‘prosecutors often make decisions that discriminate against African American victims and defendants.’⁷⁸ For instance, one study found that prosecutors are more likely to opt for the highest available charge in cases involving a white victim.⁹ Another study found that prosecutors “were statistically more likely at the initial screening stage to reject charges against white defendants than they were to reject charges against blacks and Hispanics.”¹⁰

According to a recent study conducted by researchers at Yale, even “after controlling for the arrest offense, criminal history other prior characteristics, there remains a black white sentence length gap of about 10%” because of “the prosecutor’s initial charging decision – specifically, the decision to bring a charge carrying a mandatory minimum.”¹¹ Additionally, even if one again controls for “pre charge case characteristics, prosecutors in our sample were nearly twice as likely to bring such a charge against black defendants” for non-drug cases, according to the same study.¹² Put simply, prosecutors are less likely to charge white suspects than black suspects.

These findings are neither new nor novel; similar studies in the past have concluded with familiar results. For instance, when the San Jose Mercury News reviewed almost 700,000 criminal cases in California during a period in the 1980s and 1990s, they discovered that “20 percent of white defendants charged with crimes providing for the option of diversion received that benefit, while only 14 percent of similarly situated blacks and 11 percent of similarly situated Hispanics were placed in such program.”¹³

The same study also found that during the years of 1989-1990, “a white felony defendant with no criminal record stood a 33 percent chance of having the charge reduced to a misdemeanor or infraction, compared to 25 percent for a similarly situated black or

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Hispanic.”¹⁴ Furthermore, they found that “between 1981 and 1990, 50 percent of all whites who were arrested for burglary and had one prior offense had at least one other count dismissed, as compared to only 33 percent of similarly situated blacks and Hispanics. Blacks charged with a single offense received sentencing enhancements in 19 percent of the cases, whereas similarly situated whites received such enhancements in only 15 percent of the cases.”¹⁵

One way to address these disparities, along with other issues facing the criminal justice system, is to alter the way charging decisions are made on a structural level. Such alterations could come about through the implementation of policies that different district attorney offices throughout the country found useful when they restructured their prosecution units. Changes to the timing of charging decisions, the makeup of the actual decision makers, and the standards that dictate what crimes to charge could all go a long way in creating a better charging system that would reduce racial disparities.

C. The Current Delaware Model

In Delaware, the prosecution of suspected perpetrators of crime is handled by the criminal division of Delaware’s Department of Justice. Each of the three Delaware counties maintains their own Criminal Division office. Additionally, each office is headed by a County Prosecutor, who is appointed by the Attorney General. Finally, within each office is a special unit called the ‘Felony Screening Unit.’¹⁶

“The goal of the Felony Screening Unit is to screen and process various felony cases prior to assignment to a Deputy Attorney General in Superior Court.”¹⁷ Furthermore, the Unit is “responsible for gathering information from the investigating police agency and making an initial determination as to whether the unit should be prosecuted, and, if so, on what charges.”¹⁸ Typically, the Felony Screening Unit’s overarching goal is to resolve cases at the preliminary hearing stage. They are also responsible for litigating the case at that stage, as well as at the grand jury presentation stage.¹⁹

Once the Felony Screening Unit determines what, if any, charges they will file against a defendant, a case is then moved to the ‘Initial Appearance and Bail Hearing stage.’²⁰ These ‘initial appearance’ hearings are typically held within 24 hours of an individual’s arrest. It is during these phases, when charges are contemplated and ultimately filed, that reforms can

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have the most significant impact.

D. Alternative Measures

1. Implementing an Early Case Assessment Bureau

Although maintaining a ‘Felony Screening Unit’ is a practice common to many local prosecutor’s offices across the nation, the actual mechanisms of how the unit operates varies across jurisdictions. A recent report by the United States Department of Justice found that the “timing of the charging decision varies by jurisdiction. Prosecutors may review charges for the first time prior to a defendant’s initial court appearance. Some prosecutors perform pre arrest or on scene review.”²¹ Although the timing of the screening is only one variable component, it is a very important one.

The Justice Department found that a prosecutor may take “information from law enforcement officials and, in some instances, from the arrestee, victims, or witnesses to determine whether prosecution should proceed on the original charge, proceed on a reduced charge, or be declined.”²² It is important to have an expeditious screening model because a charge reduction can lead to a bail reduction and an eventual release. These in turn lead to a substantial reduction of an “average length of confinement for those who are detained.”²³

A recent study found that the “best practice in this area of justice administration includes a system in which police and prosecutors communicate about cases within 24 hours of an arrest to determine whether additional information is needed (and setting out to collect it, if necessary) or to spot potential weaknesses in the case.”²⁴ Highlighted in the report was the need for “early post-arrest investigation and case preparation” that requires a strong “working relationship between police officers and assistant district attorneys.”²⁵ The report goes to great lengths to emphasize the need for these units to be ‘supervised and staffed by experienced attorneys who can guide police officers in preparing and developing cases that can determine the appropriate charges.’²⁶ The study cites the New York City Early Case Assessment Bureau system as an example of the “best practices.”

i. Case Study: Manhattan District Attorney’s Office

In Manhattan, nearly all arrests by the New York Police Department are brought

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through the Early Case Assessment Bureau. Upon a NYPD officer making an arrest, a defendant is initially “brought to the arresting officer’s local precinct, where the arrest is processed. At that time, the officer sends all of the arrest paperwork via facsimile to ECAB, where the case is given to an assistant who is on duty that day.”²⁷ This means that very little time elapses between an arrest being made and when the screening process begins.

The Early Case Assessment Bureau is actually staffed by “members of one of the office’s six Trial Bureaus, which rotate daily.”²⁸ They are led by a senior assistant district attorney who supervises and reviews incoming felony cases before assigning the cases to an assistant on duty. An assistant District Attorney assigned a case in ECAB has the responsibility to make sure that the NYPD has “completed all of the necessary work in connection with the arrest to file the charges.”²⁹ In order to do so, they must complete a “DA data sheet” that includes “all relevant case information, including names and information of witnesses, evidence obtained, and all officers involved in the arrest.”³⁰ Upon gathering all of this information, the assistant district attorney drafts a complaint for arraignment and prepares a bail application.

A defendant has an opportunity to make a statement to an Assistant District Attorney if they so desire. If so, then an officer “transports the defendant from the police precinct to ECAB, which is equipped to conduct video-taped statements.”³¹ Once the intake process is complete, the defendant is then transported to Central Booking for an arraignment hearing. One assessment found that this model “ensures that cases are thoroughly vetted at their inception.”³²

That said, there are some shortcomings with this model. For instance, when the bureau was initially launched in 1975, only senior assistant district attorneys were assigned to the “Complaint room.” Furthermore, only ADAs with at least “two years of experience were assigned to the ECAB team and the bureau chief was required to have a minimum of six years experience.”³³ Now, the Manhattan ECAB office is “often the first stop for new assistants.”³⁴ These new assistants supposedly work with “assembly line-like speed.”³⁵ In order to address this, some offices around the country have elected to have a dedicated specialized unit with only experienced prosecutors handling the screening process. Furthermore, the rush to take defendants to central booking for an arraignment hearing so soon raises right to counsel concerns.

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2. Specialized Units

One potential solution to the problem of having inexperienced staff attorneys assessing cases would be to re-staff the entire felony intake unit with senior level prosecutors. Those prosecutors could be individuals who are dedicated solely to reviewing cases prior to a decision to charge. Senior attorneys who have been prosecutors for a long time are likely to have a better understanding of the intricacies of a myriad of potential charges that could apply. Given their experience and skills, it may be likely that these attorneys would be more objective than newer ones who may overcharge. After all, the more experience the prosecutor, the more likely they may be to understanding whether an element of a crime is likely or unlikely to be met.

The solution of implementing an intake office solely with senior attorneys was one of many implementations that the Philadelphia Prosecutor's Office in the late 2000's. That office required a prosecutor to have five years of experience in a major trial unit before being assigned to their elite charging unit.

Another policy that Delaware should consider adopting is a horizontal prosecution method rather than a vertical one. In a vertical prosecution model, one attorney typically handles a case from the intake phase through disposition, which includes drafting the complaint, presenting it to a grand jury, and actually trying the case. In contrast, horizontal methods typically sees a specialized charging unit that handles intake phases, then a separate the grand jury unit presents to the grand jury, as well as a trial unit that tries the case.

By implementing a horizontal method, it is likely that an attorney who handles the intake may act more objectivity. If an attorney knows that they would not be required to also try the case later on, they may feel more freedom to be apply a more critical eye when deciding whether or not a charge is appropriate.

i. Case Study: The Philadelphia District Attorney's Office

The charging system for the District Attorney's Office for the City of Philadelphia was once characterized as "inadequate and dysfunctional."³⁶ A lot of discretion was given to the Philadelphia police department in making charging decisions and judges were given leeway to determine which charges were to be dropped because the facts of a case did not

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support them. Prior to implementing reforms, roughly 59% of all felonies charged in Philadelphia were dismissed at a preliminary hearing, typically because of procedural grounds.³⁷

In order to achieve reform and lower those statistics, the Philadelphia District Attorney's Office "transformed the Charging Unit from one staffed by paralegals and underperforming Assistants to an elite unit within the office, staffed by only senior, experienced assistants."³⁸ The charging unit was led by a "highly respected prosecutor who has spent more than twenty years in the office,"³⁹ who handpicked deputies to assist him in charging decisions.

As a result of these changes, a 2011 Pew Research Report found that the number of pretrial detainees has been significantly reduced, as has the jail population. As an added bonus, millions of tax dollars have also been saved.⁴⁰ Given research findings referenced earlier concerning the fact that African Americans are much more likely to be charged with a crime than their white counterparts, this reduction in pretrial detainees and ultimately the jail population would benefit black defendants who otherwise would have remained incarcerated.

3. A Stricter Burden of Proof

Another positive reform would be to require a tougher burden of proof within the office for charging. EJI suggests that Delaware should adopt a policy that a charge should not be brought unless it can be proven beyond a reasonable doubt. By implementing a more burdensome standard to meet, it is less likely that a prosecutor will bring frivolous charges. This would reduce the number of frivolous charges that are brought and discourage prosecutors from bringing a harsh charge against a defendant merely for strategic purposes. If a prosecutor has an internal burden that is difficult to meet, they will be less likely to bring a charge in the first place.

i. Case Study: The San Diego District Attorney's Office

The San Diego District Attorney's office implements many of the aforementioned solutions in their prosecution model. For example, the office not only maintains a 'specialized charging unit staffed exclusively by senior prosecutors,' but also employs a

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‘beyond a reasonable doubt standard’ before deciding to even charge a case.⁴¹ This standard has resulted in a world where “approximately 75% of cases coming into the office pled guilty at or before their preliminary hearing, a testament to the strength of the cases [that] the office elected to prosecute.”⁴² The office not only maintains a special unit dedicated to screening felony cases via intake, but also maintains another specialized unit for investigators.

According to a former San Diego County Assistant District Attorney, the San Diego District Attorney’s Case Issuing Unit is “charged with the responsibility of screening and reviewing more than 3,500 requests from criminal complaints each month from several different law enforcement agencies. The unit is responsible for handling these cases through the arraignment process.”⁴³ They are tasked with “carefully reviewing police reports documenting criminal activity that occurs in the central area of San Diego to determine whether felony charges should be filed.” They also decide whether a case should be referred to another prosecution agency or another division to be handled vertically.⁴⁴

4. Participation By Defense Counsel in the Charging Process

Another reform that could have a dramatic impact in improving the current charging mechanism in Delaware would be to allow participation by defense counsel in the charging decision process. Delaware should not only provide counsel prior to a defendant’s first court appearance, and ‘if possible, at the police station or in the holding tank,’ but also allow a defense attorney a seat at the charging conference table. This process is known as a “joint” charging process. After all, a defendant’s attorney is “likely be armed with personal and offense information” that could prove valuable to ascertaining whether elements of a charge are met or not.⁴⁵ Additionally, the counterbalance of defense counsel may even provide a greater level of objectivity to charging decisions that even experienced prosecutors lack.

In order to implement this goal, plea negotiations and final charging decisions should not occur until after parties have adequate information about the defendant and the allegations against them. Additionally, charges carrying a mandatory minimum sentence should not be irrevocably set until after the opportunity for an informed exchange between defense counsel and prosecutors at a ‘joint’ charging conference. That way, both sides of the adversarial process will have the opportunity to work together, rather than against one another, to reach a just outcome and avoid overcharging potential defendants.

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E. Conclusion

In conclusion, Delaware should require that charging decisions are made by a specialized unit staffed by experienced prosecutors who will be charged with determining if the case can be proven beyond a reasonable doubt before charges are brought. In addition, defense counsel should be given an early opportunity to weigh in on the charging process. By implementing these reforms, the likelihood of overcharging will be diminished and a more robust and efficient system should result.

III. PLEA-BARGAINING

A. The Rise of Plea Bargaining

Implementing the charging reforms mentioned above will be the first step in creating the broad change needed in Delaware's criminal justice system. After charging occurs, the next-stage of adjudication for far too many people is plea-bargaining. Ninety-seven percent of federal cases and 94% of state cases are settled by the plea bargaining process.⁴⁶ In *Missouri v. Frye*, Justice Kennedy remarked that plea bargaining "is not some adjunct to the criminal justice system; it is the criminal justice system."⁴⁷ The Court's rulings in *Missouri v. Frye*⁴⁸ and *Lafler v. Cooper*⁴⁹, which guarantee that a defendant's 6th Amendment right to counsel applies during plea bargaining, are the most recent decisions in a long line of cases solidifying plea bargaining's place in the criminal justice system. In *Brady v. United States*, the Court held that negotiations between the defendant and the state were both constitutional and important.⁵⁰ Shortly thereafter, the Court went further and held that plea bargaining was an essential component of the judicial system that should be encouraged.⁵¹ In 2010, *Padilla v. Kentucky* extended the 6th Amendment to situations in which a lawyer erroneously advises his or her client to take a plea deal;⁵² *Missouri v. Frye*⁵³ and *Lafler v. Cooper*⁵⁴ seem to stand for the proposition that the right to counsel now extends to all aspects of plea bargaining. Although plea bargaining began as an ancillary process, occurring in the shadow of trial, it has become a formal and dominant means of disposing of criminal cases in the American legal system.

The rise of plea bargaining has several causes, including underfunded public defender's offices and harsher penalties for crime. In most state systems, especially in underfunded urban areas, court-appointed defense attorneys have little time to devote to a

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particular criminal defendant.⁵⁵ With caseloads often exceeding a hundred clients, even salaried public defenders have an incentive to encourage clients to take a plea.

Although overwhelmed defense attorneys certainly contribute to the prevalence of plea bargaining, many researchers argue that stiffer punishment, especially in the form of mandatory minimum sentences, is the most important factor driving up the rate at which defendants plead guilty.⁵⁶ The gulf between length of negotiated sentences and post-trial sentences is so enormous that many risk-averse defendants avoid the possibility of the long, post-trial sentence by pleading guilty, regardless of guilt or innocence.⁵⁷

Pretrial detention is another element of the criminal justice system that often influences a defendant's decision to take a plea. Pretrial detention is discussed at length in another EJI report. As we noted there, pretrial detention often exceeds the punishment that a court would impose after trial.⁵⁸ This situation encourages a defendant to plead guilty for two reasons. First, a guilty plea with a sentence of time served results in immediate release, whereas going to trial would mean ongoing incarceration. Second, it is exceedingly difficult for detained defendants to mount a defense. An innocent person in pretrial detention may realize that the fact of detention diminishes his chances of winning at trial, making a plea all the more enticing.

B. The Absence of Defense Counsel in Delaware's Plea-Bargaining Process

The Sixth Amendment Center, a non-profit organization whose mission is to ensure that no person faces time in jail or prison without first having the aid of adequate counsel, conducted a study of Delaware's public defense system and published its findings in a report in 2014.⁵⁹ The Sixth Amendment Center conducted the study on behalf of the Office of Conflicts Counsel, a division of Delaware's Office of the Public Defender.⁶⁰ After approximately six months of data collection, interviews, and court observations,⁶¹ the Sixth Amendment Center found, inter alia, that thousands of defendants a year were foregoing the right to counsel and pleading guilty to crimes without understanding the consequences of that decision.⁶² As a result, "Delaware's indigent defense function fails to subject the prosecution's case to 'the crucible of meaningful adversarial testing' rendering the entire adversarial process 'presumptively unreliable.'"⁶³

In most cases involving potential jail time in Delaware, the Justice of the Peace Court

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(JP Court) serves as the committing magistrate on behalf of another court with statutory jurisdiction over a particular crime.⁶⁴ The JP Court initiates criminal proceedings against any defendant taken into custody by law enforcement so that a magistrate can set bail.⁶⁵ When the JP Court is serving as a committing court on behalf of another court, “the defendant shall not be called upon to plead.”⁶⁶ However, when the defendant appears before the JP Court and is *not* in custody, the “Delaware General Assembly has given the Justice of the Peace Court broad authority to act as trial court for certain lesser misdemeanors and nearly all motor vehicle cases (excluding felonies).”⁶⁷

The result, as described by the Sixth Amendment Center, is that defendants meet briefly with law enforcement and a prosecutor and then line up, sometimes five or six at a time, in front of a judge to plead guilty without ever having consulted a criminal defense attorney.⁶⁸ Most of these sentences dramatically diminish the fine that the defendant would have to pay, but many involve probation that often includes treatment or courses.⁶⁹ Although this process benefits Delaware’s court system by cutting costs and expeditiously moving defendants through the system, it also violates a defendant’s Sixth Amendment right to have counsel present at the plea bargaining process.⁷⁰

Delaware’s in-custody defendants are formally arraigned under circumstances in which guilty pleas are nearly as frequent and counsel is almost as absent. From the prosecutor’s perspective, the goal is often “to make a plea in every case.”⁷¹ This attitude is problematic because most defendants do not have counsel at arraignment.⁷² The result is that the arraignment process becomes a plea process. Defendants negotiate away their right to an attorney without the advice of one. In some instances, defense attorneys are present as “friends of the court,” a capacity in which they help defendants fill out plea forms but cannot advise defendants on whether the plea deal is a good one.⁷³

C. Increasing Prosecutorial Power

As plea bargaining becomes increasingly common, prosecutors are becoming increasingly powerful. Prosecutors have many more resources than most defendants and defense attorneys. For example, law enforcement officials investigate the government’s cases.⁷⁴ This means that prosecutors have entire police departments at their disposal. Moreover, prosecutors can use plea deals to entice witnesses to either provide information or testify against defendants.⁷⁵

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Prosecutors can offer defendants an ultimatum: plead guilty to reduced charges or go to trial and face more severe charges with harsher, often mandatory, penalties. For example, if the police raid a drug dealer's house and find his girlfriend inside of it with drugs in her purse, the prosecutor on the case might offer to charge her only for the drugs in her purse in exchange for her guilty plea, testimony against her boyfriend, and a couple of years in prison. If she rejects that offer, the prosecutor will charge her with constructive possession of all of the drugs in the house, which could result in a mandatory minimum sentence of around 25 years. In a white-collar crime case, a prosecutor might charge the defendant with one count of wire fraud for all of the emails she sent if she pleads guilty, or twelve counts of wire fraud for each email she sent if she goes to trial.⁷⁶ The prosecutor, as opposed to the judge, often decides the sentence.

The proliferation of duplicative laws gives prosecutors the power to charge a single incident under several different statutes, thereby increasing their bargaining power with a defendant. Prosecutors generally decide whether to charge a crime as a misdemeanor or felony and whether add enhancements, such as the use of a firearm in the commission of the offense, or prior convictions.⁷⁷ “In the course of plea negotiations, a prosecutor can agree to drop each time-adding allegation or threaten to add more serious charges if the defendant refuses to ‘take the deal.’”⁷⁸

The prosecutor's influence over who goes to trial and who pleads guilty, and how much time they serve in prison, is troubling in light of the fact that prosecutors do not represent the country demographically. Although white men make up only 31% of the population of the United States, they comprise 79% of the nation's prosecutors.⁷⁹ Ninety-five percent of all prosecutors are white.⁸⁰ The fact that prosecutors are so overwhelmingly white is especially disconcerting in light of the fact that prison populations in Delaware and throughout the country are disproportionately black and Latino. This stark contrast between prosecutors and defendants also perpetuates the lack of trust that many people of color have in the criminal justice system. As Melba V. Pearson, president of the National Black Prosecutor's Association said about African-Americans' mistrust of the criminal justice system: “[t]hey have to see someone that looks like them. When you walk into the courtroom and no one looks like you, do you think you are going to get a fair shake?”⁸¹

D. Racial Bias in the Plea Bargaining Process

The mistrust that many African-Americans and other minorities have of a system in which no one looks like them and no one is standing in the courtroom for them is substantiated with statistics. An assessment of 700,000 criminal cases concluded that “[a]t virtually every stage of pretrial negotiations, whites are more successful than non-whites. Of 71,000 adults charged with felonies and with no prior record in the study, one third of whites had charges reduced to misdemeanors or infractions, while only one quarter of blacks and Hispanics received these outcomes.”⁸² Such discrepancies are possible in part because prosecutorial discretion regarding whom to charge is unregulated and beyond judicial purview.

One of the reasons that defendants, many of them African-American, are so willing to plead guilty to misdemeanor crimes in Delaware despite their lack of interaction with counsel is that they see no alternative to acceding to government demands. A “robust literature” explains that African-American suspects are more likely to feel coerced by law enforcement than their white counterparts who are more confident that their rights will be respected.⁸³ This same dynamic applies to interactions with prosecutors and judges during plea bargaining; many suspects of color—especially African-American men—simply accede to the prosecutors’ requests because they fail to perceive another option.⁸⁴ The “astronomical incarceration rates” in many African-American communities lead many young men to believe that conviction and incarceration are inevitable. This belief is tragic but rational: in the context of most misdemeanor arrests, succeeding with an innocence claim would mean a defendant convincing a court to believe his word over an officer’s statement, which is unrealistic.⁸⁵

The perception that the system is biased and that procedural justice is lacking can lead defendants to believe that their sentences—even ones to which they agreed—are fundamentally unfair.⁸⁶ This, in turn, can lead to problems with compliance during incarceration and probation.⁸⁷ At a broader level, it creates dissatisfaction with the entire system and erodes one’s sense of obligation to follow the law.⁸⁸

The Sixth Amendment guarantees that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” Although that right still exists in theory, it has all but disappeared in practice. Unregulated, backroom conversations

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between unequal parties are now the process by which the vast majority of accused people are convicted in the United States. Reforms are needed to bring the process back within the boundaries of the 6th Amendment.

E. Innocent Defendants Plead Guilty

Some scholars have argued that plea bargaining too often results in innocent defendants pleading guilty. First, there is the problem of the risk-averse but innocent defendant taking a guilty plea to avoid the small chance of receiving a long sentence.⁸⁹ A related criticism is that innocent defendants plead guilty because prosecutors can adjust their offers according to the defendant's chances of acquittal such that almost every case ends with a guilty plea, regardless of its strength.⁹⁰ Using this method, prosecutors extract guilty pleas in weak cases that they could not have won at trial.⁹¹ "The point," explains scholar Oren Gazal-Ayal, "is that the defendant would have been much better off if the prosecutor had not been able to offer him a plea bargain in the first place because then she probably would not have charged him at all."⁹²

Scandals in cities like Los Angeles and New York, where numerous defendants have pleaded guilty to charges stemming from alleged crimes that police officers fabricated, show that innocent people often plead guilty.⁹³ Some critics of the plea-bargaining process argue that the best way to prevent that from happening is to create a system in which prosecutors cannot tempt or bully innocent defendants into giving up their trial rights. According to this theory, prosecutorial discretion gone array is at the heart of the problem, and curbing that discretion is the solution.

F. Recommendations

1. Defendants Should Not Plead Guilty to Any Crime without Meaningful Legal Consultation

Delaware should abolish the practice of allowing prosecutors or the court to plea bargain with defendants who do not have an attorney present. In *Rothgery v. Gillespie Cnty., Texas*, the Supreme Court held that "the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty."⁹⁴ Any

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misdemeanor conviction is a significant restraint on a person's liberty. Without an attorney present, many of the defendants bargaining with a prosecutor or law enforcement agent will not understand the collateral consequences of a misdemeanor conviction, which may include, inter alia, professional, housing, academic, social service, health care, immigration, and child custody restrictions. The stigma of the misdemeanor conviction heightens the chances that subsequent encounters with police officers will lead to an arrest, and in the event of a subsequent conviction the prior misdemeanor conviction will usually result in a harsher sentence.⁹⁵

More specifically, misdemeanor convictions are often a “key ingredient in the criminalization of the black experience.”⁹⁶ First, a conviction burdens an African-American defendant financially and socially. Ironically, it also heightens the chances that the convicted person will re-offend.⁹⁷ These are serious consequences, especially in light of Delaware's effort to confront the over representation of young African-American men in its criminal justice system and its poorest neighborhoods. Second, misdemeanor convictions have a strong psychological impact on young African-American men, alienating them from mainstream culture and exacerbating the tension between them and the legal system that Delaware is addressing.⁹⁸

Taking the existence of these collateral consequences into account, it is crucial that Delaware provide defendants with attorneys at the initial screening process, prior to any plea bargaining. Furthermore, the prosecutors with whom defendants and their counsel negotiate need to be educated and made aware of the fact that a misdemeanor conviction is, in and of itself, a harsh punishment. Moreover, misdemeanor convictions are a punishment that return people to the system as opposed to a convenient way to move people through the system. When prosecutors are negotiating with defense attorneys, they should understand that there is no “good deal” involving a conviction.

2. Judicial Involvement in Plea Bargaining

One obvious solution to the problem of unbridled prosecutorial power and unregulated back-room dealing in the plea-bargaining process is judicial involvement. Judges regulate much of the trial process already; thus, they are well-positioned to oversee this aspect of it. Although judges are specifically precluded from participating in the plea-bargaining process in federal court,⁹⁹ Delaware courts have not ruled on this issue, nor is there a state statute or

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rule of procedure on point.¹⁰⁰ Delaware courts should involve judges in the negotiation process.

The judge or magistrate managing the plea process would need to be distinct from the trial judge.¹⁰¹ The point of this judge or magistrate would be to hold the prosecutor accountable to promises made to the defendant and check the prosecutor's power more generally.¹⁰² For example, the judge might enforce expanded pretrial discovery rules, ensuring that the prosecutor shared information that would help the defendant assess the relative merits of a trial or a plea. The judge could also serve as a check on a trial-averse defense attorney pushing his client toward a plea for reasons unrelated to the client's case.

Meetings between the prosecution, defense, and judges or magistrates should be recorded.¹⁰³ This would protect both the defendant and the state. Subsequent review of the recording would protect the defendant against judicial or prosecutorial coercion during the negotiation process. Judicial coercion is necessarily a concern with judicial involvement in any part of the trial process, and the recording would be an important means of addressing that. For the state, a recording would guard against baseless claims by the defendant that the process was coercive or in any way improper.

3. Plea Bargaining and the Legislature

Legislators, like judges, can combat the unfair advantages that prosecutors have in the plea-bargaining process.¹⁰⁴ First, legislators should review previously passed laws in order to determine whether there are clusters of redundant statutes that give prosecutors an unfair advantage by allowing them to charge an offense multiple times.¹⁰⁵ Additionally, legislators could pre-screen new laws in much the same way in order to determine whether they actually criminalize behavior that is not otherwise regulated, or whether they were repetitive statutes put forward for purely political purposes.¹⁰⁶ Overly broad criminal codes “create an infinite pool of the guilty, among whom police and prosecutors have unbridled discretion to select and negotiate.”¹⁰⁷ Plea bargaining in the shadow of these codes is does not turn on personal liability but rather the government's unlimited number of bargaining chips.

This proposal is not entirely hypothetical. Colorado enacted a law in 2011 that requires pre-enactment screening of new crimes.¹⁰⁸ The statute requires that each new crime be accompanied by a fiscal note including, inter alia, “(a) an analysis of whether the new

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crime can already be charged under current law; (b) a comparison of the proposed crime to similar offenses; and (c) ‘an analysis of the current and anticipated future prevalence of the behavior that the proposed new crime...intends to address.’”¹⁰⁹ Ideally, a legislature would pass a similar law requiring retrospective analysis of existing offenses, but Colorado’s future-oriented statute is nevertheless a partial model for this type of reform.

4. Expanded Discovery in the Plea Bargaining Process

Another way to check prosecutorial discretion and empower defendants in the plea bargaining process is to liberalize discovery. Defendants do not have a constitutional right to impeachment information or even exculpatory information during the plea bargaining process.¹¹⁰ A prosecutor may first attempt to get a defendant to plead guilty to a greatly reduced sentence before revealing a critical weakness in his or her case. If prosecutors were required to reveal information prior to the bargaining process, they would likely dismiss more cases, thereby saving judicial resources and protecting innocent defendants who might otherwise be intimidated into pleading guilty.

Specifically, Delaware should consider implementing a “pre-plea discovery conference.”¹¹¹ One of the goals of a pre-plea conference would be to “make transparent and record” the discovery available to the prosecution, such as a defendant’s statements, a witness list (redacted if necessary), and exculpatory information.¹¹² As part of the pre-plea conference, there should be a colloquy between the parties and a judge in order to discuss discoverable evidence available to each side at that time.¹¹³ This would also give a judge the opportunity to question the defense attorney to ensure that she provided her client with all of the information necessary under *Lafler* and *Frye*.

Susan Klein, a leading advocate of the pre-plea conference, points out that it is more politically palatable than increasing funding for the criminal defense function or expanding a defendant’s procedural rights more directly.¹¹⁴ A conference like the one she is describing would not require legislative action and could likely escape political notice.¹¹⁵ Furthermore, the conference “merely requires the attorneys to list on record what information they have provided or intend to provide to the other party, allowing each party to make a more effective plea decision.”¹¹⁶ Liberalizing the discovery process diminishes the oft-cited power imbalance between the prosecution and defense and allows both parties to make informed decisions during the plea bargaining process.

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The recommendation that Delaware liberalize its discovery process and provide defendants with more information earlier in the process is in line with the American Bar Association's Criminal Justice Standards. The ABA recommends that the prosecution should "provide the defendant with sufficient information to make an informed plea."¹¹⁷ An informed plea requires the defendant to gauge the strength of the prosecution's case against him, which at a minimum requires the defendant's own statements and any exculpatory information that the prosecution might have.

5. Prosecutorial Screening

No entity within the state of Delaware has more power to immediately and significantly alter the plea-bargaining process than the prosecutors participating in it. Currently, some prosecutors are efficiently moving cases through the system by offering disproportionately low sentences in exchange for guilty pleas.¹¹⁸ Prosecutors could clear dockets and achieve the same level of efficiency by screening and dismissing, as opposed to pleading, weak cases. Additionally, such a system would protect innocent but vulnerable defendants from pleading guilty to a weak charge out of fear and incurring the collateral consequences of conviction discussed above.

As noted above in discussing reforms to the charging process, prosecutors should carefully review each case before filing charges. This requires prosecutors to demand sufficient information from police and investigators. It also requires prosecutors to foresee what defenses the defendant might raise and how the jury or judge would respond to the charges at trial. Furthermore, prosecutors must file appropriate charges. This means that the prosecutors cannot file a charge they do not think they could prove in court or do not think the defendant deserves simply as a bargaining chip. Finally, there must exist sufficient training, oversight, and internal enforcement to guarantee uniformity of charging and plea bargaining decisions.¹¹⁹

The New Orleans District Attorney's Office has implemented a rigorous screening process that results in the rejection of more than half of the charges recommended to it. Data collected in 1997 revealed that the New Orleans District Attorney's office received recommendations for criminal charges against 16,502 suspects. After indictment (felonies) or information (misdemeanors), 4,780 defendants (29%) plead guilty.¹²⁰ The office only filed charges in 46% of the *cases* recommended to it, and it filed 37% of all *charges* recommended

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to it. Approximately 15% of the cases were referred to another court or pretrial diversion program. In sum, the New Orleans District Attorney's office rejected 52% of all charges recommended to them in state felony court.¹²¹ As a result, only 74% of the cases they filed resulted in plea bargains, while 13% went to trial.¹²² To put that in contrast, less than 3% of federal cases went to trial in 2010.¹²³

New Orleans has also restricted prosecutors' ability to bargain with defendants by lowering charges or offering significantly reduced sentences. Although proponents of this system argue that it forces prosecutors to drop weak cases, its effect on defendants is not clear. It may have severely negative consequences for individuals who want to accept responsibility for their action but are facing unduly harsh sentences. New Orleans's restrictions on plea bargaining may also hurt defendants by preventing prosecutors from meaningfully reducing sentences in light of mitigating circumstances.

Moreover, New Orleans does not have a model criminal justice system. Its Public Defender's office is infamously underfunded and the criminal justice system in general is often criticized for worsening the plight of the city's poorest, usually African-American residents.¹²⁴ Nevertheless, its novel approach to plea bargaining that prioritizes prosecutorial screening suggests that it is feasible for prosecutors in Delaware and throughout country to decline to prosecute a greater percentage of cases than they currently do.

6. Reforming Plea Bargaining Requires Reforms to Bail and Reducing Excessive Sentences

There is nothing inherently wrong with a system in which people who have committed crimes plead guilty in exchange for lenient sentences. Rather, the worst flaws in the plea bargaining system in Delaware and throughout the United States are symptoms of a dysfunctional bail system and excessively harsh sentencing schemes. For example, innocent defendants typically plead guilty because (a) they are languishing in pretrial detention and a guilty plea would result in immediate release or (b) they are terrified of a mandatory minimum or disproportionately severe sentence should they choose to exercise their right to trial. Pretrial detention and excessively harsh sentences render plea bargaining a coercive process. A defendant who cannot afford to pay bail or feels threatened by a long sentence resulting from the potential of several redundant charges is not truly bargaining. Delaware must reform bail and reduce excessive sentences in order to curb abuses in plea bargaining

as well.

G. Conclusion

More than 95% of criminal cases in Delaware and throughout the United States are resolved via plea bargains. As a result, a plea-bargaining system in which defendants' Sixth Amendment rights are respected and prosecutorial power is kept within appropriate constitutional limits is crucial to the integrity of Delaware's criminal justice systems. To this end, EJI recommends that Delaware prohibit prosecutors and courts from plea bargaining with defendants until they have had a meaningful opportunity to speak with counsel. Furthermore, EJI recommends involving judges or magistrates in the plea-bargaining process and implementing standard measures by which prosecutors can screen and dismiss cases. While plea-bargaining has become entrenched in the criminal justice system, there are ways to alter the system in order to reduce racial disparities and ensure that people are not unduly pressured into taking plea deals.

Moreover, EJI recommends that the State of Delaware view bail reform and reducing excessive sentences as crucial components of a healthy plea bargaining system. Plea bargaining works when defendants have a meaningful ability to choose between accepting responsibility or contesting culpability at trial. The State of Delaware would be taking great strides toward a more just plea bargaining system by implementing the recommendations outlined in EJI's bail report and the sentencing recommendations discussed below.

IV. SENTENCING

Each of the stages in the criminal procedure need to be addressed to create broad reforms. Charging decisions and plea-bargaining reforms will help create lasting change but sentencing also remains one of the most important avenues to reduce racial disparities in the criminal justice system. Human beings, disproportionately people of color, have been locked in cages as they serve excessively long sentences that serve no penological purpose at great expense to taxpayers. Delaware has an opportunity to take a lead in implementing reforms that will reduce its prison population and address the vast disparities in the criminal justice system. In this report, we put forward broad proposals for change because broad changes are required to counteract the policies of the past few decades. Criminal justice reform is finally politically viable and yet states continue to put forward proposals that are piece-meal and

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only begin to address the surface of the overincarceration in this nation. In order to create lasting change, Delaware needs to make the big changes—abolish the death penalty, restrict the use of life without parole, encourage parole boards to release people, eliminate mandatory minimum sentences and habitual offender statutes, allow the elderly prison population to return home, and introduce racial impact statements to prevent future disparate treatment based upon race.

The increase in the jail and prison population from 300,000 to 2.3 million in the past 40 years has disproportionately impacted people of color. Nearly 60 percent of middle-aged black men without a high school degree have been imprisoned, and while African Americans and Latinos comprise 30 percent of the population, they are 58 percent of prisoners.¹²⁵ In America today, one out of every three black baby boys born in 2001 will go to jail or prison if current trends continue, and black men are more than six times more likely to be incarcerated than white men. In Delaware, these racial disparities are even more pronounced: African Americans make up approximately 22 percent of the state's population but more than half (56.6 percent) of the prison population.¹²⁶ These disparities permeate all segments of the prison population from nonviolent offenders to people on death row. In order to comprehensively reduce racial disparities, Delaware needs to take a close look at its prison population and the policies that created it.

To begin, Delaware can reduce racial disparities and send a powerful message by abolishing the death penalty. There are currently fifteen men on Death Row in Delaware.¹²⁷ Though Delaware's population is 21.4 percent African American, 60 percent of the men on Death Row are African American. The death penalty is infected with racial bias and any discussion on reducing racial disparity must include abolition of the death penalty.

In addition, 64.8 percent of those serving life sentences in Delaware are African American.¹²⁸ The state needs to examine the imposition of excessively long sentences. The elimination of life without parole would reduce racial disparities, save taxpayers money without any increased risk to public safety, and enable people to better themselves with a renewed focus on rehabilitation. Delaware must also make use of its parole system, currently Delaware paroles far fewer people than the national average. The state has only 81 parolees per 100,000 people compared to the national average of 319 per 100,000 people.¹²⁹ Delaware needs to abolish its Truth-in-Sentencing Act and provide people a meaningful opportunity for release. Along with these changes should be the implementation of compassionate release

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programs, 33 percent of aging prisoners nationwide are African American, and the elderly population does not pose a safety risk and is incredibly costly for states.¹³⁰ Excessive sentences in Delaware should be reduced as a means to reduce racial disparities, cut budgetary expenses, and enable people to return home and contribute to society. Delaware should also eliminate its mandatory minimum sentences and its habitual offender act, as these sorts of legislation have clear discriminatory effects.¹³¹

Finally, racial impact statements will help prevent more racial disparities from arising through legislation that has unintended consequences. Some pieces of legislation, such as those relating to school drug zones, may have been passed with the alleged goal of public safety, but have disproportionately affected people of color. Racial impact statements would bring these realities to light and then legislators can consider alternative solutions that would not have the same disproportionate consequences. Our nation has reached this state of crisis in its criminal justice system due to legislation that has had drastically disparate effects and racial impact statements serve as a prophylactic to prevent these injustices from reoccurring.

A. Abolish the Death Penalty

The death penalty was nearly abolished this past year in Delaware as the Senate voted to abolish the death penalty and Governor Jack Markell came out in favor of abolition, stating, “It doesn’t make us safer. Should the repeal bill come to my desk, I would sign it.” The legislation ultimately stalled in the House, but the time is ripe to revisit the issue. With support in the Senate and in the Governor’s office, Delaware appears ready to join the growing number of states who have abolished the death penalty.

Per capita, Delaware is number five in states that impose the death sentence and number three in executions. In addition, Delaware has a broad statute governing the death penalty such that accomplices to murder can even be sentenced to death. Nearly any murder can qualify as capital murder. Delaware is also one of only three states that allows a death sentence to be overridden by a trial judge, a practice whose constitutionality has been called into question by the Supreme Court.¹³² Delaware was on the brink of abolishing the death penalty this past year and should commit this year to its abolition.

President Obama just recently declared, “At a time when we’re spending a lot of time thinking about how to make the system more fair, more just, that we have to include an

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examination of the death penalty in that.”¹³³ An examination into the death penalty paints a clear answer—it is a system inextricably infected with racial bias and error and it is time for its abolition.

There are currently fifteen men on Death Row in Delaware.¹³⁴ Though Delaware’s population is 21.4 percent African American, 60 percent of the men on Death Row are African American. These statistics mirror realities regarding the death penalty across the country, over half of the people on death row are people of color and only 1 percent of chief prosecutors in death penalty states are African American.¹³⁵ 1277 people have been executed in the United States from 1976 to 2011 and in approximately 80% of the cases where the defendant has been executed, the victim was white.¹³⁶ Over half of the people on death row are people color and only 1 percent of chief prosecutors in death penalty states are African American.¹³⁷ The color of a defendant and victim’s skin is a determining factor in who receives the death penalty. The famous Baldus study presented in McClesky v. Kemp, 481 U.S. 279 (1987), analyzed over 2000 cases in Georgia and found that a defendant is 4.3 times more likely to receive the death penalty if the victim is white. Baldus replicated his study in Philadelphia, and found that the odds of receiving a death sentence are nearly four times greater if the defendant is black, controlling for all other case differences.¹³⁸ While we readily recognize that smoking increases the risk of heart disease, race is significantly more predictive of death sentencing than smoking is predictive of heart disease.¹³⁹ Every study reiterates these facts—there is no denying that the death penalty is inextricably linked to race.

In addition, 90 percent of people on death row were indigent at the time of their trial, people find themselves on death row based on their race and socioeconomic status. “As Justice William O. Douglas noted in Furman, ‘One searches our chronicles in vain for the execution of any member of the affluent strata in this society.’”¹⁴⁰ Death row is disproportionately filled with people of color and people from impoverished backgrounds. The only way to end these disparities is to abolish the practice altogether.

The death penalty has also been riddled with errors—there have been at least 153 people exonerated from death row since 1973.¹⁴¹ There have been an average of five exonerations per year from 2000 to 2007.¹⁴² Mounting evidence shows that innocent people have been sentenced to death and that serious legal errors infect the administration of capital punishment. For every ten people executed in this country, one innocent person on death row has been identified and exonerated. In response to growing concerns about reliability, many

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states have suspended executions or experienced a decline in the use of capital punishment¹⁴³ Anthony Ray Hinton was released this past spring after serving thirty years on death row for a crime he did not commit. He walked out of Jefferson County Jail, exclaiming “the sun does shine”¹⁴⁴ and he continues to speak out against the death penalty and the prevalence of wrongful convictions within the criminal justice system. His case is another reminder of the irreversible dangers inherent in the use of the death penalty. The level of error and the risk of racial bias is so severe in this country that the death penalty cannot continue to be imposed.

Prosecutorial misconduct is also rampant in the administration of the death penalty. In Delaware, this past July, former Deputy Attorney General R. David Favata committed intentional misconduct during the capital trial of Isaiah McCoy. The Delaware Supreme Court suspended Mr. Favata after he expressed his opinion that Mr. McCoy was guilty and told Mr. McCoy to “start acting like a man,” and said, “you can dress him up. He’s still a murderer.” Mr. Favata threatened Mr. McCoy, saying that he would have the detective on the trial testify that Mr. McCoy was a snitch, to cause him future trouble in prison.¹⁴⁵ While the Delaware Supreme Court took appropriate action in overturning the conviction and death sentence and suspending Mr. Favata, this incident is one of many across the country where prosecutorial misconduct played a significant role in a capital case.

The death penalty is also costly and ineffective. In Maryland, the average death penalty case cost the state 3 million dollars. And in Florida, the death penalty costs the state \$51 million a year more than the cost to punish everyone convicted of first-degree murder to life without parole.¹⁴⁶ In California, a coalition called Taxpayers for Justice advocated for the repeal of the death penalty in 2012 based on the fact that California spent \$4 billion on capital punishment, resulting in 13 executions. The group included over 100 law enforcement personnel and crime-victim advocates. One member of the coalition, former Los Angeles County District Attorney Gil Garcetti, whose office pursued dozens of capital cases during his 32 years as a prosecutor, explained, “my frustration is more about the fact that the death penalty does not serve any useful purpose and it's very expensive.”¹⁴⁷

Not only is the death penalty exorbitantly expensive, there is no proven connection between its use and reduced crime. Between 2000-2010, the murder rate in states with capital punishment was 25-46% higher than states without the death penalty.¹⁴⁸ And in adjacent states where one has the death penalty and the other does not, there is no clear relationship

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between homicide rates and the existence of the death penalty. “For example, between 1990 and 1994, the homicide rates in Wisconsin and Iowa (non-death-penalty states) were half the rates of their neighbor, Illinois – which restored the death penalty in 1973 [though it has since abolished it], and by 1994 had sentenced 223 persons to death and carried out two executions.”¹⁴⁹ The death penalty does not serve to make any state safer and its continued existence is unjustifiable.

In 2009, the American Law Institute (ALI), removed capital punishment from its Model Penal Code. “The ALI, which created the modern legal framework for the death penalty in 1962, indicated that the punishment is so arbitrary, fraught with racial and economic disparities, and unable to assure quality legal representation for indigent capital defendants, that it can never be administered fairly.”¹⁵⁰

States have also come to recognize these inherent flaws. Seven states have abolished the death penalty in the past eight years—Maryland, New Jersey, New York, New Mexico, Illinois, Connecticut, and Nebraska.¹⁵¹ The repeal in Nebraska had bipartisan support, with support coming from liberals and conservatives who explain that it is a misuse of taxpayer money. The Connecticut Supreme Court found the death penalty unconstitutional because it is “incompatible with contemporary standards of decency.” In particular, the court focused on the “freakishness with which the sentence of death is imposed; the rarity with which it is carried out; and the racial, ethnic, and socio-economic biases that likely are inherent in any discretionary death penalty system.”¹⁵² The governors in Washington, Oregon, and Colorado have all issued moratoriums on the death penalty in their respective states.¹⁵³

In a recent interview, President Obama said that his prior beliefs on the death penalty have been unsettled due to the impact of racial bias, wrongful convictions, and botched executions.¹⁵⁴ From President Obama and the Department of Justice, to state supreme courts, state governors, and state legislatures, there is an agreement that we need to take a close look at our practice of executing our own people. Former Attorney General Eric Holder expressed his reservations about the death penalty, “there’s always the possibility that mistakes will be made . . . There is no ability to correct a mistake where somebody has, in fact, been executed. And that is from my perspective the ultimate nightmare.”¹⁵⁵ This ultimate nightmare can be prevented through the abolition of the death penalty. The answer is clear.

In his dissent from denial of cert in Evans v. Muncy, 498 U.S. 927, 930-31 (1990)

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Justice Thurgood Marshall declared:

The State's interest in 'finality' is no answer to this flaw in the capital sentencing system. It may indeed be the case that a State cannot realistically accommodate postsentencing evidence casting doubt on a jury's finding of future dangerousness; but it hardly follows from this that it is *Wilbert Evans* who should bear the burden of this procedural limitation. In other words, if it is impossible to construct a system capable of accommodating all evidence relevant to a man's entitlement to be spared death—no matter when that evidence is disclosed—then it is the *system*, not the life of the man sentenced to death, that should be dispatched.

Wilbert Evans wrote on his copy of the dissent, "please bury this with me," tucked the copy into his pocket, and walked into the execution chamber.¹⁵⁶

There comes a time when every state and this nation as a whole needs to reevaluate its practices. Delaware should abolish its death penalty and help move this country in the right direction.

B. Restrict Life Without Parole

In order to reduce the growing prison population, the most lengthy sentences should be reconsidered. Life without parole deprives people of hope and foregoes one of the key concepts behind our criminal justice system—rehabilitation. In most cases, the sentence is also costly and unnecessary—people who have been released after serving life sentences have considerably lower recidivism rates than the general released prison population.¹⁵⁷ The sentence came into existence only recently but its use has spread dramatically, today 41,095 people have been sentenced to die in prison.¹⁵⁸ In Delaware, 318 people are serving life without parole, 8.3 percent of Delaware's prison population.¹⁵⁹

Over one third of the people serving life without parole in Delaware are serving that sentence for a non-homicide offense, and many of those are serving it for nonviolent offenses. There is no justification for a person who has not committed a violent offense to

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die in prison for his crime. As the Supreme Court has recognized, “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers,” and a life without parole sentence “alters the offender’s life by a forfeiture that is irrevocable.” Graham v. Florida, 560 U.S. 48, 69-70. (2010) at 69, 70. Taken together, a life without parole sentence should not be imposed for anyone convicted of a non-homicide offense. The sentence also “means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.” Id. (omitting internal quotations). Delaware should eliminate life without parole for those convicted of a non-homicide offense.

People of color are disproportionately sentenced to life without parole. Nationally, African Americans comprise 56.4 percent of the LWOP population while only making up 12.6 percent of the population.¹⁶⁰ In the federal system, 71.3 percent of those serving LWOP are African American.¹⁶¹ And in Delaware, 64.8 percent of those serving life sentences are African American.¹⁶² Restricting the use of the life without parole sentence will reduce racial disparities in Delaware’s criminal justice system.

Limiting the use of life without parole also does not necessarily mean that those prisoners will be released; it means only that they will be eligible to see a parole board and have a meaningful opportunity for review. In Norway, the maximum sentence available in the country is twenty-one years, though five-year extensions can be imposed after the twenty-one years if a judge finds that the person still poses a risk to the public.¹⁶³ Marc Mauer, the director of the Sentencing Project, suggested this approach in his testimony to a congressional task force on reforming the federal prison system, advocating for a 20 year cap on terms with the possibility for parole boards or judges to add time if necessary to protect the public.¹⁶⁴ This structure would protect society while also enabling people who no longer pose a risk to return home and contribute to society. It would also bring the United States in line with international practices that emphasize rehabilitation instead of an overly-punitive retributive system. This shift would address the overcrowding within prisons, reduce racial disparities of incarcerated populations, cut expenditures, and instill hope in people who had formerly been sentenced to die in prison.

Delaware should restrict the use of life without parole only to homicide cases where the individual would otherwise have received the death penalty.

C. Make Parole Count

Delaware technically abolished parole in 1990 under the state's Truth-In-Sentencing Act. Since that time, the only way to come before the parole board is if the Department of Corrections recommends a person to the Delaware Board of Parole for a sentence modification, then the Board must determine that there is good cause for modification, and if they do, they then will forward a favorable recommendation to the sentencing judge for the final decision. This process has nearly eviscerated the possibility of parole. Since 1990 a total of only 409 sentences have been modified by the courts. Only 14 sentences were modified in fiscal year 2008 and 15 cases in 2009. Delaware paroles far fewer people than the national average, the state has only 81 parolees per 100,000 people compared to the national average of 319 per 100,000 people.¹⁶⁵ This system does not promote public safety because people who have been released early have lower recidivism rates than their counterparts released after serving their full sentence."¹⁶⁶

This "truth-in-sentencing" trend emerged during the tough on crime era and the U.S. Congress even authorized incentive grants in 1998 to abolish parole. To qualify, states had to require persons convicted of a Part 1 violent crime to serve not less than 85% of the prison sentence."¹⁶⁷ During that time, fourteen states and the federal government either eliminated or restricted parole, instead relying upon determinate sentencing schemes.¹⁶⁸ Delaware's act redefined and regulated good time credits and abolished parole eligibility standards. The result has been that the actual percentage of time served in a Level V facility ranges between 85 and 87 percent."¹⁶⁹ This reality is also reflected in the growing elderly population in Delaware's prisons as people who no longer pose a risk to society are denied the possibility of release. Sentencing reform must expand and promote the use of parole.

Across the nation, parole is in a state of crisis, and Delaware is an extreme example. "As politicians from both parties seek alternatives to mass imprisonment, the parole process has emerged as a major obstacle... in many states, parole boards are so deeply cautious about releasing prisoners who could come back to haunt them that they release only a small fraction of those eligible — and almost none who have committed violent offenses, even those who pose little danger and whom a judge clearly intended to go free"¹⁷⁰ There is very little oversight over parole boards and many hearings, including those in Delaware, are closed to the public.¹⁷¹ Under 11 Del. C. §4322, the Delaware Parole Board's records are privileged

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except under the rare circumstances when the Court determines that it is appropriate to permit inspection.¹⁷² Delaware needs to open the doors of its parole hearings and ensure that there is accountability for what occurs in hearings.

The Marshall Project reported on the paradox of parole, “older inmates who have committed the most serious crimes, and served the longest terms, are the least likely to commit new crimes upon release” but they are the least likely to be paroled because of the political risk.¹⁷³ One Stanford University study of 860 people convicted of murder paroled in California found only five returned to prison for new felonies, and none for murder.¹⁷⁴ Yet, these are the same people that parole boards are too wary of releasing due to a political calculus. In addition, people who are paroled are then supervised in the community and the parole board sets the terms of their release—thus there are ways to monitor people. Those who aren’t paroled then serve out their full sentences and are released without any conditions or supervision. “The people deemed too dangerous to release therefore become the very people released with no conditions and no supervision.”¹⁷⁵ Everything about this situation is paradoxical. Catherine McVey, the former chairman of Pennsylvania’s parole board explained how the system should work: “when a person is parole-eligible, if they meet the qualifications, if they've done the programming, if they pose a manageable risk, then you want to parole them at the earliest point possible.”¹⁷⁶ However, the number of people who have maxed out has doubled over the past two decades.¹⁷⁷

Research has consistently demonstrated that people “mature out of lawbreaking before middle age, meaning that long sentences do little to prevent crime.”¹⁷⁸ Arrests for homicides peak at age 18 and research by criminologist Alfred Blumstein found that for murder, rape, robbery, aggravated assault, burglary, larceny-theft, arson, and car theft, five to ten years is the typical duration when adults commit these crimes.¹⁷⁹ As incarcerated people age, their likelihood of committing a crime continues to decrease until it reaches practically zero. We have incarcerated people for their entire lives when they do not pose a danger to society. “Between 1981 and 2010, the average time served for homicide and nonnegligent manslaughter increased threefold, to almost 17 years from five years. Over 10 percent of federal and state inmates, nearly 160,000 people, are serving a life sentence, 10,000 of them convicted of nonviolent offenses.”¹⁸⁰ Excessive sentences need to be eliminated and parole needs to be a process that has real teeth. Boards should approach incarcerated people with an attitude that they should be released, unless there are particular, articulable reasons why they continue to pose a risk to society. All of the research shows that these reasons should

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decrease until they cease to exist for most incarcerated people as they age and mature.

1. Best Practices from other States

As criminal justice reform is becoming more accepted and encouraged, states have begun to realize that they need to rely upon parole and improve their systems. For instance, New York has created incentives to speed up parole consideration based upon “merit time” credits that can come from participation in education, vocational training, and treatment programs in prison. These types of programs demonstrate a new commitment to rehabilitation and a focus on learning and growth as tools to enable people to successfully reenter society.

New York also relies upon “evidence-based” instruments to determine release that consider both “static” and “dynamic” factors.¹⁸¹ Static factors include age at sentencing, criminal history, prior parole history, employment history, substance abuse history, and gender. Dynamic factors look towards the person’s current status such as present age, institutional history—such as recent programs completed and disciplinary violations, ongoing ties to the outside community, and current custody level.¹⁸² New Jersey has adopted risk assessment instruments as a way to better enable the parole board to determine parole release and the result has been an increased rate of granting parole. North Carolina passed legislation under the Treatment for Effective Community Supervision Act of 2011 to “support the use of evidence-based practices to reduce recidivism” and requires that the Department of Corrections develops a recidivism-reduction plan for the state.¹⁸³ And Michigan has also used data-driven policies to identify lower-risk cases for release and designated two prisons to serve specifically as “reentry prisons” and prioritize programming that will assist in release.¹⁸⁴

Data-driven policies can serve an important role in rationalizing parole decisions such that people are not denied relief based on reflexive fear-based decision making, but it will likewise be important to analyze any instruments used to see if they further racial disparities. Some of the criteria used in these tests can reinforce the same problems by fixating too much on criminal history, ties to the outside community, and other factors that may have a disparate impact on people of color. The Sentencing Project recommends that any risk assessment tool needs to be validated and revalidated continually, particularly as any particular factor’s utility for predicting recidivism may change over time.¹⁸⁵ These tests should be approached thoughtfully, but Delaware should consider the use of evidence-based tests to increase parole

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release.

New Hampshire has also expanded authorized earn time, another important reform.¹⁸⁶ Good time allows prisoners to earn a reduction in their sentence based on good behavior. Expanding access to good time encourages positive behavior while incarcerated. People released early based upon good-time often show reduced rates of recidivism compared to those who served their full sentences.¹⁸⁷ Nebraska passed a law increasing good-time credits such that people can earn three days, instead of one day, for each month with a clean record.¹⁸⁸ North Dakota also passed a law providing more flexibility to grant “performance-based” sentence reductions, earning reductions of one day for every six days, to people sentenced to certain crimes if they participate in treatment and education programs.¹⁸⁹

South Dakota has a mandatory parole system—if an incarcerated person completes an Individual Program Directive which establishes standards for the person’s parole. If the person completes the work, education, and treatment programs, agrees to the conditions of supervision, and has an approved parole release plan, then they will be automatically released at their initial parole date.¹⁹⁰ The IPD is a multi-element rubric that one has to pass to be considered compliant. It includes the following elements: 1. Compliance with DOC policies; 2. Employment/Work as Assigned; 3. No Conduct Evincing Intent to Re-Offend; 4. STOP (for sex offenders); 5. Chemical Dependency/Gambling Programming; 6. Educational Programming (GED); 7. Completion of core programs. Elements 1-3 are applied to everyone, while the other elements apply when they are appropriate. If the person has not “substantively complied”, then there will be a hearing with the board to determine the compliance. And if the person failed to comply, he will have a discretionary parole hearing at least every two years. For those who have completed all their requirements, parole at the first date is automatic. This structure makes intuitive sense as it enables people to leave prison who have completed all requirements that the state determines will best prepare them for release, and could serve as an excellent model for Delaware.

Delaware is far behind other states in releasing people who have served time and are ready to contribute to society. Delaware should look to these other states and prioritize using parole and repealing its Truth-in-Sentencing Act. Delaware should also open up its parole hearings to the public and work to ensure accountability. Parole guidelines creating criteria for the board to base its decision upon and requiring written decisions for each decision would be additional steps to increase accountability. Parole decisions should also be

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appealable to an outside court as a means to check the board. Delaware should also ensure a right to counsel at parole hearings. Delaware could provide a statutory right with the recognition that the parole process is onerous and technical and counsel can best protect the rights of those who appear in front of the board.

With the nation's criminal justice system in a state of crisis, states must begin implementing parole reform. If parole is a real option, then there are more incentives in place for incarcerated people to participate in programming, maintain contact with friends and family, gain job skills, and prepare to reenter society and give back. People who no longer pose a risk to society also should be released because incarcerating them no longer fulfills any criminal justice purpose and drains the state of money that could better be spent on preventive measures. We cannot see significant improvements to Delaware's criminal justice system without addressing the problems at the back-end, notably the problem with the parole system. Parole reform must be a part of the conversation on making changes to Delaware's criminal justice system.

D. Eliminate Mandatory Minimum Sentences and Excessive Sentences

One of the biggest drivers of the extraordinary growth in the prison population has been mandatory minimum sentences. The federal system and states across the US have realized that these sentences are counterproductive. As Senator Coon of Delaware explained, “Every American has the right to a criminal justice system that imposes fair criminal penalties according to the facts of each case...Mandatory minimum sentencing jeopardizes that right by trading judicial discretion for one-size-fits-all, arbitrary sentencing requirements that are unnecessarily punitive and have not improved public safety.”¹⁹¹

Reforms are spreading rapidly and while Delaware has already taken steps to address its mandatory minimum sentences, it can go much further in these reforms. Most states are taking a piece-meal approach to address mandatory minimum sentences—such as eliminating them for the lowest-level offenses, for people with no prior convictions, etc. However, to really see noticeable change in our criminal justice system, we need to be thinking about much larger reforms. Instead of adopting changes that will only affect a small percentage of people, Delaware should take the lead in completely abolishing its mandatory minimum sentences.

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There is no need for mandatory minimums, judges can use their discretion to impose sentences and the parole board can also serve as a check before people are released. The Vera Institute explains, “safety, justice, and cost reduction should guide policymakers when crafting the specific eligibility criteria or classifications of offenses or offenders in new policies. For example, when aiming to reduce the number of offenders who are incarcerated or their lengths of stay, the criteria should link eligibility to an identified driver of a state’s prison population. The objective of a proposed reform may be undermined, for example, if eligibility is unnecessarily limited to the lowest risk offenders, particularly if such offenders do not constitute a significant proportion of the incarcerated population.”¹⁹²

The calls to reform mandatory minimum sentences are occurring across the country. In March 2014, then Attorney General Eric Holder endorsed a change to the Federal Sentencing Guidelines that would lower by two levels the offense associated with drug quantities involved in drug trafficking crimes.¹⁹³ He was praised for speaking out in favor of reform, but it is also important to note how states and the federal government need to go further in these reforms. For instance, “if prosecutors were to apply Attorney General Holder’s new charging directive to the 15,509 people incarcerated in 2012 under federal mandatory minimum drug statutes, given its exclusionary criteria (i.e., aggravating role, use or threat of violence, ties to or organizer of a criminal enterprise, and significant criminal history) only 530 of these offenders might have received a lower sentence.”¹⁹⁴ To see real, concrete changes in the prison population, we need to think bigger and broader.

The U.S. Sentencing Commission has started to take more significant steps. Between October 30th and November 2nd, “the Justice Department is set to release about 6,000 inmates early from prison — the largest one-time release of federal prisoners — in an effort to reduce overcrowding and provide relief to drug offenders who received harsh sentences over the past three decades, according to U.S. officials.”¹⁹⁵ The changes to the sentencing policies that have been made retroactive could result in the early release of 46,000 of the nation’s approximately 100,000 people serving sentences for drug offenses in federal prison.¹⁹⁶ To really make a dent in the prison population, we need sweeping changes that can counteract the decades of failed tough-on-crime policies.

These reforms will never be sufficient if they are only focused on non-violent offenses. While there is now consensus regarding reform for non-violent drug offenses, politicians appear to be in denial about the very limited impact reforms solely focused on

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non-violent offenses will have. Less than a fifth of state prisoners, 17 percent, are serving time for nonviolent drug offenses.¹⁹⁷ Reducing the population of people who have committed violent offenses needs to be a part of the discussion. In addition, focusing on this population is critical to addressing racial disparities. In 2003, African Americans constituted 562,100 (44.7%) of the 1,256,400 persons incarcerated for a violent offense in state prisons.¹⁹⁸ Rather than scratching the surface of change by focusing on non-violent offenses, Delaware should take the next step and address the excessive sentences imposed upon people convicted of violent offenses as well.

To reduce the stigma surrounding violent offenses, it helps to consider that the technical definitions of violent or non-violent offenses are often murky. As Joe Margulies, a professor at Cornell University, explains, “A significant number of people who have been convicted of violent offenses aren’t violent people...People who never hurt anyone, who never confronted a victim, can nevertheless be convicted of violent crimes.”¹⁹⁹ Rather than relying upon the conviction itself, risk assessment tools are much better indicators of how dangerous people actually are. Many people convicted of violent crimes reach an age where they no longer pose a risk to society. Risk assessment tools demonstrate that someone who was convicted some years ago of a violent offense is not by definition a violent person, and are a much more accurate indicator of likelihood of recidivating than basing the judgment off of a criminal conviction.²⁰⁰ These arguments are also furthered by the research presented in the sections above regarding recidivism rates as people age. As discussed in more detail below with regards to compassionate release, most people convicted of a violent crime at a young age no longer pose a risk to society as they age and mature.

Delaware passed HB 19 (2011) in its reform efforts, creating three main drug crimes with varying levels of seriousness: drug dealing, aggravated possession, and possession. The law eliminates mandatory minimum sentences for some first time offenders, including those convicted of trafficking low quantities of drugs if no aggravating circumstances are present. The drug trafficking mandatory minimum was at least two years in prison and the maximum was as high as 25 years.²⁰¹ While this is certainly a step in the right direction, there is no need for the mandatory minimums to exist at all. Delaware Public Defender Brendan O’Neill called the state’s old mandatory minimum sentencing “a failure” and shared the effects the policy had on Delaware’s criminal justice system.²⁰² He explained that mandatory minimums limit judicial discretion, give prosecutors disproportionate leverage in the plea negotiation process, and also raise the stakes of going to trial to irrationally high levels. As a

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consequence, defendants who may have been innocent often pled guilty to lesser charges to avoid the disproportionately high risk presented by mandatory minimum sentences.²⁰³ Mr. O'Neill concluded, "Experience teaches that the one-size-fits all effect of mandatory minimums results in justice being denied."²⁰⁴

Delaware also has a Habitual Offender law, Section 4214 of Title 11. Six hundred and fifty people are serving long sentences under the Habitual Offender law, costing taxpayers \$23 million.²⁰⁵ State Senator Karen Peterson introduced Bill 188 in 2014 to vest judges with discretion to determine sentences for "habitual offenders" and to permit people to be resentenced by judges.²⁰⁶ The bill passed in the Senate but was tabled by the House Judiciary Committee. Delaware should revisit this legislation and amend its habitual offender statute.

1. Best Practices from other States

States are reforming their sentencing policies with a specific focus on addressing racial disparities. For instance, California specifically "targeted statutory penalties found to have a racially disparate impact by equalizing quantity triggers for intent-to-sell powder and crack cocaine offenses," as did Missouri, Ohio, and South Carolina.²⁰⁷ Illinois also repealed a statute that required the automatic transfer of 15 and 16 year olds accused of certain drug offenses within 1,000 feet of a school or public housing. "The law was found to be racially biased, unnecessary, and unfair, resulting in youth of color comprising 99% of those automatically transferred to adult court."²⁰⁸ Delaware has taken a step in the right direction by decreasing the size of the protected school zone from 1,000 feet to 300 feet in HB 19 (2011),²⁰⁹ but the idea of a protected zone could be eliminated entirely as it has been found to have drastically disproportionate impact on people of color.

States across the country have recognized the urgent need for reform. At least 29 states have taken steps to roll back mandatory sentences.²¹⁰ The approach can vary—some states have created a "safety valve" provision that enables a judge to bypass the mandatory minimum sentence, some have narrowed the scope of automatic sentence enhancements, and others have repealed laws completely. At least 18 states have passed legislation that enhances judicial discretion.²¹¹ For instance, Georgia passed HB 349 in 2013 that allowed judges to depart from mandatory minimum sentences from drug offenses if the defendant was not a ringleader, did not possess a weapon during the crime, did not cause death or serious bodily injury to an innocent bystander, had no prior felony conviction, and if the interest of justice

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would otherwise be served.²¹² While these piece-meal reforms have a concrete impact on many people, ultimately, we urge Delaware to repeal its mandatory minimum laws. Mandatory minimum laws have been repealed in at least 17 states and by the federal government.²¹³ For instance, Rhode Island eliminated mandatory minimums for the manufacture, sale, or possession with intent to manufacture or sell a Schedule I or II controlled substance. Previously these offenses carried a mandatory minimum sentence of 10 years and a maximum of 50 years in cases involving less than one kilogram of heroin or cocaine and less than five kilograms of marijuana, now there is no mandatory minimum and the judge can assign a sentence ranging from zero to fifty years.²¹⁴

Delaware has taken steps to restrict its mandatory minimums but it is time to repeal these outdated laws. Delaware also has the opportunity to repeal or amend its habitual offender act. These attempts to be “tough on crime” have long been discredited and we are in a new era where politicians and everyday citizens have recognized the urgent need for reforms.

E. Institute Implicit Bias Training in the Judicial System

If Delaware takes the right step and eliminates its mandatory minimum sentences, discretion is placed back within the realm of the judges. Judicial discretion should help reduce racial disparities by enabling judges to take into account people’s individual circumstances and not mandatorily impose excessive sentences. However, discretion does allow for implicit biases to factor into decision-making. The initial rationale behind guidelines and mandatory minimums was to create uniformity to control for discrimination. Though the laws had the exact opposite effect, the same concerns will arise when discretion is restored. The best way to cope with this reality is to ingrain implicit bias training into the judicial system.

Sentencing guidelines and mandatory minimums “remove[d] nearly all traditional sentencing factors from the calculus, effectively reducing sentencing judges to mere clerks who find the correct sentence in the sentencing grid.”²¹⁵ These sentences eliminated any individualization and empathy and judges couldn’t consider such traditional factors as “age, educational attainment or vocational skills, employment history or career potential, family status or responsibilities, physical, mental or emotional condition, and disadvantaged background.”²¹⁶ Rather than serving the goal of creating a uniform and objective system,

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defendants became reduced to their criminal records, ensuring that “racially divergent life experiences cannot mitigate the extremely harsh punishments that are, themselves, racially disparate.”²¹⁷ Returning to a discretionary system will enable judges to consider broader sentencing factors and life experiences. Yet, there are risks in this system as the prejudice of judges could seep into sentencing decisions. Implicit bias trainings will be an essential component of the transition back to a discretionary system.

EJI’s Report on Root Causes of Racial Disparities in Delaware’s Criminal Justice System provides detailed explanations of implicit bias and the ways in which it infects the criminal justice system and should be consulted, particularly regarding the implicit biases of judges. Judges have been found to be more likely to sentence people of color to serve prison time and impose longer sentences, “even after accounting for differences in crime severity, criminal history, and educational level.”²¹⁸ Judges must be forced to confront their biases to avoid the continuation of sentencing that only increases racial disparities.

1. Case Studies of Trainings

California, Minnesota, and North Dakota have all implemented implicit bias trainings for judges. California’s program emphasized the science of implicit bias—there was a website for participants to use with additional resources and a link to the Implicit Association Test and an hour-long documentary with national experts. Prior to watching the documentary, only 29.6 percent of participants thought that most judges decisions with the public could be influenced by unconscious bias toward different racial groups, but the number went up to 78.9 percent after watching the documentary.

Minnesota used the same documentary along with a PowerPoint lecture and small group discussions and debriefing reactions in pairs dialogue. Minnesota had on-site experts as well to lead presentations. Comments from participants indicated that they learned about the development and operation of implicit biases and several people wrote actions that they would take as a result, such as “try to deal with my biases and learn techniques to counteract.”

North Dakota used a four-hour live conference presentation on social cognition and decision making that included video clips followed by discussions, and faculty presenters including a social psychologist and a judge from another state. Afterwards, 97 percent of the

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32 participants responded that that they would apply the course content to their work.

These trainings are just the beginning of an effort to address implicit biases. There are no easy solutions for such a problem but recognizing that it is a problem and providing education around it are important steps. Discretionary sentencing should replace mandatory minimums but with that responsibility comes a need for additional trainings and conscious efforts to avoid biases in sentencing.

F. Make Legislative Changes Retroactive

In order for sentencing reform to be equitably applied and to have an impact on the largest number of people, all new legislation and amendments must be retroactive. There have been positive outcomes of retroactive changes in California, Michigan, and New York.

In California, voters passed Proposition 36 in 2012, which revised the mandatory life sentence on people convicted of their third felony offense, ensuring that the third conviction is serious or violent, and allowed courts to resentencing those serving life sentences under the old law. Since then, “judges have granted 95 percent of the petitions for resentencing, 1,011 people have been resentenced and released from prison and more than 2,000 resentencing cases are pending.” After 4.4 months, less than 2 percent of the group was reincarcerated compared to California’s overall recidivism rate of 16 percent in the first 90 days and 27 percent in the first six months.” California saved more than \$10 million in the first nine months of its implementation.²¹⁹

Michigan is another success story in this regard, in 2002, they eliminated mandatory sentences for most drug offenses and applied the changes retroactively. Nearly 1,200 people were then eligible for release and the state closed 20 prison facilities between 2002 and 2010 and lowered spending on corrections by 8.9 percent. In addition, violent crimes and property crimes dropped by 13 and 24 percent between 2003 and 2010, demonstrating that these “smart on crime” changes only increase the safety of people living in a state.²²⁰

In New York, mandatory minimums for low-level drug cases were eliminated in 2009 and applied retroactively. Since 2008, the amount of people serving time under drug offenses decreased by 43 percent, affecting more than 5,100 people. In addition, 746 people have been approved for resentencing and 539 have been released. Due to these significant drops in both

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prison populations and crime, Governor Andrew Cuomo proposed four new prison closures in July 2013, saving the state \$30 million. These closures brought the total number of prisons closed since 2009 to fifteen.²²¹

Making any changes retroactive will ensure that everyone affected can receive relief and it is the most effective way to create the needed, broad changes to Delaware's criminal justice system.

G. Compassionate Release

*Joseph Bostic is blind, wheelchair-bound, and mumbles like a man 25 years older than his 56 years. The former truck driver's mind seems sharp enough as he recounts 27 years of deterioration in prison: diabetic comas, kidneys lost, bleeding ulcers, heart surgery. But he's fuzzy at best about less concrete subjects, like whether "20 years mandatory" means he can be paroled someday or die in prison.*²²²

Mr. Bostic has been incarcerated in the infirmary at James T. Vaughn Correctional Center in Smyrna, Delaware for the past nine years. He is one of the 1,058 people over the age of 50 who are incarcerated in the state of Delaware.²²³ Due to the rise in harsh penalties that occurred over the past few decades, the American prison population has not only swelled in general, but the specific population of elderly incarcerated people has become an enormous problem. The plight of the elderly in prison is not only devastating to witness, it is also incredibly taxing for a state's budget. A Delaware Criminal Justice Council Report estimates that it costs three to five times more to care for elderly people in prison than the general prison population.²²⁴ And because people who are incarcerated are not eligible for Medicare or Medicaid (unless they are hospitalized at an outside location), it is the state that pays the bill. It is also worthwhile to note that the biophysical age of incarcerated people is 10 to 15 years older than their chronological age, in large part due to physical and mental trauma, mental illness, chronic stress, and lack of regular preventive health care.²²⁵

Of the 2.3 million adults in state and federal prisons, about 246,000 are 50 or older, according to the National Institute of Corrections. The U.S. currently spends more than \$16 billion annually caring for these aging inmates, and their numbers are projected to grow

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dramatically in the next 15 years.²²⁶ If changes do not occur, experts project that there will be over 400,000 elderly people incarcerated in the United States by 2030, a 4,400% increase over a fifty-year time span.²²⁷ Amidst this national crisis, Delaware currently has the second highest growth rate in the nation.²²⁸ Delaware's over-50 prison population has nearly quadrupled from 1999 to 2012 and the expansion has driven up the cost of providing health care behind bars by 41 percent between 2007 and 2011.²²⁹ Change is urgently needed. Some states have implemented programs such as conditional releases for elderly people enabling people in prison to request parole hearings once they reach the age of fifty. Reforms such as these are needed across the country and particularly in Delaware, as the rate of the elderly population in prison continues to grow. This population does not pose a risk to society and should have a chance to go home.

Burl Cain, the Warden of Louisiana State Penitentiary at Angola, said “When I came here and saw the elderly population, I said, ‘God, well, why are they here?’ Our name is Corrections to correct deviant behavior [but] there’s nothing to correct in these guys; they’re harmless...”²³⁰ The recidivism rates for elderly people are drastically lower than the general population. For example, in New York, only 7% of people released from prison at ages 50-64 returned to prison for new convictions within three years.²³¹ A study by the Florida Department of Corrections found that age is the single greatest predictor of a lower chance of recidivating.²³² In addition, a vast amount of elderly prisoners are serving time for nonviolent crimes. For instance, in Texas, over 65% of the incarcerated population over 50 is in prison for a nonviolent offense.²³³

Recognizing these realities, Louisiana has created a conditional release program that provides incarcerated people the right to request a parole hearing once they reach a certain age. The parole board uses a risk assessment instrument and releases people who do not pose safety risks. Virginia and Maryland also have laws that allow elderly prisoners to go before the parole board. These conditional release programs should also include reintegration services as elderly people leaving prison will encounter even more obstacles than the average person reentering society.

Other states have medical parole or geriatric provisions that allow release conditioned on extreme medical ailments, yet states that have these laws on the books rarely use them. For instance, Colorado, Oregon, Maryland, Virginia, and Oklahoma have released a combined total of just twenty-three people between 2001 and 2009 under their geriatric

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provisions.²³⁴ Not only should states make use of the provisions that they have on the books but also these eligibility requirements should be expanded to enable aging prisoners to access the outside world, rather than making access contingent on being terminally ill or physically incapacitated. Medical parole programs should also be simplified—in Hawaii, due to “unnecessarily complicated application and review processes, barely half of all prisoners approved for release from 2009 to 2012 were actually granted release.”²³⁵

Conditional release programs and medical parole should be viable options in Delaware and should be made use of as much as possible. There is virtually no safety risk in allowing this population to go home. And for those who continue to worry about the minuscule risk in releasing people, the parole board and future supervision serve as checks on releases. These programs would recognize the humanity of the people who remain behind bars and allow them to return home to their loved ones. They also will be an enormous economic benefit to the state. Solely referring to non-violent offenders, across the country, releasing those who are age fifty-five and above would save taxpayers \$900 million dollars the first year, and \$175 million dollars would be saved if non-violent elderly prisoners aged sixty-five and above were released.”²³⁶ There is no need to limit this to non-violent offenders, the statistics prove that this population does not pose a risk of future criminality regardless of prior history.²³⁷

Compassionate release also serves as a means to address the racial disparities in the prison population and address the devastating consequences of the failed, “tough on crime” policies. Thirty three percent of aging prisoners are African American, a vastly disproportionate amount when 12.6% of the U.S. population is African American.²³⁸ The rise in the elderly prison population is a direct result of the policies implemented in the late 80's and early 90's already discussed above, such as the rise in the imposition of life without parole sentences, the use of mandatory minimums, truth-in-sentencing statutes, and habitual offender acts. “From 1986 to 1995—the apex of the tough on crime period—the number of people sentenced to 20 years or more in prison more than tripled. From 1984 to 2002 , the number of state and federal prisoners serving life sentences (with or without parole) more than quadrupled.”²³⁹ Compassionate release is needed to address the consequences of these failed policies as America’s prisons are overcrowded with elderly people who do not pose a danger and who are desperate for a chance to be reunited with loved ones before it is too late. The indignities of incarceration also increase with age. “An aging inmate told us that his unit houses approximately 160 inmates, with only one handicapped-accessible toilet. A

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second inmate in the same unit confirmed that, as a result, he often sees wheelchair-bound inmates waiting in line for that toilet because the rest of the toilet stalls are too narrow to accommodate wheelchairs.”²⁴⁰ These heart-wrenching situations can be avoided by releasing people and ensuring that they can return home for the remainder of their lives.

H. Racial Impact Statements

Our nation has reached its current criminal justice crisis through the passage of sentencing legislation that has had drastically disproportionate impacts on people of color. While the proposals presented in this report suggest repealing many of these pieces of legislation, racial impact statements would be a prophylactic to help ensure that the same mistakes aren't made in future legislation. Racial impact statements would operate in a similar manner to fiscal or environmental impact statements and would anticipate any racial disparities in an effort to consider “alternative policies that could accomplish the goals of the legislation without causing undue racial effects.”²⁴¹

For instance, school zone drug laws were often passed under the goal of protecting children from exposure to drugs, yet the legislation has had severely disproportionate racial impacts due to housing patterns. People living in cities are much more likely to live close to schools since urban areas are more densely populated. “A state commission analysis of the New Jersey law documented that nearly all (96%) of the persons serving prison time for drug free zone offenses were African American or Hispanic.”²⁴² Habitual offender acts likewise disproportionately affect African Americans due to the prevalence of prior criminal histories. “In California, African Americans represent 31.3% of the inmate population but 44% of persons serving three strikes sentences.”²⁴³

These impacts could have been foreseen and to prevent making the same mistakes in the future, racial impact statements would serve as a means to consider these impacts prior to passage of legislation. Legislation that creates sentencing statutory changes, sentencing guideline adjustments, creates new substantive crimes, parole policies, or “early” release policies should automatically trigger a racial impact statement as the legislation is debated.²⁴⁴ The agencies charged with compiling these statements could include sentencing commissions or budget and fiscal agencies. The Delaware Sentencing Accountability Commission would be ideally suited to create the racial impact statements.

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The statements would look at the breakdown of both proportional disparities and population disparities. Providing this context would then enable the legislature to consider alternative policy choices to avoid increasing racial disparities. For instance, if racial impact statements had been conducted prior to passing school zone drug laws, policymakers could consider passing bills that related to selling drugs during school hours, or selling directly on school property—rather than near it, as “any such priorities would both direct sentencing policy more specifically toward the area of concern and would almost inevitably reduce the racial disparities that would ensue under the expanded concept of ‘school zone.’”²⁴⁵ The American Bar Association's Justice Kennedy Commission recommends racial and ethnic disparity impact analyses for both proposed legislation and existing situations, “along with a call for policymakers to “propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.”²⁴⁶

In 2008, Iowa passed the nation's first racial impact statement measure to enable policymakers to assess the racial impact of proposed changes to sentencing and parole policies.²⁴⁷ Connecticut also passed a racial impact statement bill in 2008 such that bills and amendments that relate to pretrial or sentenced populations are subject to racial impact analysis.²⁴⁸ And in 2013, Oregon passed legislation providing a process to formally request racial impact systems when legislation relates to criminal justice and child welfare legislation.²⁴⁹ A policymaker from each major political party has to submit the request and then the Oregon Criminal Justice Commission is required to prepare an analysis of the racial impact of the legislation.

Delaware should pass legislation allowing for racial impact statements whenever new legislation or amendments are proposed that would affect criminal justice. This proactive measure would help prevent the state from passing new legislation that could replicate the same disparities. While the rest of this proposal looks mainly to steps to take to remedy current problems, racial impact statements serve to prevent future problems.

I. Conclusion

Ultimately, significant sentencing reforms are needed in Delaware to permanently reduce racial disparities in the criminal justice system. Excessive sentences must be reduced by abolishing the death penalty and restricting the use of life without parole. Parole releases should be encouraged and compassionate release is a necessary component of that process.

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Mandatory minimum sentences should be abolished. And these changes should be retroactive such that deserving men and women locked behind bars in Delaware can work towards a brighter future and eventually return home to their communities.

V. CONVICTION INTEGRITY UNITS

A. The Need for Conviction Integrity Units

On May 16, 1994, at 3:15 a.m., Richard Miles was arrested outside of a liquor store six miles from a Texaco gas station where two men had been shot.²⁵⁰ He told the police that he had only been at the liquor store to use its pay phone, but they had no other suspects, so Mr. Miles went to trial. A witness to the shooting identified Mr. Miles as the gunman. A ballistics expert found gunpowder residue on his hands. The prosecutor pointed to his prior conviction for drug possession. After the guilty verdict, Mr. Miles was sentenced to 60 years.

Nearly 15 years later, a volunteer at Centurion Ministries—a non-profit that works to exonerate the wrongly convicted—noticed that Mr. Miles's case file did not look right. He did not match the witness's original description of the shooter. At trial, no one mentioned a phone call from a woman claiming that her boyfriend, who did match the description, was in fact the shooter. The witness later testified she had been coached to identify Mr. Miles at trial. The ballistics expert acknowledged that the gunpowder residue could have been from Mr. Miles's cigarette. On February 15, 2012, Mr. Miles was exonerated.

Richard Miles is one of over 1,600 people listed on the National Registry of Exonerations.²⁵¹ When the registry launched in 2012, it had 891 names. In just three years, that number has increased by over 700.²⁵² As Innocence Projects have been established across the country and the number of exonerations has soared,²⁵³ calls to reform the prosecutorial system can no longer be ignored.

As of December 1, 2014, sixteen district attorneys' offices had responded to calls for reform by creating Conviction Integrity Units (CIUs).²⁵⁴ CIUs have two basic functions: investigating claims of wrongful convictions and, in response, developing policies that guard against future error.²⁵⁵ These sixteen offices are all relatively new and operate according to their own internal guidelines.

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The State of Delaware should develop a state-wide conviction integrity unit that both re-examines questionable convictions and prospectively develops polices that prevent wrongful convictions from occurring in the future. The following recommendations represent best practices promoted by non-profit organizations like the Innocence Project and Conviction Integrity Project, scholars, and the district attorneys implementing these projects in places like Dallas, Texas, New York, New York, and Brooklyn, New York.

B. Recommendations

1. Establish A Conviction Integrity Unit to Review Claims of Innocence

The State of Delaware should not wait to establish a state-wide CIU until high-profile exonerations or misconduct force it to do so. Instead, it should affirmatively hire at least two lawyers (ideally with backgrounds in criminal defense or innocence work), an investigator, and a paralegal to review claims of innocence. The proactive establishment of a state-wide CIU would demonstrate the State's commitment to integrity in the prosecutorial process, thereby bolstering citizens' confidence in the criminal justice system generally. The newly formed CIU would review claims provided by innocence organizations, the defense bar, individual prosecutors, police, courts, press, and individuals claiming innocence.

2. Staff the Conviction Integrity Unit

The personnel structure of the CIU must promote efficiency and autonomy. To that end, a management-level attorney with significant clout in the office should oversee the CIU, and that attorney should report directly to the district attorney and not a mid-level manager.²⁵⁶ The review of the innocence claim should not be conducted by the original prosecutor, and the prosecutor in charge of the CIU should be an "inspector general-type prosecutor who has no connection to the past procedures and trials that are the subject of the conviction review."²⁵⁷ Finally, there should be an external advisory committee comprised of outside experts that are not subject to pressure from within the district attorney's office.²⁵⁸

3. Develop Criteria for Selecting Cases for Review

There are multiple criteria that Delaware's CIU might use to select cases for review. The most straightforward is that the facts of the case present a plausible claim of

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innocence.²⁵⁹ If this is the case, the fact that a defense lawyer might have discovered the facts with due diligence should not bar review of the claim.²⁶⁰

Next, the the CIU should review cases for evidence of constitutional violations. These might include *Brady* violations, ineffective assistance of counsel, or and unfair trial or plea agreement. Although CIUs are strongly associated with actual innocence claims, wrongful convictions resulting from constitutional violations threaten the integrity of the entire State's legal system.

Finally, the CIU should review cases in the interest of justice whenever appropriate.²⁶¹ The interest of justice might be an especially important consideration when, as in most cases, “there is a need to resolve issues with less than perfect information.”²⁶²

4. Carefully Audit Reversals of Convictions

District attorneys' offices should have a protocol by which specific teams perform “root cause analyses” to determine why a wrongful conviction occurred.²⁶³ For example, did the prosecutor fail to disclose exculpatory information because of an error in the system or an individual's mistake? Was information overlooked or hidden? Does fault lie with the police, the prosecutor, or some third party, like a crime laboratory?

The State of Delaware should adopt a written policy for how this analysis is to be conducted. Moreover, it should identify a person or entity not within a prosecutor's office to oversee the process. Finally, when the analysis is complete, Delaware should publish its findings so that they are available to the public.²⁶⁴

5. Implement Open-File Discovery Policies

“Studies show that official misconduct contributes to as many as 42% of false convictions that later lead to exonerations (most prevalently in homicide cases) and failure to disclose exculpatory information is the most common form of misconduct.”²⁶⁵ CIUs combat that type of misconduct by implementing open-file policies that ensure their work is transparent. Furthermore, open-file policies allow prosecutors to share the responsibility for disclosure with defense attorneys, who are often better equipped to recognize material exculpatory evidence.

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i. Post-Conviction

When CIUs reinvestigate post-conviction claims of innocence they should coordinate with defense lawyers or innocence organizations. This should include “joint witness interviews with prosecution and defense investigators or lawyers, agreements about recording interviews, jointly planned identification procedures, [and] joint requests to obtain information from third parties....”²⁶⁶ In other words, prosecutors should involve defense attorneys in the process of gathering new information on old cases. Such a system promotes efficiency by eliminating the need for both parties to conduct independent investigations. Furthermore, the immediate input of a defense-oriented attorney regarding new information would help neutralize prosecutorial bias, which may cause a prosecutor to downplay the materiality of new, exculpatory evidence. Finally, cooperation between defense attorneys or innocence organizations and prosecutors as they re-investigate convictions essentially trains prosecutors to better identify potentially exculpatory evidence.

Cooperating defense attorneys and prosecutors should interact according to predetermined policies and agreements. For example, prior to working together parties may choose to sign formalized confidentiality agreements that address issues such as what information goes to the media in the event of an exoneration. Furthermore, prosecutors may need to protect sensitive information, such as the identities of confidential informants. As a result, prosecutors should disclose the personal records in their possession to the defense “subject to judicial reviews and protective orders.”²⁶⁷ Although defense attorneys should share information with prosecutors to the extent that they believe doing so will help their clients, policies guiding the relationship between the prosecution and defense in the context of conviction review should account for the uniquely confidential relationship between attorneys and clients and need not be entirely reciprocal.

ii. Pre-Disposition

In addition to granting defense attorneys and innocence organizations access to old files during post-conviction investigations, prosecutors should consider disclosing all potentially exculpatory evidence as they become aware of it. This obviates “the need to engage in the often thorny *Brady* analysis of whether deprivation of evidence *before* trial would render a trial unfair.”²⁶⁸ Additionally, this protects the defendant against prosecutorial misconduct, which is often the result of a well-intentioned prosecutor erroneously

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determining that a piece of evidence does not rise to the level of materiality that would constitutionally require disclosure. Cognitive biases often prevent prosecutors from recognizing the importance of evidence while they are in the midst of the adversarial process.²⁶⁹ Furthermore, it is often difficult to make an accurate pretrial determination as to whether the absence of a piece of evidence would deprive a defendant of a fair trial once all of the other evidence has been presented at trial. In short, an open-file discovery process that requires prosecutors to turn over all potentially exculpatory evidence regardless of materiality will protect both accuser and accused.

6. Create Checklists to Prevent Wrongful Convictions

Prosecutors should create checklists establishing best practices in both the investigation and prosecution of cases. This is a low-cost and effective way to “codify routine procedures in criminal cases, which in turn help remind line prosecutors of the need to comply with all steps in the investigative and trial process.”²⁷⁰ For example, checklists are particularly useful in enforcing *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that suppression of evidence by prosecution favorable to defendant who requested it violated due process where evidence was material to guilt or punishment). They provide a clear, office-wide definition of what constitutes *Brady* material and foster the universal and thorough enforcement of that definition.²⁷¹

The CIU in the Manhattan District Attorney’s Office (discussed in the case study below) has promulgated a questionnaire meant to help prosecutors identify *Brady* material. The questionnaire addresses the following categories of information:

- (1) Misidentifications and non-identifications;
- (2) Prior inconsistent statements of witnesses;
- (3) Material variances in witness statements;
- (4) Non-recorded *Brady* and *Giglio* information, regardless of whether it has been memorialized in a document or some other form;
- (5) Witness or third-party benefits;
- (6) Known but uncharged criminal conduct;
- (7) Mental and physical health conditions that may impair a witness’s ability to testify to the events

- he/she perceived; and
(8) Bias or motive to fabricate testimony²⁷²

Other checklists pertain to the investigation of a witness ID case, law enforcement testimony, and confidential informants.²⁷³ Although these lists do not guarantee that a prosecutor will comply with *Brady*, they significantly diminish the chance of an exculpatory piece of information will be overlooked or lost.

C. Case Studies

1. Dallas District Attorney's Office, Texas

In the early 2000s, the Dallas District Attorney's Office was the stereotypical prosecutor's office insofar as the lawyers working in it were rewarded for convictions.²⁷⁴ "You would get big accolades for big sentences, and everyone wants to be promoted" says Harris Heath, who is the highest ranking assistant district attorney in the office.²⁷⁵

In 2006, the spirit of the office shifted dramatically with the election of Craig Watkins as District Attorney. Watkins is a former public defender who had never prosecuted a case prior to becoming Dallas's first African-American district attorney. Watkins came into office following (and in part because of) several high-profile conviction reversals based on DNA evidence.²⁷⁶ Once in office, Watkins established one of the country's first and most successful CIUs. The unit has generated 25 exonerations thus far.²⁷⁷

The first key to the Dallas CIU's success is its systematic approach to wrongful convictions. Attorneys review them "the same way that the Federal Aviation Administration investigates an airplane crash scene, working backward from the wrongful conviction to see what malfunction in the system caused that result."²⁷⁸ The prosecutors reviewing wrongful convictions were not content to discover what had gone wrong in a particular case; rather, they looked for the underlying, systemic flaw that caused the problem.

Second, Watkins hired Mike Ware to run the Dallas CIU. Ware was a veteran criminal defense attorney and supervising attorney at the Wesleyan Innocence Project at the Texas Wesleyan School of Law when he took a job at the district attorney's office.²⁷⁹ Ware had no personal attachment to the cases under review or the system by which they were prosecuted.

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Furthermore, Ware and his team worked on reviewing convictions full time; their unit was separate from the day-to-day operations of the district attorney's office.²⁸⁰

Third, Watkins reversed the office's "longstanding opposition to DNA testing, implementing a policy of supporting testing if there was relevant biological evidence to test and the outcome of that test was potentially dispositive on the issue of guilt or innocence."²⁸¹ Watkins also embraced the opportunity to be held accountable by DNA testing in a public way. For example, on his second day on the job, Watkins attended Andrew Gossett's exoneration hearing and publicly apologized to him.²⁸² The Dallas CIU again demonstrated its lack of hesitation to hold itself accountable when it exonerated Michael Phillips in 2014 after he had spent 24 years in prison for a rape conviction that DNA evidence later proved he did not commit. Remarkably, the exoneration was the result of the Dallas CIU's systematic review of old convictions for possible errors; Phillips was not seeking exoneration when the CIU reviewed his case.²⁸³

Finally, Watkins updated the Dallas District Attorney's office policies on myriad issues, including *Brady* disclosures, eyewitness identifications, and police lineups.²⁸⁴ By responding to the office's past mistakes and updating its policies, Watkins ensured that fewer people would be wrongly convicted moving forward.

2. Manhattan District Attorney's Office, New York

Like Craig Watkins, Cyrus Vance, Jr. left the defense bar to become a district attorney.²⁸⁵ In 2010, Vance created a CIU at the Manhattan District Attorney's Office, explaining that "the criminal justice system is subject to human error and thus can be fallible."²⁸⁶ In light of that recognition, Vance vowed to investigate wrongful conviction claims in earnest. Thus far, his office has reviewed more than 160 cases, reinvestigated 14 cases, and vacated 5 convictions.²⁸⁷

In his effort to prevent as well as rectify wrongful convictions, Vance has implemented policies that clarify and standardize the way the lawyers in his office prosecute a case. For example, he has provided them with checklists detailing proper procedure for high-risk tasks like corroborating eye-witness information.²⁸⁸ His checklist includes scrutinizing police reports in an attempt to determine a witness's whereabouts; subpoenaing phone/photo/E-Z pass records—anything that would reveal location; searching work records

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and the defendant's online presence; and checking to see whether the defendant was incarcerated.²⁸⁹ Vance has also incorporated a "conviction integrity" component into every major training session, ensuring that the prosecutors in his office are aware of and know how to use the checklists and other tools that he has provided them.²⁹⁰

3. Brooklyn District Attorney's Office, New York

Of the 16 CIUs in the United States today, none is facing a more monumental task than the one in the Brooklyn District Attorney's Office. The Brooklyn CIU has been reviewing all 57 cases involving a retired police detective, Louis Scarcella, whose corrupt policing methods lead to wrongful convictions in at least 7 murder cases.²⁹¹ Additionally, the unit has reviewed dozens more cases, many of them from the crime-ridden 1980s and 1990s, when the chaos of Brooklyn's 600 murders a year masked police and prosecutorial misconduct.²⁹²

The first iteration of Brooklyn's CIU was established by District Attorney Charles Hynes.²⁹³ Hynes's 24 year career was marked by controversy, including accusations that he used seized drug money to fund a political campaign, used faulty eyewitnesses, and relied on evidence obtained by discredited detectives.²⁹⁴ In January of 2014, current District Attorney Kenneth Thompson took office following a campaign in which he vowed to clean up the District Attorney's office, in part by establishing the Conviction Review Unit (CRU).²⁹⁵

During his time in office, Thompson has expanded the CRU so that it now has 10 attorneys, three investigators, and an annual budget of \$1.1 million.²⁹⁶ The CRU is investigating over 100 cases, and in 2014 CRU exonerated 10 people convicted of murder.²⁹⁷

One of CRU's characteristics that sets it apart from other CIUs is that Thompson is not simply looking at wrongful conviction cases in which someone can prove that he is innocent; rather, he is looking to set aside any conviction that "has no integrity."²⁹⁸ Convicts are always at the heart of wrongful convictions, and Thompson acknowledges that wrongful convictions "destroy the lives of the people who have been wrongfully convicted, and their families."²⁹⁹ But his additional focus on the convictions themselves shows that he is equally concerned about what wrongful convictions—even wrongful convictions of potentially guilty people—do to the "integrity of the system."³⁰⁰ As Delaware looks to model CIUs, Brooklyn's

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should stand for the idea that conviction integrity is inextricably linked to the integrity of the entire criminal justice system. By creating a conviction review unit that seeks to remedy convictions lacking in integrity, Thompson is achieving his broader goal of restoring faith in the Brooklyn District Attorney's Office as a whole.

D. Conclusion

The implementation of a state-wide CIU is a necessary step toward ensuring that those who have been wrongly convicted can access relief and preventing similar errors in the future. By creating checklists, "opening" the discovery process, carefully auditing reversals of convictions, and creating an efficient and autonomous CIU structure, EJI hopes that the State of Delaware will guard both the freedom of its innocent citizens and the integrity of the district attorneys' offices that protect them.

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 reform its system at every stage. Changes that only address one stage in isolation will never be sufficient, as each stage of the adjudication process plays a role in furthering racial disparities. Addressing the root cause of the problem requires a holistic look at all of these stages. This report suggests key reforms in charging, plea-bargaining, and sentencing to create sustainable change in Delaware's criminal justice system.

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268. CONVICTION INTEGRITY PROJECT, *supra* note 265, at 5.

269. *Id.* at 23 (citing Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012: Report by the National Registry of Exonerations* at 40 tbl.13, 65-66 (May 2012), *a v a i l a b l e a t* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf).

270. CONVICTION INTEGRITY PROJECT, *supra* note 265, at 5.

271. Scheck, *supra* note 263, at 2244-45.

272. CONVICTION INTEGRITY PROJECT, *supra* note 265, at 19.

273. *Id.* at 20-21.

274. Barber, *supra* note 250.

275. *Id.*

276. Mike Ware, *Dallas County Conviction Integrity Unit and the Importance of Getting It Right the First Time*, 56 N.Y.L. SCH. L. REV. 1033, 1037 (2012).

277. Sarah Mervosh, *Q&A with Dallas County's New Expert on Wrongful Convictions*, DALLAS MORNING NEWS (Sep. 8, 2015, 8:00 a.m.), <http://crimeblog.dallasnews.com/2015/09/qa-with-patricia-cummings-freer-of-the-wrongfully-convicted.html/>

278. Boehm, *supra* note 256, at 628.

279. Ware, *supra* note 276, at 1034.

280. Boehm, *supra* note 256, at 628.

281. *Id.* at 629.

282. Ware, *supra* note 276, at 1039.

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283. THE NATIONAL REGISTER OF EXONERATIONS, *supra* note 251.
284. Boehm, *supra* note 256, at 630.
285. Cyrus Vance, Jr., WIKIPEDIA, https://en.wikipedia.org/wiki/Cyrus_Vance,_Jr.
286. Press Release, N.Y. Cnty. Dist. Attorney's Office, N.Y.C. DA Vance Announces Conviction Integrity Program (Mar. 4, 2010)
287. Brooke L. Williams, *Are DAs Doing Enough to Overturn Wrongful Convictions?*, G O T H A M G A Z E T T E (J u l . 1 3 , 2 0 1 5) , <http://www.gothamgazette.com/index.php/government/5802-are-das-doing-enough-to-overturn-wrongful-convictions>
288. Boehm, *supra* note 256, at 635.
289. CONVICTION INTEGRITY PROJECT, *supra* note 265, at 20.
290. Boehm, *supra* note 256, at 636.
291. Stephanie Clifford, *Another Man Freed as Brooklyn District Attorney's Office Reviews Cases*, N . Y . T I M E S (J u n e 3 , 2 0 1 4) , <http://www.nytimes.com/2014/06/04/nyregion/in-brooklyn-scarcellas-cases-continue-to-face-review.html>
292. *Id.*
293. The Editorial Board, *A Prosecutor's Reputation Sinks Lower*, N.Y. TIMES (June 3, 2 0 1 4) , <http://www.nytimes.com/2014/06/04/opinion/a-prosecutors-reputation-sinks-lower.html>
294. *Id.*; see also Matthew McKnight, *No Justice, No Peace*, NEW YORKER (January 6, 2 0 1 5) , <http://www.newyorker.com/news/news-desk/kenneth-thompson-conviction-review-unit-brooklyn>
295. McKnight, *supra* note 293.

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296. THE NATIONAL REGISTER OF EXONERATIONS, *supra* note 251.

297. *Id.*

298. McKnight, *supra* note 293.

299. *Id.*

300. *Id.*