



# Staff Memorandum

**HOUSE OF DELEGATES**  
**January 31, 2020**

REQUESTED ACTION: Approval of the report and recommendations of the New York County Lawyers Association with respect to the problem of innocent people entering into plea bargains.

Attached is a report from the New York County Lawyers Association analyzing the problem of innocent people who plead guilty. Over 90% of criminal dispositions in both state and federal courts result from negotiated plea agreements. Evidence indicates that a segment of defendants plead guilty to crimes they did not, in fact, commit. The report notes several factors that can prompt an innocent person to plead guilty to “get the matter over with”: (a) the costs of repeated court appearances; (b) a lack of knowledge as to how the plea might affect housing and employment; (c) fear of a significantly longer jail or prison sentence; and (d) the disproportionate effect on vulnerable populations with limited resources.

The report makes a number of proposals to address this problem:

- Reduce unnecessary appearances by defendants.
- Facilitate pre-trial communication between incarcerated clients and defense counsel.
- Provide defendants with resources about the criminal justice system, criminal procedure, and what to expect as their case proceeds.
- Adopt the recommendations of the National Association of Criminal Defense Lawyers relating to penalizing a defendant who goes to trial and proportionality between pre-trial and post-trial sentences.
- Enhance judicial discretion in sentencing.
- Reduce the volume and impact of low-level offenses in the criminal justice system, including decriminalizing low-level offenses; declining to prosecute offenses; diversion; and expungement.

This report was submitted in November 2019. No comments have been received.

The report will be presented at the January 31 meeting by Hon. Jed S. Rakoff and Lewis F. Tesser.

**NYCLA JUSTICE CENTER  
TASK FORCE:**

**SOLVING THE PROBLEM  
OF INNOCENT PEOPLE  
PLEADING GUILTY**



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## I. INTRODUCTION<sup>1</sup>

The operative basis of the criminal justice system in the United States today is that a substantial number of people charged with crimes will resolve those charges by entering pleas of guilty and forgoing their right to trial. While plea bargaining is generally accepted as necessary to a well-functioning justice system, an inevitable and hidden cost is that it can lead individuals who are innocent to plead guilty to crimes they did not commit.<sup>2</sup> The acceptance of plea bargaining is based on there being the semblance of an actual bargain struck by relatively equally situated and informed parties. But all too often this is a fiction. When an innocent person is pressured to plead guilty it undermines our fundamental expectation that criminal court procedure must lead to fair and just results. To the extent that pressures leading to not truly bargained for pleas have become endemic in the criminal justice system, they undermine the integrity and reliability of the system for all of us and breed disrespect for the courts, prosecutors and the rule of law.

The Plea Bargaining Task Force of the NYCLA Justice Center (the “Task Force”) was formed in 2018 at the suggestion of the chairs and under the auspices of the NYCLA Justice Center as part of its mission to combine NYCLA’s resources with other segments of the bench and bar and community groups to “identify and understand legal and social justice issues, promote access to justice, and act as a catalyst for meaningful improvement in, and a positive

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<sup>1</sup> The Task Force wants to thank Morrison & Foerster LLP for hosting all of the Focus Group and Steering Committee sessions and a plenary Task Force meeting, and the New York County Lawyers’ Association (the “NYCLA”) for hosting an all-day Forum of the entire Task Force. The Task Force also wants to thank Tesser, Ryan & Rochman LLP, Colyn Eppes, Jackson Kerr, Randy Tesser, and Omar Evans for working tirelessly to conduct meetings, facilitating consensus, coordinating the preparation of this Report, and for keeping their heads and our heads level while immersed in this serious and compelling problem. Finally, the Task Force would like to acknowledge the efforts of the Honorable Judge Rakoff in bringing light to the issue of innocent people pleading guilty.

<sup>2</sup> Criminologists who have studied this phenomenon of innocent people pleading guilty “estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent.” Jed S. Rakoff, “Why Innocent People Plead Guilty” (The New York Review of Books Nov. 20, 2014), at 7-8.

perception of, the administration of justice in New York State”. The Task Force was asked to investigate whether and why innocent people plead guilty to crimes they did not commit and to recommend practical and achievable steps for reducing the incidence of such pleas and improving implementation and public perception of the fairness of the plea-bargaining process. Lew Tesser and Chet Kerr generously agreed to spearhead the project and, with the assistance of the Justice Center and a steering committee, assembled a 70-member task force of knowledgeable people with substantial experience and varied perspectives related to the criminal justice system in the federal and state courts in New York City. After a year of study, discussion and analysis, the Task Force has identified several factors that can powerfully influence an innocent person’s decision to plead guilty. These are related to, *inter alia*, systemic pressure for speed and efficiency of case processing, the burden of repeated court appearances placed on the accused, and unduly harsh sentences imposed on felony offenders who exercise their right to trial.

Accused misdemeanants and felony offenders often plead guilty simply to “get the matter over with.” Many make that choice because they cannot bear the costs of repeated court appearances, including lost work and/or necessary child care expenses. Others make the choice without knowing how the plea might seriously prejudice their housing and employment opportunities. For defendants accused of serious crimes, fear of a significantly longer jail or prison sentence after trial—compared with the state’s offer of a much lower sentence in return for a guilty plea—can motivate even an innocent person to plead guilty quickly. Finally, the enormous number of low-level offenses charged and prosecuted in our lower courts disproportionately affects our most vulnerable populations, including the impoverished and people of color, and results in a staggering number of people, who have only limited resources to

defend themselves, pleading guilty and being sentenced to undeserved and often harsh jail time and/or fines.

To address these negative factors inherent to the criminal justice system, the Task Force has developed a set of proposals and recommendations that will reduce their influence on the plea-bargaining system in New York and thus potentially reduce the number of innocent individuals who feel pressured or compelled to enter guilty pleas. These proposals include:

- Create systems to reduce unnecessary court appearances;
- Develop ways to help defendants to become more knowledgeable decision-makers;
- Restore judicial discretion with respect to sentencing outcomes and do not penalize defendants for rejecting a plea offer and proceeding to trial; and
- Increase the decriminalization of low-level offenses and employ sensible strategies to manage the criminal process more effectively, acknowledging that administrative efficiency is not and should not be the determining factor in plea bargaining discussions.

#### **A. The Existence and Prevalence of the Problem**

Jury trials and an independent judiciary have long been recognized and celebrated as a means to determine guilt or innocence and as a check on arbitrary government power.<sup>3</sup> The reality today, however, is that few criminal defendants are tried by a jury of their peers. Negotiated plea bargain agreements account for well over 90% of criminal dispositions—with less than 3% of cases proceeding to trial—in both federal courts nationwide and in the New York

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<sup>3</sup> See Lucian E. Dervan & Vanessa A. Edkins Ph.D., *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 7-15 (2013).

State Courts.<sup>4</sup> A principal reason for this wide use of plea bargaining is that, in the majority of cases, a negotiated plea agreement is seen as mutually beneficial for both an accused criminal defendant and the government. The ability of prosecutors to offer, and a defendant to accept, a reduced charge and/or a shorter sentence in exchange for a plea of guilty satisfies several interests: 1) the defendant's interest in obtaining the lowest sentence possible without facing the risk of trial; 2) the prosecutor's interest in serving justice while conserving the resources of its office; and 3) the interest of the judicial system of achieving efficient resolutions of a large number of cases.<sup>5</sup>

Exoneration data, scholarly estimates, and anecdotal evidence suggest, however, that there is a subset of criminal defendants who chose to plead guilty to crimes that they did not, in fact, commit.<sup>6</sup> On the federal level, it is estimated that between two and eight percent of convicted defendants plead guilty to crimes for which they are factually innocent.<sup>7</sup> While post-conviction exoneration of defendants who have previously pled guilty is some evidence of the phenomenon,<sup>8</sup> the nature of wrongful convictions and the challenges of empirical research have

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<sup>4</sup> John Gramlich, *Only 2% of federal criminal defendants go to trial, and most who do are found guilty*, PEW RESEARCH CENTER (June 11, 2019), available at <https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/> (based on research collected by the federal judiciary and the National Center for State Courts); John Gramlich, *Federal Criminal Prosecutions Fall to Lowest Level in Nearly Two Decades*, PEW RESEARCH CENTER (Mar. 28, 2017), available at <https://www.pewresearch.org/fact-tank/2017/03/28/federal-criminal-prosecutions-fall-to-lowest-level-in-nearly-two-decades/>; National Center for State Courts, Court Statistics Project, 2017 Gen. Jurisdiction Criminal Jury Trials and Rates, New York, available at [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx).

<sup>5</sup> See generally, F. Andrew Hessick III, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189 (2002).

<sup>6</sup> *People v. Tiger*, 32 N.Y.3d 91, 114-15 (2018) (Wilson, J., dissenting). The Supreme Court has implicitly acknowledged the phenomenon of innocent people pleading guilty and has upheld the practice of a defendant entering a guilty plea while maintaining their innocence. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

<sup>7</sup> See Rakoff, *supra* note 2, at 7-8; Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliability Acquit the Innocent*, 49 RUTGERS L. REV. 1317, 1343-44 (1997); cf. *People v. Serrano*, 15 N.Y.2d 304 (N.Y. 1965).

<sup>8</sup> See *Exonerations in 2017*, THE NATIONAL REGISTRY OF EXONERATIONS (Mar. 14, 2018), available at [https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf?utm\\_source=National+Registry+of+Exonerations+Newsletter&utm\\_campaign=7008e6a520-EMAIL\\_CAMPAIGN\\_2018\\_03\\_07&utm\\_medium=email&utm\\_term=0\\_47e13608bc-7008e6a520-66652693](https://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf?utm_source=National+Registry+of+Exonerations+Newsletter&utm_campaign=7008e6a520-EMAIL_CAMPAIGN_2018_03_07&utm_medium=email&utm_term=0_47e13608bc-7008e6a520-66652693).

made it difficult to quantify the number of instances where someone who is factually innocent has entered a plea of guilty.<sup>9</sup> Nevertheless, the available sources cited herein all point to the same conclusion: that there are individual defendants who are pleading guilty notwithstanding their factual innocence and, thereafter, suffer unjustly the consequences of a criminal conviction.<sup>10</sup> It is the position of the NYCLA Justice Center (the “Justice Center”) and this Task Force that efforts must be made to reduce the incidence of innocent people pleading guilty.

### **B. Why do Innocent People Plead Guilty?**

There are a variety of reasons that an innocent person might voluntarily enter a plea of guilty rather than seek vindication through a public trial.<sup>11</sup> Notably, there are various institutional forces that might prompt this act. These forces typically operate on misdemeanor defendants as process-related costs they cannot bear, and on felony defendants as the threat of significantly longer sentences of incarceration for those who exercise their right to trial and are convicted.

Even if a defendant believes that acquittal after trial is likely, trials can be long, difficult, and disruptive.<sup>12</sup> Defendants may desire to spare the often excessively high expense and emotional cost associated with proceeding to trial, both to themselves and their families. Entering a plea of guilty might well be seen as more acceptable than facing the exhaustive trial process, which can require missing work and having to make child care or elder care arrangements on short notice. Because the plea-bargaining process (and other pre-trial

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<sup>9</sup> See Rakoff, *supra* note 2, at 7-8.

<sup>10</sup> Givelber, *supra* note 7, at 1318-1320; John H. Blume and Rebecca J. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 172-80 (2014); Josh Bowers, *Punishing the Innocent*, 156 U. PENN. L. REV. 1117, 1179-1121 (2008).

<sup>11</sup> Blume and Helm, *supra* note 10, at 172-80; see *People v. Tiger*, 32 N.Y.3d 91, 115-16 (2018) (Wilson, J., dissenting).

<sup>12</sup> According to the PETIT JUROR’S HANDBOOK, “[t]he average length of a criminal trial is five to ten days.” New York State Unified Court System Petit Juror’s Handbook, at p. 10, available at [https://www.nyjuror.gov/pdfs/hb\\_Petit.pdf](https://www.nyjuror.gov/pdfs/hb_Petit.pdf).

procedures) can be arduous and anxiety-inducing, some defendants may choose to plead guilty merely to put an end to their present situation, particularly if they are in jail pending a trial or other resolution.<sup>13</sup>

Prosecutors often have broad discretion in making charging decisions, including the ability to threaten more severe charges if a defendant declines a plea offer.<sup>14</sup> In fact, post-trial sentences tend to be significantly higher than sentences offered in plea negotiations,<sup>15</sup> and because of mandatory minimum sentence statutes, a prosecutor's charging decisions can often dictate the resulting sentence after trial. Some defendants may choose to accept a plea deal that carries a predictable outcome, rather than risk (even the unlikely chance) of a disproportionately more severe outcome after trial. Some defendants may also choose to plead guilty to become eligible for beneficial programs, such as diversionary programs, for which they must be found guilty to be admitted.<sup>16</sup>

Criminal defendants may also be unfamiliar with the criminal justice system and not fully understand that defense attorneys are on their side. As a result, defendants can feel powerless in a complex, opaque system, and may decide that entering a plea of guilty, with its known and sometimes unknown attendant consequences, is better than being caught in a stressful situation about which they have little understanding and over which they perceive they have little or no control. Many defendants charged with crimes carrying short jail terms or probationary sentences do not always realize the future implications for housing and employment

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<sup>13</sup> See, e.g., Blume & Helm, *supra* note 10, at 173-74.

<sup>14</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

<sup>15</sup> See NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT (2018) (hereinafter, the "NACDL Report").

<sup>16</sup> See, e.g., N.Y. Crim. Proc. L. § 216.05(4).

opportunities and will plead guilty to achieve what they perceive to be an inconsequential sentence.

### **C. Recent, Relevant Criminal Justice Reform Efforts**

#### **1. Bar Reports**

Several bar associations and other institutions have recently published reports which have focused on addressing flaws within our criminal justice system, including the plea-bargaining process. The Task Force has reviewed and relied upon the following reports, which have been helpful in understanding the specific issues addressed in this Report.

In 2018, the National Association of Criminal Defense Lawyers (“NACDL”) issued a report discussing the phenomenon of the “trial penalty,” *i.e.*, the “discrepancy between the sentence the prosecutor is willing to offer in exchange for a guilty plea and the sentence that would be imposed after a trial” if the defendant is convicted in federal courts.<sup>17</sup> Based on its findings, the NACDL set out ten principles intended to guide ten specific recommendations for addressing this problem, some of which were particularly important to the Task Force’s work of identifying proposals to lessen the likelihood of innocent people pleading guilty.<sup>18</sup> The principles related to the impact that the trial penalty and plea bargaining practices had on the role of the justice system.

In 2019, the New York State Bar Association’s second Task Force on Wrongful Convictions (the “TFWC”) published a report, expanding on the findings of an earlier TFWC report from 2009, which had identified six causes that were “primary factors responsible for wrongful convictions.”<sup>19</sup> These factors included: identification procedures, mishandling of

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<sup>17</sup> See *NACDL Report*, *supra* note 15, at 5-6.

<sup>18</sup> *Id.* at 11-12.

<sup>19</sup> NEW YORK STATE BAR ASSOCIATION TASK FORCE ON WRONGFUL CONVICTIONS, REPORT OF TASK FORCE ON WRONGFUL CONVICTIONS 5 (February 8, 2019) (hereinafter, the “2019 TFWC Report”); NEW YORK STATE BAR

forensic evidence, use of false confessions, errors by law enforcement (including prosecutors), defense practices, and the use of jailhouse informants.<sup>20</sup> After reviewing recent data and developments over the past decade, the 2019 TFWC Report advocates, *inter alia*, that:

- Each District Attorney’s Office in the State of New York establish a Conviction Integrity Unit (CIU), or, where not feasible, create a program for conviction review;<sup>21</sup> and
- The New York Legislature add a new section (h) to N.Y. Crim. Proc. L. § 440.10 that would permit newly discovered evidence claim after a guilty plea.<sup>22</sup>

## 2. Prosecutorial Reform

In 2019, Kings County District Attorney Eric Gonzalez published an action plan for his office with the intention that it serve as a “national model of what a progressive prosecutor’s office can be.”<sup>23</sup> The action plan may well have the effect of reducing the amount of innocent people pleading guilty through, *inter alia*, expanded diversionary programs and exploring new alternatives to incarceration.

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ASSOCIATION TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT OF NEW YORK STATE BAR ASSOCIATION’S TASK FORCE ON WRONGFUL CONVICTIONS (April 4, 2009).

<sup>20</sup> 2019 TFWC Report, *supra* note 19, at 5.

<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 10. In *People v. Tiger*, 32 N.Y.3d 91 (2018), the New York Court of Appeals held that a motion to vacate a judgment of guilty in a criminal proceeding based on newly discovered evidence is not available where the defendant has voluntarily entered a plea of guilty. *Id.* at 99-102 & n. 7.

<sup>23</sup> ERIC GONZALEZ, Justice 2020, BROOKLYN DISTRICT ATTORNEY’S OFFICE 9 (2019). District Attorney Gonzalez’s plan aims to take a targeted approach in dealing with crime in Kings County, focusing resources on “identifying and removing from the community those who cause the most harm ... while diverting out of the criminal justice system or into community-based services those who don’t pose a threat to public safety.” *Id.* at 8. In order to achieve those goals, the Kings County action plan focused on four main areas: 1) reducing incarceration by making jail the “alternative”; 2) engaging communities as partners in justice; 3) focusing resources on the drivers of crime; and 4) transforming and educating the internal culture of the DA’s office. *Id.* at 12-13.

### 3. Recent Legislative Amendments to the Criminal Justice System in New York

In April 2019, the New York State Legislature passed comprehensive reforms to its Criminal Procedure Law, which will take effect in January of 2020 (the “2019 NY Criminal Justice Reform Legislation”). These reforms focus on changes to the bail system, criminal discovery and speedy trial requirements under New York law. The Task Force studied these legislative changes and considered how they might potentially affect the extent to which innocent individuals agree to plead guilty. In particular, the Task Force has considered how a lengthy pre-trial detention and a lack of access to discoverable information in the early stages of a case can have a coercive impact on an innocent defendant’s decision whether to plead guilty.<sup>24</sup>

First, the new legislation eliminates cash bail for all misdemeanors and class E felonies (the lowest level of felony offense), with some minor exceptions, and instead requires police officers to serve desk appearance tickets, allowing individuals to remain at liberty pending the resolutions of their cases.<sup>25</sup> This bold reform aims to decrease the disruption in individuals’ lives when they have been arrested and accused of committing low-level offenses. Instead of spending a night, multiple nights, or months in jail because they cannot afford to post bail, people will attend their jobs, take care of their families, and otherwise live their normal lives as they await court dates. The new bail legislation also incentivizes judges to release individuals under non-monetary conditions rather than holding them in pre-trial detention, unless a court determines an individual to be a flight risk.<sup>26</sup> The new legislation is expected to decrease the number of individuals who are being held in pre-trial detention.

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<sup>24</sup> See Blume & Helm, *supra* note 10, at 173-74; *Id.* at 183; Hessick, *supra* note 5, at 211-15. See also Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 307-09 (2008).

<sup>25</sup> N.Y. Crim. Proc. § 510.10.

<sup>26</sup> N.Y. Crim. Proc. § 510.10(1).

Second, the new discovery statute calls for open discovery in all criminal cases and further requires prosecutors to turn over their discovery to defendants within fifteen days of a defendant's arraignment.<sup>27</sup> More transparent discovery practices ensure that defendants are better informed about the facts of their cases as they weigh the decision of whether to plead guilty or take their case to trial. In particular, the new discovery legislation assures that defendants will have access to the prosecution's discoverable material before accepting a plea offer.<sup>28</sup> This will help close the information gap between prosecutors and defendants, which previously led some defendants to feel coerced into accepting a plea deal without an understanding of the government's case.

Third, the changes to speedy trial requirements provide that when the prosecution tells the court that they are ready for trial, they must sign a certificate of compliance that the new discovery requirements have been met, and the defendant will have a chance to object on the record if this is not the case.<sup>29</sup> Moreover, if the prosecution tells the court that they are ready to proceed with trial, but subsequently asks for more time, the court will approve the request only upon "a showing of sufficient supporting facts." This legislative change is likely to shorten the pre-trial detention period for many defendants.

These reforms are relevant to the problem of innocent people pleading guilty, and it is expected that, if fully and effectively implemented, they will serve to moderate some of the

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<sup>27</sup> The breadth of this initial discovery obligations includes, *inter alia*: all *Rosario* material, grand jury testimony of the victim and the defendant, names and contact information of witnesses (with certain exceptions), police reports, search warrants and accompanying affidavits in support of the warrants, electronically stored information, and criminal conviction records of both the defendant and prosecution witnesses. See N.Y. Crim. Proc. § 245.10.

<sup>28</sup> When a defendant is charged with a felony, and the prosecution makes a pre-indictment plea offer to a crime, the prosecutor must disclose all discoverable items not less than three calendar days prior to the expiration date of any plea offer or any deadline imposed by the court for acceptance of the plea offer. N.Y. Crim. Proc. § 245.25(1). When a defendant is charged with a misdemeanor and the prosecution makes a pre-indictment plea offer, the prosecution must disclose its discoverable material not less than seven calendar days prior to the expiration of the plea offer. N.Y. Crim. Proc. § 245.25(2).

<sup>29</sup> N.Y. Crim. Proc. § 30.30(5).

coercive aspects of plea bargaining. Taken together, these studies, policy initiatives, and recently-passed laws indicate that justice professionals are open to taking a fresh look at the issue of plea bargaining compelling innocent people to plead guilty. The Justice Center now adds its voice to the discussion.

## **II. NYCLA'S JUSTICE CENTER TASK FORCE**

### **A. Mission & Composition of Task Force**

The mission of the Task Force is to research and evaluate the issue of innocent people pleading guilty and to identify some practical and achievable solutions to prevent this phenomenon from happening. In order to efficiently utilize the resources of the Task Force, we focused our research primarily on the processes, procedures and rules applicable to the Federal and State courts in the New York City Metropolitan area. Nevertheless, the Task Force hopes that the proposals, individually and collectively, will serve as a model for New York State, other states and the federal government for reducing the occurrence of this disturbing phenomenon. In addition, the problem of innocent people pleading guilty extends to both felonies and misdemeanors. Accordingly, both levels of offenses were studied and proposals are made that have applicability to both felonies and misdemeanors.

The Task Force was composed of approximately 70 members, including former appellate court and criminal court judges, prosecutors, defense counsel, law school professors and other leaders of the bar. In the rare circumstance in which general consensus was not manifest, it is noted in this Report. The Roster of the Task Force is shown in Appendix A.

### **B. The Task Force Process**

The Justice Center created the Task Force in late 2018. The Task Force quickly identified and collected a wide range of Law Review articles, Bar Reports and case law addressing the issue of plea bargaining and made that research available to all Task Force

Members. The Task Force held its first plenary meeting on January 22, 2019, to discuss its mandate and the process it would use to evaluate the issue of innocent defendants pleading guilty and to identify proposals to address this issue. The Honorable Jed S. Rakoff delivered the keynote address.

The Task Force conducted an exhaustive review of the history of plea bargaining and determined that it would be neither advisable nor practicable to endorse a wholesale overhaul of the plea bargaining system, which the Supreme Court has described as “not only an essential part of the [criminal justice] process, but a highly desirable part for many reasons.”<sup>30</sup> Over the Spring of 2019, the Task Force held a series of “focus groups,” at which Task Force members considered a wide range of substantive and procedural issues that arise over the duration of a criminal proceeding. The operating theory was that discussions by knowledgeable people with on-the-ground experience, looking at the various stages of the criminal and plea bargaining process might expose opportunities for corrective action that would not endanger public safety. Each of the six focus group meetings were open to the entire Task Force. Nearly the entire Task Force participated in one or more of the focus groups.

The focus group discussions examined how each of these issues impacted defendants, defense counsel, prosecutors and judges as a case moved through the system and how that, in turn, that could potentially motivate—or pressure—innocent people to plead guilty. Based on these discussions, participants in the focus groups identified potential proposals for reform.

In the initial stages of the focus group discussions, the Task Force determined that the topics of bail, criminal discovery and speedy trial were areas of possible concern, in part because

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<sup>30</sup> *Santobello v. New York*, 404 U.S. 257, 261 (1971). For more information on the history of plea bargaining, see generally, Albert Alschuler, *Plea Bargaining and Its History*, 79 COL. L. REV. 1 (January 1979), and *Special Issue on Plea Bargaining – Historical Perspectives*, 13 LAW & SOC'Y REV. 189, 211-285 (1979).

the then current system was perceived as unduly burdensome on defendants, thus adding pressure on defendants to plead guilty. But after the 2019 New York Criminal Justice Reform Legislation passed, the Task Force decided that it would be more effective to support and supplement the efforts of the New York legislature, rather than propose entirely new initiatives in these areas. The Task Force discussed potential challenges that defense attorneys, prosecutors, and judges might face in adapting to the new legislative framework and whether there were any initiatives that it could undertake to ease this transition consistent with the goal of reducing the incidence of innocent people pleading guilty.

### **C. Topics Studied By The Focus Groups**

#### **1. Charging**

The Task Force considered the role of prosecutorial discretion in our justice system, including balancing the presumption of innocence, managing prosecutorial resources, the values of an adversarial justice system, and the role of grand juries in moderating prosecutorial discretion. The Task Force also discussed unintended consequences that have stemmed from the current state of prosecutorial discretion, such as public perceptions of incongruent leverage between prosecutors and defendants, the ability to charge multiple degrees of the same offense and multiple offenses based on the same conduct, and reliance on police reporting which might not be sufficiently confirmed.

#### **2. Role of Defense Counsel**

The Task Force considered the role of defense counsel within the criminal justice system, and how the limits of that role might contribute to the phenomenon of innocent people pleading guilty. Topics explored included how and when defense counsel communicate with their clients, how the plea-bargaining process is affected by the mistrust of prosecutors among defense counsel, the lack of funding for defense counsel, and the impact of delay tactics by both

prosecutors and defense counsel during pretrial proceedings. Additionally, the Task Force discussed time pressures in the plea-bargaining process, and the limited access defense counsel have to their clients often resulting in insufficient time to speak with them about their cases.

### **3. Judicial Involvement in the Plea-Bargaining Process**

The Task Force considered the differing approaches to judicial participation in the plea-bargaining process in the New York State courts and in Federal Court. The Task Force examined how judicial involvement in the plea-bargaining process could risk influencing the defendant's plea, learning confidential information, and giving the appearance of being a biased party. The Task Force also considered whether judicial involvement in plea bargaining would allow judges to ensure that defendants are informed, acting as a check on misconduct and power of litigants, and could increase perceptions of fairness.

### **4. Sentencing**

The Task Force examined the history and intent of mandatory minimum sentence statutes and sentencing guidelines at both the State and Federal levels. The Task Force discussed the positive effects of these statutes and guidelines, such as deterrence from committing crimes, and the potentially problematic effects, such a widening the gap between pre-trial and post-sentences, which some argue can coerce defendants to plead guilty.

#### **D. Developing and Selecting Potential Solutions**

Guided by its research and the focus group process, the Task Force initially identified over one hundred proposals that, if implemented, could potentially reduce the number of innocent people who plead guilty. These proposals were circulated to, and ranked by, the members of the Task Force. In evaluating which proposals to potentially adopt, the Task Force considered both the likelihood—and the extent to which—such proposals would reduce the incidence of innocent people pleading guilty, as well as the feasibility of implementing such

proposals. The twelve highest ranked proposals were then discussed and debated at the Task Force’s second plenary session on May 9, 2019. Following these extensive deliberations, the Task Force voted on which proposals were most likely to affect positive change for innocent defendants (as well as the criminal justice system at large) and that are realistically implementable.<sup>31</sup> The recommendations in this Report and the following declaration are the result of this multi-stage process.

**III. DECLARATION THAT EFFICIENCY OF THE CRIMINAL JUSTICE PROCESS SHOULD NOT BE A DETERMINATIVE FACTOR FOR MAKING PLEA BARGAINING DECISIONS**

A common foundational principle cutting across all points of concern the Task Force identified is that procedural efficiency should not produce unjust outcomes. Throughout the focus group meetings, there was a recurring discussion about the role of “efficiency” in the criminal justice system and whether it provides a justification for current plea bargaining practices. The Task Force recognized that the drive for efficiency in the criminal justice system – and an attendant pressure to plea bargain – can sometimes reflect and be driven by powerful institutional pressures to reduce costs and preserve resources. This ongoing dialogue set the stage for the generation of a number of proposals, some of which were ultimately adopted in this Report.

The Task Force has determined that the current plea bargaining system as it operates in New York effectively incentivizes criminal defendants to plead guilty, forfeiting their constitutional rights to avoid the time, risk and cost of a trial by jury. While plea bargaining is an important, and arguably necessary, component of this country’s criminal justice system, the

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<sup>31</sup> The Task Force decided that any proposals enacted in this Report must be generally endorsable by all of the various stakeholders in the criminal justice system, prosecutors, defense attorneys, judges, academics, and policy advocates—all of whom are represented on the Task Force. Drafts of the report were also shared with knowledgeable people from groups outside the Justice Center.

Task Force believes that encouraging defendants to plead guilty cannot and should not be justified by institutional pressure – from judges, prosecutors and/or defense counsel -- to preserve financial resources and avoid the necessary costs of a fair system of justice.

Administrative efficiency and cost savings are, of course, worthy goals, but protecting the bedrock constitutional values at play in the operation of a just criminal system must be paramount. To preserve these important values, it is essential that administrative efficiency must not be a determinative factor for making plea bargaining decisions.

The fundamental Constitutional rights afforded to any person charged with a crime – the privilege against compulsory self-incrimination, the right to trial by jury and the right to confront one’s accusers – are essential to protect individuals from arbitrary governmental power, and serve to safeguard and validate the basic assumption that all defendants are innocent until proven guilty. Entering a plea of guilty necessarily requires a defendant to waive these rights and accept the finality of a criminal conviction.

The Task Force recognizes that, in appropriate cases, a plea of guilty can serve both a defendant’s needs and society’s interests in a fair, just and efficiently run criminal justice system. For this reason, the United States Supreme Court has long affirmed that a system that allows for guilty pleas – and that requires defendants who are charged with a crime to waive fundamental Constitutional rights – has many benefits for both defendants and Society as a whole.<sup>32</sup>

But speed and the administrative efficacy of moving individuals charged with crimes quickly through the justice system – motivated by an interest in attendant cost savings – cannot alone justify the cost of waiving Constitutional protections. The Courts have made clear that “while justice should be administered with dispatch, the essential ingredient is orderly expedition

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<sup>32</sup> *Brady v. United States*, 397 U.S. 742, 751-52 (1970).

and not mere speed.”<sup>33</sup> Thus, the Supreme Court has emphasized the importance of defendants having a full and fair opportunity to assert their procedural and substantive rights, even if that slows down the criminal process.

In large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a *deliberate pace*. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.<sup>34</sup>

This balance can be severely tested by institutional and cost-saving pressures to process defendants quickly through the criminal justice system by relying on plea bargaining to resolve the vast majority of criminal cases. There are statutory and institutional incentives for persons charged with a crime not only to plead guilty, but to enter a plea early in the process even if the defendant may not yet have a full understanding of the factual basis of the charges they face. This is especially true when local governments, judges and prosecutors are faced with financial pressures to allocate limited resources to address a large number of criminal defendants, many of whom are poor and cannot afford criminal representation of their own. As noted above, the institutional pressures to reduce costs and protect “scarce judicial and prosecutorial resources” is actually cited as a basis for justifying the use of guilty pleas instead of allowing full criminal trials.<sup>35</sup> In the Federal System, criminal defendants can receive a reduction in sentence by agreeing to plead guilty early in the process “thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.”<sup>36</sup>

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<sup>33</sup> *Smith v. United States*, 360 U.S. 1, 10 (1950).

<sup>34</sup> *United States v. Ewell*, 383 U.S. 116, 120 (1966) (emphasis added); see Darryl K. Brown, *Essay: The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014).

<sup>35</sup> *Brady*, 397 U.S. at 752.

<sup>36</sup> See United States Sentencing Commission, *Guidelines Manual* § 3E.1.1(b). This Guideline, which allows for a downward adjustment in the initial calculation of a possible criminal sentence, falls within the adjustment factor known as “Acceptance of Responsibility.” As made clear in the Commentary Notes, “[t]he timeliness of the defendant’s acceptance of responsibility is a consideration under both subsections [a and b]” of this adjustment factor. United States Sentencing Commission, *Guidelines Manual* § 3E.1.1 Commentary Note 6; see generally

When defendants feel pressured to barter their constitutional rights in order to save administrative costs, the system unavoidably breeds cynicism. The Task Force recognizes that the added pressures to process defendants quickly can be especially acute for those charged individuals who are factually innocent and are presented with plea deals seemingly endorsed by Judges, prosecutors and defense counsel, all of whom have an interest in keeping the system moving. There are inherent, conflicting pressures faced by anyone charged with a crime when considering whether to plead guilty, but impelling individuals who may not have not committed a crime to nevertheless plead guilty to meet the goals of saving money and administrative efficiency is an especially insidious attack on Constitutional protections that serve us all.

Thus, the Task Force believes that pursuing “administrative efficiency” in our system of plea bargaining – focusing solely on the expeditious processing of defendants through the criminal justice system for the purpose of saving money and resources – should not be and cannot be the driver of a fair criminal system. Pleas bargaining is and will likely remain a key part of our justice system, but its ongoing validity necessarily depends upon the ability of individuals charged with a crime to assert their rights secured by the Constitution without penalty. Accordingly, when evaluating how to improve our plea-bargaining system to reduce the number of innocent individuals who plead guilty – as well as protect all defendants charged with a crime – the safeguarding of every individual’s ability to assert and exercise their rights must be paramount.

Emphasizing the importance of allowing all defendants to freely choose to assert these Constitutional rights – even defendants who choose to plead guilty – is consistent with, if not required by, the Constitution.

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Margareth Etienne, *Acceptance of Responsibility and Plea Bargaining Under the Feeney Amendment*, 16 FED. SENTENCING REP. 109 (2003).

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy governmental officials no less, and perhaps more, than mediocre ones.<sup>37</sup>

These important values of promoting the exercise of Constitutional rights by criminal defendants over the need to process them quickly through a criminal system primarily made up of plea-bargaining remain as important today as they did fifty years ago. Justice Gorsuch recently made this point forcefully in a case dealing with whether or not a defendant was entitled to a jury trial before he could be sentenced to the maximum sentence for violating the terms of his supervised release.

Jury trials are inconvenient for the government. Yet like much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty. . . . This Court has repeatedly sought to guard the historic role of the jury against such incursions. For "however *convenient* these may appear at first, (as doubtless all arbitrary powers, well executed, are the most *convenient*) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters. [4 Blackstone, at] 344.<sup>38</sup>

For all these reasons, the Task Force believes that cost savings in the operation of the criminal justice system should not be found through rewarding guilty pleas or by punishing defendants who decline to sacrifice their constitutional rights. The system should look elsewhere to find savings.

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<sup>37</sup> *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); accord *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632, 646 (1974); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

<sup>38</sup> *United States v. Haymond*, No. 17-1672, 2019 U.S. LEXIS 4398, at \*32 (U.S. June 26, 2019).

#### **IV. TASK FORCE PROPOSALS**

##### **A. Proposal No. 1: Reduce Unnecessary Appearances by Defendants**

The Task Force determined that many participants in the criminal justice process—prosecutors, defense counsel and judges—believe that repeated court appearances by defendants, whether they are at liberty or are incarcerated, impose added and undue pressure. This, in turn, may result in some number of individuals pleading guilty just to end the process, including those defendants who are in fact innocent.

The need to attend repeated court appearances can be extremely disruptive to a defendant's everyday life. For those defendants who are not being held pre-trial, they are often compelled to disrupt their daily routine to appear for court appearances. If the defendant has a job, they may need to take a day off from work or, if that is not possible, get coverage from a co-worker or risk being fired. They might need to reveal to their employer or co-worker that they had been charged with a crime, a serious privacy concern. Even if a defendant has permission to take time off and go to court for a court appearance, scheduling changes are constant in the New York court system, and many defendants may end up having to come back to court repeatedly. To meet these scheduling demands, a defendant may need to cancel appointments, arrange and pay for childcare or elder care, and deal with many other disruptions to their everyday routine. This can be extremely burdensome, especially if a defendant needs to appear in court four, five, or even ten times during the disposition of their case, which often may result in the loss of employment.

Even when a defendant is being held in pre-trial detention, attending multiple court days can be extremely stressful, especially for a defendant who is, in actuality, factually innocent. A defendant will be awakened very early in the morning for transport and be required to travel a significant distance to get to the courthouse where they will sit in a holding cell until their case is

called. The defendant may have limited access to food and water while they are waiting for their case to be heard. Some defendants will wait in the holding cell in the courthouse all day only to learn that they will be traveling back to the jailhouse and doing it over again the following day because their case was not called.

The Task Force found that these lengthy and often unnecessary court appearances can be extremely disruptive and impose substantial pressure on a defendant during the pretrial process. The Task Force further found that the need to make repeated appearances, with the resulting substantial disruptions in a defendant's everyday life, imposes substantial pressure on defendants to terminate the proceedings by pleading guilty. The Task Force believes that reducing the need for these appearances can potentially relieve some of this pressure and, thus, make it less likely that individuals who are innocent will nonetheless feel they have no choice but to plead guilty.

The Task Force proposes that an accused defendant should not be required to attend any hearing or court appearance where there will be no substantive determination of the merits or case disposition and/or where there will be no impact on the defendant's substantive constitutional rights, unless the Court specifically directs the defendant to be present. Thus, the defendant will not need to be present for mere ministerial or scheduling hearings that will not impact the ultimate disposition of his or her case.

The Task Force further proposes that an accused person, with no criminal history, no previous warrants, or an overall history of regularly attending court proceedings should be deemed *presumptively* excused from certain court proceedings. An "eligible" court proceeding is one at which there is no realistic possibility of case disposition or of any proceedings regarding the merits of the case, or where the input, participation or presence of the accused is unnecessary. Additionally, an accused person with employment, educational, family care responsibilities or

other life situations that make repeated court appearances difficult or impossible could be excused whenever possible.

### **1. Implementation Considerations**

All decisions regarding excusal of an accused shall be made by the court, on application of defense counsel, giving the prosecutor an opportunity to be heard. Those applications shall be made on the record with respect to each prospective court adjourn date, with appropriate notations made on the court file. Counsel should confer in advance of the call of the case to discuss whether the presence of the accused will be necessary on the next adjourn date.

In the event an accused advises court personnel that an unexpected pressing commitment has arisen, the court should endeavor to cooperate with the accused so that their commitment can be accommodated, to the extent possible. If the accused's presence is determined to be necessary, the court should explain why accommodation is not possible and attempt to fashion some alternate solution.

When the court has granted defense counsel's application to excuse the accused on the next court date, the accused should be given written notice of the next date, by court personnel, indicating that the defendant's presence is excused, and providing contact information for the courtroom where the case will next appear. The notice should advise that any intentional failure to appear at future court dates may result in the issuance of a bench warrant. Courts should be encouraged to give *Parker* warnings,<sup>39</sup> orally and in writing, at the first such adjournment.

Defendants should be promptly notified of what occurred when they were not present.

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<sup>39</sup> In *People v. Parker*, 57 N.Y.2d 136 (1982), the Court of Appeals held, *inter alia*, where a defendant has actual notice of a trial date and voluntarily fails to appear, that defendant has not therefore implicitly relinquished their right to be present at trial. *Id.* at 140-42. A "Parker Warning" is an affirmative notice to a defendant that they have a right to be present in court and that they can, by their conduct, waive, forfeit, or lose that right. *See* NY MODEL COLLOQUIES, PARKER ADMONITIONS (Aug. 2016), available at <http://www.nycourts.gov/judges/cji/8-Colloquies/1MCTOC.shtml>.

Incarcerated accused persons may be separately permitted to waive their appearance in court at future ‘eligible’ court proceedings, preferably on the record on the preceding court date. As video technology advances and becomes more generally available in courtrooms, courts can explore its use as a way to facilitate appearances, for both defendants who are incarcerated and for defendants who are not incarcerated pretrial.<sup>40</sup>

Implementation of these proposals, with the exception of those requiring increased personnel and financial support, will likely not require additional statutory authority or modification of court rules. Rather, whether on a court by court or county by county basis, individual defense counsel can make application to have their clients excused or placed on telephone alert. The Task Force hopes that, by highlighting the problems that can arise from requiring repeated appearances by defendants will result in increased receptivity by prosecutors, defense counsel and the courts to excusing accused individuals from appearing when appearance is unnecessary.

**B. Proposal No. 2: Facilitate Pre-Trial Communication Between Incarcerated Clients and Defense Counsel**

At the heart of the attorney-client relationship lies attorney-client communication and the trust between an attorney and their client. Effective communication is a vital method for, *inter alia*, the mutual transmission of information, the building of a relationship of trust, and the development of strategy by defense counsel and client. To be effective, it requires – among other things – sufficient privacy and adequate time.

Despite the importance of effective attorney-client communication, significant factors can impede the ability to communicate, especially for clients who are in custody pretrial. If attorney-

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<sup>40</sup> As discussed below, video conferencing should not be used as a wholesale substitute for in-person meetings between attorneys and clients. *See infra*, at 26.

client communication only consists of a few rushed minutes near the courtroom when an incarcerated client is brought for an appearance, the rare visit at a correctional facility, or the occasional phone call, it is much more difficult to build a relationship of trust between a defendant and counsel.

The Task Force found that ineffective communication can lead to frustration and distrust of the criminal justice system by defendants and, thereby, impose added pressure on innocent defendants when presented with a proposed plea agreement. Many defendants do not have a sophisticated understanding of the criminal justice process and, therefore, are reliant on their counsel to advise them as their case proceeds. Moreover, defendants may not understand why their case seems to not be progressing even though they have been to court multiple times. Ensuring effective communication with counsel allows defendants to navigate the criminal justice process more effectively and helps them not to make rash decisions, such as pleading guilty to a crime they did not commit simply to end the process.

For those in custody, the pressure to accept a guilty plea is particularly significant, as a defendant may perceive, incorrectly, that taking a plea offers the quickest prospect of freedom. If defense counsel can effectively communicate with their clients, they can counter this pressure in various ways, such as educating their clients about the criminal justice process, gaining information that will strengthen arguments for taking a case to trial, making applicable pretrial motions, discussing possible trial strategies, and offering support and hope. Conversely, in those situations where it might be in a client's best interest to accept a plea deal rather than proceeding with a case, the lack of adequate communication can frustrate that outcome. In short, improved access to defense counsel will grant more defendants the ability to confidently make informed decisions about whether to plead guilty.

The Task Force specifically focused on those defendants who are in the pre-adjudication custody of the New York City Department of Correction (the “DOC”) and the need to improve communication between defense counsel and their clients at the City’s correctional facilities.

**1. Reforming the Scheduling Procedure and Facility Accommodations for In-Person Visits with Clients at Correctional Facilities**

One of the barriers to effective communication between attorneys and their incarcerated clients is the amount of time and difficulty it takes to visit clients at the City’s Correctional Facilities, especially Rikers Island.<sup>41</sup> Rikers Island is inconveniently located, and the process for visiting or meeting with a defendant in custody is highly inefficient and often involves substantial wait times. Once through the initial security checkpoint at Rikers, attorneys must wait for a bus to take them to the specific facility where their client is held. After arriving at that specific facility, attorneys must once again go through security and can often wait for over an hour for a client to be brought to the visiting area to have in-person meeting.

The Task Force proposes that the DOC permit attorneys to schedule, in advance, in-person meetings at correctional facilities at specific, designated times so that clients can be brought in advance and attorneys are not required to endure long wait times.

The DOC is already using this type of scheduling process for video-conferencing, which has proven to be more effective at ensuring that clients are in a certain place at a certain time. Currently, if an attorney wants to meet with a client for a video conference, a call is placed by the attorney’s office to the specific facility where the client is being held to schedule the conference. Video conferences are available between 9:00 a.m. and 4:30 p.m. Monday through Friday, generally in 30 minute increments. After the conference has been scheduled, the

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<sup>41</sup> The DOC’s Facility at Rikers Island actually consists of ten separate jail facilities, all of which must be accessed through the Benjamin Ward Visit Center.

attorney's office must email a "production sheet" to the DOC with specific information about the client, the attorney, and the conference. All of this must happen by 3:30 p.m. the day before the scheduled conference.

At the date and time of the scheduled visit, the client is brought to the video conference area of the facility in which they are being held. The attorney calls that facility to confirm the client is present, and then places a call to the Office of Court Administration's ("OCA") Video Conference Unit, who connects the attorney's office to the booth the client has been placed in at the facility for the meeting.

The Task Force proposes that this same type of advance scheduling process be adopted for in-person meetings between counsel and a defendant. The attorney's office could call the specific facility where their client is being held in advance to schedule the meeting.<sup>42</sup> The attorney's office would then send a "production sheet" to DOC with the required information by 3:30 p.m. the day before the scheduled meeting. It would then be up to the attorney to arrive at Rikers Island 30 minutes prior to the start of the scheduled meeting to allow them time to clear security and arrive at the specific facility.

The Task Force anticipates that DOC will express concern that attorneys will fail to show up for meetings at the scheduled time. As with video conferences, there should be a cancellation window before the meeting is scheduled to start. Attorneys who know that they will not be able to attend the meeting due to unforeseen circumstances must call and cancel by this time to ensure

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<sup>42</sup> The 9:00 a.m. to 4:30 p.m. scheduling limitations for video conferences should not be applicable in this instance because those times are constrained by the OCA Video Conference Unit's working hours. Because the OCA does not play any role in scheduling in-person meetings, the times could be extended.

that clients are not needlessly moved around the facility. Attorneys must also be sure to schedule meetings only for times when they are confident they will be available.<sup>43</sup>

This simple change in scheduling policy would save time and greatly aid in facilitating communication between defense attorneys and their incarcerated clients.

## **2. Create Remote Communication Procedures for Incarcerated Clients**

The Task Force believes that the value of in-person meetings between incarcerated clients and defense counsel cannot be overstated. Unlike other forms of communication, in-person meetings allow defense counsel to: 1) present and explain relevant documents to their client; 2) analyze the validity of the client's version of the factual nuances of the case; and 3) assess their client's physical and mental well-being. Moreover, in-person communication demonstrates to incarcerated clients that they have an advocate in their corner who is fervently advocating for their best interests.

The unfortunate reality, however, is that defense counsel, and especially public defenders, have limited opportunities to make personal visits to jails to discuss their client's case. The Task Force believes this problem can be remedied by making it easier for defense counsel to communicate with their clients by telephone.

The Task Force recommends that procedures be adopted by the DOC and other institutions that would allow defense counsel to contact their clients by telephone at specific designated times. Facilities can set aside time for inmates to receive calls from defense counsel at workable times, for example, taking into account daily routines such as meals, counts, and lockdowns. The Task Force also recommends that counsel be able to schedule calls in the same way videoconferences are currently scheduled.

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<sup>43</sup> Scheduling a visit should not be required--an attorney could still show up at their own convenience just as before and choose to wait for a client to be brought to the visiting area at the correction facility.

Remote communications also play a vital role in ensuring adequate attorney-client communication. Incarcerated clients must know that they have the ability to reach out and communicate with their counsel. Making private remote communications between counsel and client more accessible allows defense counsel to provide updates about the status of their case, develop a rapport with their client and lessen the client's feeling of despair and being "lost in the system." Remote communication also allows counsel with large caseloads to regularly stay in contact with clients without devoting significant portions of a day to make personal visits, and should alleviate the frustration a client has when he or she attempts to call counsel and is unable to reach them.

As video conference technology continues to develop, the Task Force recommends that the DOC explore how to expand the availability of video conferencing for defendants and their counsel. This includes increasing the number of rooms available for defendants to use for video conferences with their attorneys and utilizing the DOC procedures already in place.<sup>44</sup> The Task Force further recommends the expansion of the availability of telephonic communications between attorneys and incarcerated clients.

**C. Proposal No. 3: Provide Defendants with Educational Resources About the Criminal Justice System, Criminal Procedure, and What to Expect as their Case Proceeds.**

The vast majority of criminal defendants lack a basic knowledge of criminal procedural and substantive law. In addition, despite the best efforts of defense counsel, many defendants have only a limited understanding about what has happened and what is likely to happen as their case progresses. The Task Force is concerned that this lack of information may prevent defendants from making well-informed decisions regarding plea offers, which in turn heightens

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<sup>44</sup> See *supra*, at 26.

the risk that innocent defendants may be pressured to enter a plea of guilty. To address this problem, the Task Force recommends that defendants be provided with easily accessible educational resources about the criminal justice system and basic criminal procedure, the status of their individual cases, and the collateral consequences of taking a plea or being convicted of a crime.

Initially, it is important to understand the impact that a defendant's lack of understanding about the criminal law and criminal process has on the decision-making process. Individuals who find themselves caught in the machinery of the criminal justice system, a complex and at times opaque process, often have little or no training in the how the justice system operates. Therefore, many defendants have only a basic understanding of what to expect as they are pushed through the process. Legal terminology can be difficult and confusing. There are many procedural aspects of a criminal proceeding that only an attorney or someone experienced in the legal system would understand well. Most criminal defendants cannot be expected to understand the nature of motion practice, the various reasons for numerous court hearings, the purpose behind the defense attorney asking certain questions, or the explanation for why the process can take such a long time. Additionally, most defendants do not fully understand, let alone know about, the collateral consequences of accepting a guilty plea, such as prohibitions on obtaining housing and certain licenses, or the effects a conviction could have on employment opportunities. This lack of knowledge and understanding can make it extremely challenging for defendants to fully appreciate what is happening in their cases and to make reasoned and thoughtful judgments about the risks of proceeding to trial or accepting a plea offer.

When accepting any plea deal, criminal defendants are required to state on the record that their acceptance is knowing, voluntary and that understand the consequences of the acceptance.

In reality, however, many criminal defendants lack a basic understanding of the consequences of accepting a plea deal. This is true even after their attorneys have explained the consequences to them.

The Task Force believes that criminal defendants' lack of understanding of the criminal justice system can significantly and negatively impact their ability to consider and assess the costs and benefits of entering a plea of guilty. More importantly, this lack of understanding can impose added pressure on a defendant to accept a plea offer, notwithstanding their innocence. Providing criminal defendants with access to additional information will help them make better informed decisions regarding the full consequences of accepting guilty pleas, and not to act out of frustration simply to get out of jail and see their families.

Accordingly, the Task Force makes two recommendations to address this problem. First, the Task Force proposes that informational materials and videos be created that describe, in general terms, how the criminal justice process works and what defendants can anticipate will happen as their case proceeds through the system. Second, the Task Force proposes that docketing and scheduling information about individual defendant's cases be collected and made easily available to defendants, regardless of whether they have been incarcerated or released pending a resolution of their matter.

Turning first to the informational materials and videos, the Task Force recommends that information materials about the criminal justice system and how it works be created and made available to every individual who is arrested or charged.<sup>45</sup> In addition to written materials, this

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<sup>45</sup> The New York Unified Court System website already has basic information about a range of subjects, including subjects such as Criminal Case Basics (which includes a section on Plea Bargaining), Collateral Consequences, Sentencing and Criminal Records & Sealing. *See* <https://www.nycourts.gov/courthelp/Criminal/caseBasics.shtml>. For those defendants without any internet access, however, this information is inaccessible.

could include creating a video (similar to the video that is shown to jurors at the beginning of jury duty) that defendants who are being held pre-trial can view. The written materials and video would provide an overview of the criminal justice process, including the stages of the criminal prosecution—*e.g.*, arraignment, discovery, motion practice, trial, appeal. They would also describe and explain each person's role in the criminal justice system, including the judge, prosecutor, and defense attorney, as well as rights defendants have regarding paperwork, trial, the People's burden, and other information relevant to most criminal cases. The Task Force recommends that these materials be made available and that the video be shown at the earliest possible time, *i.e.*, immediately following arraignments, and remain available for defendants to view at other points in time when they would otherwise be waiting idly. The Task Force also recommends creating companion written materials in plain, understandable language (and in various language translations) that defendants may review in their cells.

With respect to scheduling and docketing information for individual matters, the Task Force recommends that this information could be made available through kiosks at detention centers, courts, and in other areas where individuals are held. The kiosks could serve as information centers where defendants can learn about the status of their own cases, find contact information for their attorneys, and review the schedule of upcoming matters and appearances. For defendants to learn about the publically-available specifics of their own cases, the kiosks could allow individuals to type in or scan their docket number, which would pull up a list of charges against them. An application on the interface would allow the individuals to listen to or read the elements of the charges that the People must prove beyond a reasonable doubt (similar to pattern jury instructions). An application on the interface would inform individuals of the broad range of sentencing exposure and the advisability of consulting with their attorney as

to potential outcomes (similar to New York Prosecutors Training Institute’s Crime Time), and another application would inform individuals of the proceedings that have already taken place and those upcoming (similar to the Criminal Records & Information Management System). The kiosks would have an application that defines legal terms in understandable language, and would allow defendants to print out individual dockets and the contact information of their attorneys.

### **1. Implementation Considerations**

An obvious question is who will create and curate the material. A potential answer is that it could be done by the various Bar Associations, perhaps working with the Unified New York Court System.<sup>46</sup> Another question that may arise could pertain to the level of specificity that should be included in the kiosk information and ways to avoid creating conflicts or violating attorney–client privilege. To solve those issues, the kiosks could provide a reminder about the attorney–client privilege and could include a disclaimer that the information is not, and not a substitute for, legal advice. And, of course, the practical consideration of where the videos and kiosks would be placed will require input from those most acquainted with the process in each jurisdiction, who could provide the best insight regarding where defendants would be able to access the information the easiest.

To conclude, individuals charged with crimes lack appropriate access to information about their own cases and the criminal justice system as a whole. This information gap fosters a distrust in the system and a sense of hopelessness that leads these individuals into making uninformed – and sometimes non-beneficial decisions – including pleading guilty when they are innocent of the crimes charged. Bridging this gap is a means to fixing that problem for the

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<sup>46</sup> See *supra* note 45 (describing the type of information that has already been developed by the Office of the New York Unified Court System).

people whose lives and liberty depend on it, and the Task Force recommends implementing informational videos and kiosks to achieve that goal.

**D. Proposal No. 4: Adopt Recommendations of the NACDL Report Dealing with the Trial Penalty and Proportionality Between Pre-Trial and Post-Trial Sentences**

In July 2018, the NACDL issued its Report “The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It”.<sup>47</sup> Based on its findings, the NACDL Report listed 10 guiding principles as well as 10 specific recommendations for reform. The principles reflected a broad range of beliefs, such as the values of the jury trial system, the troublesome nature of the decline of the frequency of trials, and the damage to society from mass incarceration—particularly for people of color and the poor. These principles have specific resonance with regard to plea bargaining, in expressing that there is a problematic discrepancy between pre-trial and post-trial sentences, that there are coercive elements of plea bargaining, and that choosing to go to trial is a right which should not be punished.<sup>48</sup>

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<sup>47</sup> *NACDL Report*, *supra* note 15.

<sup>48</sup> *NACDL Report*, *supra* note 15, at 11.

The trial penalty—the substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial—undermines the integrity of the criminal justice system. Trials protect the presumption of innocence and encourage the government to charge cases based only on sufficient, legally-obtained evidence to satisfy the reasonable doubt standard. The decline in the frequency of trials impacts the quality of prosecutorial decision-making, defense advocacy, and judicial supervision. The decline in the frequency of trials tends to encourage longer sentences thereby contributing to mass incarceration, including mass incarceration of people of color and the poor. The decline in the frequency of trials erodes the oversight function of the jury thereby muting the voice of lay people in the criminal justice system and also undercuts the role of appellate courts in supervising the work of trial courts. The trial penalty creates a coercive effect which profoundly undermines the integrity of the plea-bargaining process. A reduction for accepting responsibility through a guilty plea is appropriate. The same or similar reduction should be available after trial if an individual convicted at trial sincerely accepts responsibility after trial regardless of whether the accused testified at trial or not. No one should be punished for exercising her or his rights, including seeking pre-trial release and discovery, investigating a case, and filing and litigation of pre-trial statutory and constitutional motions.

*Id.* The *NACDL Report* also recommended the abolition of mandatory minimum sentences, which is treated separately in this Report. *See infra*, at 39-44.

An extreme difference between a sentence before and after trial, and the discretion of prosecutors to widen that gap by charging certain crimes and require mandatory minimums, create a grave risk that innocent people will plead guilty merely to avoid draconian consequences for exercising their constitutional right to trial. In circumstances in which the expected sentence after trial is substantially more severe than the plea offer (for no reason other than the mere fact of exercising the right to trial), a defendant's decision to plead guilty may have little to do with their actual guilt; instead the decision may be explained almost entirely by risk tolerance or risk avoidance theories.<sup>49</sup>

Many of the NACDL Report's principles and recommendations, particularly those that aim to preserve criminal defendants' right to trial and reduce the use of coercive plea tactics, are consistent with the objectives of this Report. After extensive deliberation, members of this Task Force have overwhelmingly supported adopting two of the NACDL Report's recommendations, insofar as they relate to the New York State criminal justice system:

Remove the Trial Penalty: The government should not be permitted to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty. This includes an accused person's decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions.

Proportionality Between Pre-Trial and Post-Trial Sentencing: Procedures should be adopted to ensure that the accused are not punished with substantially longer sentences for exercising their right to trial, or its related rights. Concretely, post-trial sentences should not increase by more than the following: denial of acceptance of responsibility (if appropriate); obstruction of justice (if proved); and the development of facts unknown before trial.<sup>50</sup>

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<sup>49</sup> See generally, Dervan & Edkins, *supra* note 3.

<sup>50</sup> NACDL Report, *supra* note 15, at 12-13.

## 1. Removing the Trial penalty

The widespread practice of conditioning plea offers on an accused's agreement not to litigate statutory and/or constitutional issues undermines transparency, basic fairness, and the integrity of the criminal legal system more broadly.<sup>51</sup> As such, the Task Force recommends adopting the NACDL's recommendation of doing away with the "trial penalty," thereby eliminating prosecutors' ability "to condition plea offers on waiver of statutory or constitutional rights necessary for an accused person to make an intelligent and knowing decision to plead guilty," including "an accused person's decision to seek pre-trial release or discovery, investigate a case, or litigate statutory or constitutional pre-trial motions."<sup>52</sup> Eliminating the trial penalty would give substance to statutory and constitutional protections designed to protect innocence and proportionality of punishment and provide accountability for the conduct of law enforcement. Further, eliminating the trial penalty helps assure fair and proportionate outcomes for every person going through the criminal justice system.

The NACDL Report provides a summary of research showing how the trial penalty contributes to wrongful convictions by undermining procedural protections that elucidate when evidence is unlikely to be compelling prior to trial.<sup>53</sup> Because the majority of cases are resolved before pre-trial motions are heard, issues pertaining to the voluntariness of an accused's statements to law enforcement and whether an out-of-court perpetrator identification procedure is reliable rarely receive evidentiary hearings or meaningful judicial scrutiny.<sup>54</sup> As a result,

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<sup>51</sup> *Id.* at 28-30.

<sup>52</sup> *Id.* at 59 (Recommendation No. 6).

<sup>53</sup> *Id.* at 24-30.

<sup>54</sup> *People v. Huntley*, 15 N.Y.2d 72 (1965) (voluntariness of statements); *United States v. Wade*, 388 U.S. 218 (1967) (suggestive identification procedures).

coerced confessions and misidentifications, as well as other potential abuses such as instances of police misconduct,<sup>55</sup> are unlikely to come to light.

New York's recent bail and discovery reforms have already addressed some of the concerns reflected in the NACDL Report's recommendations.<sup>56</sup> New York's new discovery statute, which goes into effect January 1, 2020, mandates open-file discovery early in the life of a criminal case. Critically, this requires prosecutors to comply with discovery obligations *prior* to the expiration of a plea offer and expressly provides that while the accused may waive his or her discovery rights, "a guilty plea offer may not be conditioned on such waiver."<sup>57</sup> This level of transparency, unique among the country's criminal discovery laws, eliminates one party's ability to exploit information asymmetries in plea negotiations. Moreover, New York's elimination of pretrial detention for the vast majority of people facing misdemeanor and nonviolent charges removes the inherently coercive effect of pretrial incarceration for large swaths of people in New York's criminal courts.

The elimination or reduction of the trial penalty would extend this transparency principle to the litigation of statutory and constitutional issues. As a first step, local and state bar associations can support broad adoption of the NACDL recommendations and facilitate the drafting of new ethics guidelines to regulate the exercise of prosecutorial discretion. District attorneys are encouraged to voluntarily adopt limits to their plea-bargaining practices.

The Supreme Court has granted prosecutors broad latitude to leverage their informational and procedural advantages against people accused of crimes in order to extract guilty pleas.<sup>58</sup>

Further efforts should be under taken to explore legislative solutions to reforming plea

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<sup>55</sup> See NACDL Report, *supra* note 15, at 8.

<sup>56</sup> *Id.* at 11-12.

<sup>57</sup> N.Y. Crim. Proc. L. § 245.25(1) and (2) (pre-indictment guilty pleas and all other guilty pleas, respectively).

<sup>58</sup> See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

bargaining conditions by examining the model of the recently passed criminal discovery statute and by expressly prohibiting the conditioning of plea offers on the waiver of pre-trial motions. Legislative limitations should be implemented only in conjunction with broad sentencing reform so that an end to the trial penalty does not provoke a reactionary response of elevated charges and plea offers.

## **2. Proportionality Between Pre-Trial and Post-Trial Sentencing**

Because pre-trial and post-trial sentences are often so vastly disproportionate,<sup>59</sup> it is not surprising that many defendants feel they are coerced to accept pre-trial plea offers, regardless of the intent of prosecutors.<sup>60</sup> Evidence suggests that a large enough discrepancy between expected outcomes can lead factually innocent defendants to plead guilty.<sup>61</sup>

Of course, there are defensible reasons for a disparity between a sentence offered in a plea and one imposed after trial. For example, a sentencing disparity resulting from a finding of obstruction of justice or the development of facts unknown before trial is not considered problematic by the NACDL or the members of this Task Force. The existence of obstruction of justice is proper grounds for increasing a potential sentence following trial because the conduct is independently punishable. The development of facts unknown before trial is also a proper ground for imposing a different than anticipated sentence if it is relevant in ascertaining the conduct that is being punished and establishing whether the elements of an offense have been met.

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<sup>59</sup> “In 2015, in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence. In antitrust cases, it was more than eight times as high.” *NACDL Report*, *supra* note 15, at 15.

<sup>60</sup> See *NACDL Report*, *supra* note 15, at 15-16; See *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (2013).

<sup>61</sup> See *NACDL Report*, *supra* note 15, at 17; Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 95 (2012).

The Task Force also agree with the NACDL report that demonstrated remorse on the part of a defendant who pleads guilty is an acceptable justification for reducing a sentence, at least somewhat. However, basing sentences on a defendant's demonstrated remorse can be risky and imprecise because it is a subjective determination and runs the risk of artificially inflating sentence severity for those who do *not* "accept responsibility," *i.e.* who exercise the right to trial.

In practice, defendants who plead guilty are credited with "acceptance of responsibility" even if they feel no remorse, while genuinely remorseful defendants who exercise their constitutional right to trial are denied the sentencing credit of acceptance of responsibility. "Acceptance of responsibility" has become synonymous with "pleading guilty." This sentencing framework can pressure defendants to plead guilty early when the system dictates that an early guilty plea demonstrates remorse. Even factually innocent defendants may be unwilling to assume the risk of receiving a disproportionately harsh post-trial sentence.<sup>62</sup> "Acceptance of responsibility" as a sentencing factor is a component of the framework that contributes to the disproportionality between pre-trial and post-trial sentences, and therefore deserves the attention of this Task Force.

The Task Force adopts the NACDL's reasoning and concludes that acceptance of responsibility is an appropriate factor to mitigate a defendant's sentence, but only: (1) when it is reflective of true remorse rather than an automatic result of plea-bargaining; (2) when it is available even after a defendant has exercised their right to trial; and (3) when it is not used punitively to increase a sentence solely because the defendant has exercised their right to trial.<sup>63</sup> The Task Force recommends that determinations regarding "acceptance of responsibility" be decoupled from the acceptance of plea offers.

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<sup>62</sup> See *NACDL Report*, *supra* note 15, at 39-40.

<sup>63</sup> *Id.* at 40-41.

More broadly, consistent with the NACDL findings, the Task Force recommends further investigation into avenues to enact comprehensive appellate review of the proportionality of sentences, by statute or by rule, and that further efforts be undertaken to develop an implementation plan for this proposal that balances the need to curb post-trial sentences that are disproportionately severe with the need to preserve judicial discretion in sentencing.

**E. Proposal No. 5: Enhancing Judicial Discretion in Sentencing**

Traditionally, a defining feature of our criminal justice system has been the jury trial, where a prosecutor charges a defendant and, if the defendant is convicted at trial, a judge imposes sentence. Today, however, the practical reality of our criminal justice system is that criminal trials have given way to the resolution of criminal charges through plea agreements, which are negotiated in private between the prosecutor and defense counsel. Fewer than five percent of all persons formally accused of a crime go to trial.<sup>64</sup> More importantly, in New York, a plea bargain typically determines the parameters of the ultimate sentence. Thus, the role of judges in determining the proper length of a criminal sentence has been significantly curtailed.

Defendants, including defendants who have been charged but are factually innocent,<sup>65</sup> may be confronted with having to defend against an offense carrying a mandatory minimum sentence. If the defendant is convicted at trial, the judge has no discretion to downwardly depart from the mandatory minimum sentence, even if the judge believes that the facts warrant such a deviation. Consequently, factually innocent defendants are confronted with a difficult risk-utility balancing decision as to whether they should assert their right to trial and potentially be

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<sup>64</sup> *NACDL Report*, *supra* note 15, at 14.

<sup>65</sup> All defendants are presumed innocent and have a constitutional right to a trial. Systemic and other individual factors can have the effect of discouraging defendants from exercising this right, sometimes to excruciatingly unjust results. This Report addresses solely the predicament of factually innocent defendants.

convicted, thereby subjecting themselves to a mandatory minimum, or take a plea deal to a reduced charge carrying a lesser sentence.

The Task Force recommends that—within New York’s current mandatory minimum framework—judges be provided with the discretion to depart below a mandatory minimum sentence for defendants convicted of non-violent crimes if the judge states their reasons for doing so on the record (or in a subsequent written decision). The Task Force does not advocate for any specific changes in the Federal sentencing guidelines or mandatory minimum statutes. The Task Force believes that any such reforms would be extremely difficult to accomplish outside of federal legislation that would affect the entire country and not just the state of New York and, in any event, the restructuring of the entire federal criminal justice system is well beyond the mandate of this Task Force.

## **1. Mandatory Minimums Sentences**

### **a) A Brief History of Mandatory Minimum Sentencing**

In response to rising crime rates and drug usage during the 1970’s and 1980’s, Congress and several states began passing mandatory minimum sentences for, inter alia, drug offenses, gun offenses, and sex offenses.<sup>66</sup> To illustrate, before the passage of the Fair Sentencing Act of 2010 by the Obama Administration, simply possessing five grams of crack cocaine carried a five year mandatory minimum sentence.<sup>67</sup> Similarly, in 1973, New York passed the infamous “Rockefeller Laws”, which prescribed harsh mandatory minimums for a slew of drug offenses.<sup>68</sup> Possession of four ounces of marijuana, even without an intent to distribute, carried a fifteen year

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<sup>66</sup> Frederick P. Hafetz, The “Virtual Extinction” of Criminal Trials: A Lawyer’s View from the Well of the Court”, VI. 31, NO. 4-5 FED. SENT’G REP. 248 (April/June 2019).

<sup>67</sup> United States Sentencing Commission, Report to Congress: Impact of the Fair Sentencing Act of 2010, UNITED STATES SENTENCING COMMISSION (2015), at 30.

<sup>68</sup> Madison Gray, A Brief History of New York’s Rockefeller Drug Laws, TIME MAGAZINE, available at <http://content.time.com/time/nation/article/0,8599,1888864,00.html>.

mandatory minimum sentence.<sup>69</sup> By the early 2000's, it had become clear that these draconian laws had led to unduly harsh sentences, especially in poor communities and among people of color.<sup>70</sup> For decades, New York has undergone the process of chipping away at this mandatory minimum framework – both in terms of length of sentences and offenses carrying mandatory minimum sentences.<sup>71</sup> Nevertheless, New York still has numerous offenses<sup>72</sup> that carry a mandatory minimum sentence from which the judge has no discretion to deviate, except in the most limited circumstances.

## 2. Pros & Cons of Mandatory Minimum Sentences

The Task Force has considered various arguments as to the utility and shortcomings of mandatory minimum statutes.

### Pros:

- Mandatory minimums protect the public for a prescribed amount of time from behavior the legislature has deemed a threat to the public welfare.<sup>73</sup>
- Mandatory minimums are a deterrence mechanism against recidivism by an individual offender, or by other would-be offenders.<sup>74</sup>
- Mandatory minimums might tend to eliminate or reduce sentencing disparities among defendants convicted of the same crime and among similarly situated defendants, particularly as it affects minorities.<sup>75</sup>

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<sup>69</sup> Rakoff, *supra* note 2, at 2-3.

<sup>70</sup> Gray, *supra* note 68.

<sup>71</sup> *Id.*

<sup>72</sup> See e.g. N.Y. Penal Law § 60.04 (proscribing minimum sentences for Class A drug felony offenses); N.Y. Penal Law § 60.05 (proscribing minimum sentences for Class C non-violent felony offenses); N.Y. Penal Law § 130.95 (proscribing minimum sentences for non-drug offense predicate felons).

<sup>73</sup> See American Judges Association Annual Educational Conference, *Mandatory Minimum Sentences: Handcuffing the Prisoner or the Judge*, AMERICAN JUDGES ASSOCIATION (October 7, 2014), at 31 (hereinafter, “*American Judges Association*”).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

Cons:

- Mandatory minimum sentences may exacerbate the phenomenon of mass incarceration by uniformly lengthening the sentences of convicted persons.<sup>76</sup>
- There is insufficient evidence that – especially in narcotics cases – mandatory minimums lead to a reduced likelihood of recidivism.<sup>77</sup>
- Longer sentences increase costs of monitoring and providing for prisoners.
- Mandatory minimum offenses only take into account the specific elements of the offense and do not consider the history and circumstances of the defendant.<sup>78</sup>
- Judges have no discretion to deviate from the minimum – even when there are mitigating factors that might justify a deviation, such as the ability to weigh the nature and circumstances of the crime, as well as the individual who committed them, including the risk of reoffending, the defendant’s prior record, and any substance abuse or mental health issues.<sup>79</sup>

The Task Force recommends that the New York legislature enact provisions whereby the judge is permitted – in non-violent felony cases<sup>80</sup> (as defined by New York’s Penal Law) – to deviate from a conviction carrying a mandatory minimum, provided that the judge states his or her reasons for doing so on the record, or in a subsequent written opinion. The Task Force further recommends the New York Legislature adopt guidelines for a judge to consider when

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<sup>76</sup> See James Cullen, *Sentencing Laws and How They Contribute to Mass Incarceration*, BRENNAN CENTER FOR JUSTICE (October 5, 2018), available at <https://www.brennancenter.org/blog/sentencing-laws-and-how-they-contribute-mass-incarceration-0>.

<sup>77</sup> See *American Judges Association*, *supra* note 73, at 31.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> The Task Force did not achieve consensus as to whether a judge should also have the discretion to deviate from a mandatory minimum for persons convicted of violent felonies. We recommend that additional research be conducted by subsequent task forces as to the feasibility and advisability of providing judges with this discretion. The Task Force also recommends conducting empirical studies to examine the utility of eliminating (certain or all) mandatory minimum sentences under New York’s Penal Law.

departing from a mandatory minimum. These guidelines could mirror, for example, many of the factors federal judges are required to consult when sentencing a defendant.<sup>81</sup> In determining whether a “sentence is sufficient, but not greater than necessary”,<sup>82</sup> federal judges are required to consult a list of factors, which includes:

- the nature and circumstances of the offense and the history and characteristics of the defendant;<sup>83</sup> and
- the need for the sentence imposed:
  - to reflect the seriousness of the offense, to promote respect of the law, and to provide just punishment for the offense;<sup>84</sup>
  - to afford adequate deterrence to criminal conduct;<sup>85</sup>
  - to protect the public from further crimes of the defendant;<sup>86</sup>
  - to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.<sup>87</sup>

Under the Task Force’s proposal, prosecutors would have the right to appeal any sentence lower than the mandatory minimum.

Providing judges with discretion to deviate from mandatory minimum sentences alleviates the arguably coercive effect mandatory minimums play in plea bargaining. Restoring the judicial autonomy judges once enjoyed – and what was traditionally within their purview – would make a defendant’s choice to assert their right to a trial less onerous and less risky,

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<sup>81</sup> See 18 U.S.C. § 3553(a).

<sup>82</sup> *Id.*

<sup>83</sup> 18 U.S.C. § 3553(a)(1).

<sup>84</sup> 18 U.S.C. § 3553(a)(2)(A).

<sup>85</sup> 18 U.S.C. § 3553(a)(2)(B).

<sup>86</sup> 18 U.S.C. § 3553(a)(2)(C).

<sup>87</sup> 18 U.S.C. § 3553(a)(2)(D).

thereby reducing the likelihood that an innocent person would choose to plead guilty to a lesser charge in order to escape a mandatory minimum sentence if convicted at trial.

Sentencing is one of the most difficult and nuanced tasks a judge must perform. It requires the judge to balance society's legitimate concerns—public safety, deterrence, promoting respect for the law and reflecting the seriousness of the offense—while also taking into account possible mitigating factors such as the history and characteristics of the defendant. Unlike the legislatures who set mandatory minimums—which focus solely on the offense—the sentencing judge hears the underlying facts of the case, hears the arguments of both the prosecutor and defense counsel, and receives reports from probation offices containing extensive background information about the defendant. Given the wealth of information in their hands, the Task Force believes judges should be allowed to use their practical judgment to arrive at an appropriate sentence.

**F. Proposal No. 6: Reducing the Volume and Impact of Low-Level Offenses in the Criminal Justice System**

The perceived impediments to pleading guilty are lessened if penalties such as those that affect low-level offenses are relatively minor. Even if an innocent defendant understands the consequences of a guilty plea, they might decide to plead if the sanctions are relatively minor. Low-level offenses are the perfect example of when an innocent person might say “it is easier to just plead guilty and pay the fine.” Of course, the collateral consequences of such a plea may extend to well beyond paying a fine, including significantly diminishing an individual's quality of life.

For an overwhelming majority of defendants, involvement with the criminal justice system stems from arrests and prosecutions for minor offenses. In 2018, over 270,000 misdemeanor arrests were made in New York State (nearly half of these within New York City),

representing two-thirds of all arrests that year.<sup>88</sup> A substantial proportion of such arrests are for victimless offenses commonly associated with poverty, homelessness, addiction, and mental illness. Of the misdemeanor arrests made in New York City in 2016, 27,642 (18%) were classified as a “theft of services” charge,<sup>89</sup> which is primarily fare-beating on public transit.<sup>90</sup> 21,457 (14%) were made for marijuana charges,<sup>91</sup> 15,458 (10%) for other drug charges, 7,543 (5%) for trespassing,<sup>92</sup> and 2,194 (1.5%) for prostitution.<sup>93</sup>

In New York City, most misdemeanor arrests do not result in convictions: in 2018, 63% of dispositions for such arrests were dismissals of some form.<sup>94</sup> Where a conviction for a misdemeanor or a violation is obtained, the sentence itself is generally less than that for a felony, but the collateral consequences can be extremely severe. A criminal conviction may cause an

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<sup>88</sup> Division of Criminal Justice Services, *Adult Arrests: 2009 - 2018*, <https://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/index.htm> (last visited Jun. 24, 2019).

<sup>89</sup> Preeti Chauhan, *et al.*, *Trends in Arrests for Misdemeanor Charges in New York City, 1993-2016*, Feb. 1, 2018, at 143-144, available at [http://misdemeanorjustice.org/wp-content/uploads/2018/01/2018\\_01\\_24\\_MJP.Charges.FINAL\\_.pdf](http://misdemeanorjustice.org/wp-content/uploads/2018/01/2018_01_24_MJP.Charges.FINAL_.pdf).

<sup>90</sup> *Id.* at 137 (stating that 95.1% of “Theft of Services” arrests from 1993-2016 were for violations of N.Y. Penal Law § 165.15(3)).

<sup>91</sup> The state legislature recently passed legislation that would treat possession of small quantities of marijuana as a violation, and the New York City Police Department (“NYPD”) has announced of a policy of issuing Desk Appearance Tickets rather than making arrests in most such cases. *See* Jesse McKinley & Vivian Wang, *Marijuana Decriminalization is Expanded in N.Y., but Full Legalization Fails*, N.Y. TIMES, Jun. 20, 2019, available at <https://www.nytimes.com/2019/06/20/nyregion/marijuana-laws-ny.html>; Press Release, New York City Police Department, *Mayor De Blasio, Commissioner O’Neill Unveil New Policy to Reduce Unnecessary Marijuana Arrests* (Jun. 19, 2018), available at <https://www1.nyc.gov/site/nypd/news/pr0619/mayor-de-blasio-commissioner-o-neill-new-policy-reduce-unnecessary-marijuana-arrests>. Despite this development, it nonetheless remains the case that a significant number of individuals will be convicted of violations for marijuana possession in New York City and other parts of the state.

<sup>92</sup> Defense attorneys in New York City have argued that a substantial proportion of trespassing charges are in fact brought against defendants who are lawfully present in apartment buildings. *See, e.g.*, Joseph Goldstein, *Prosecutor Deals Blow to Stop-and-Frisk Tactic*, N.Y. TIMES, Sept. 25, 2012, available at <https://www.nytimes.com/2012/09/26/nyregion/in-the-bronx-resistance-to-prosecuting-stop-and-frisk-arrests.html> (reporting that then-chief of arraignments for the Bronx District Attorney’s Office “had received numerous complaints from defense lawyers who claimed that many of the people arrested were not trespassers,” and that upon investigation found that “in many (but not all) of the cases the defendants arrested were either legitimate tenants or invited guests”); M. Chris Fabricant, *Rousting the Cops*, VILLAGE VOICE (Oct. 30, 2007), available at <https://www.villagevoice.com/2007/10/30/rousting-the-cops/> (public defender in the Bronx reports that he has “had a disgraceful number of innocent clients, many of whom plead guilty to a trespassing charge”).

<sup>93</sup> Chauhan, *supra* note 2 at 143-144.

<sup>94</sup> Division of Criminal Justice Services, *New York City — Adult Arrests Disposed*, available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf> (last visited Jun. 21, 2019).

individual to be denied employment or housing, or even to be legally prohibited from working in certain professions.<sup>95</sup> Persons convicted of misdemeanors are ineligible for public housing provided by the New York City Housing Authority (“NYCHA”) for periods of three or four years.<sup>96</sup> Being convicted of a drug offense, regardless of its severity, can cause even a lawfully present noncitizen to be deported, as can offenses treated under federal immigration law as “crimes involving moral turpitude,” which include minor offenses such as turnstile jumping, shoplifting, and indecent exposure.<sup>97</sup> The impact of these collateral consequences disproportionately fall upon minority communities: in New York City, the misdemeanor arrest rate for the black population is 5.5 times as high, and that of the Hispanic population is three times as high, as that of the white population.<sup>98</sup>

### **1. Impact on Plea Bargaining and Wrongful Convictions**

The various factors that lead criminal defendants to forsake trial and plead guilty are greatly exacerbated in the context of adjudicating minor offenses. Defendants charged with minor offenses face particularly strong incentives to plead guilty whether they are factually guilty or not, owing to the “process costs” of proceeding to trial: attending pretrial court appearances, enduring pretrial detention, paying legal fees if counsel is retained.<sup>99</sup> Even if the risk of a conviction and incurring the “trial penalty” are taken into account, such costs may

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<sup>95</sup> See, e.g., Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C.D. L. REV. 277, 297-303 (2011); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 589-90 (2005).

<sup>96</sup> New York City Housing Authority, *Tenant Selection and Assignment Plan* (Sept. 23, 2016), at 23, available at <https://www1.nyc.gov/assets/nycha/downloads/pdf/TSAPlan.pdf> (last visited Jun. 24, 2019).

<sup>97</sup> Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1759-1760 (2013).

<sup>98</sup> Meredith Patten et al., *Trends in Misdemeanor Arrests in New York, 1980 to 2017* (Dec. 26, 2018), at 77, available at <http://misdemeanorjustice.org/wp-content/uploads/2018/12/FINAL.pdf>.

<sup>99</sup> See Bowers, *supra* note 10, at 1132-39.

outweigh those of pleading guilty, and may be more readily apparent and compelling than the long-term, often unforeseen collateral consequences of conviction.

In light of these considerations, it is unsurprising that virtually all misdemeanor defendants choose to forego trial: of the 259,016 cases that reached a disposition in New York City Criminal Court in 2017, 120,707 (46.6%) were resolved by a guilty plea, 111,679 (43.12%) were eventually dismissed or adjudicated in contemplation of dismissal (ACD); and only 646 (0.25%) terminated by a trial verdict.<sup>100</sup> A review of exonerations subsequent to misdemeanor convictions has found that almost 80 per cent were in cases where the defendant pled guilty, in contrast to the 16 per cent of felony exoneration cases where the defendant pled guilty.<sup>101</sup> While it is impossible to know just how many more innocent individuals have been convicted of minor offenses, it is certainly a substantial number, for most defendants in such cases face overwhelming incentives to plead guilty.

The Task Force recommends that, in order to reduce the number of innocent people who plead guilty, there should be a reduction in the volume and impact of low-level offenses in the criminal justice system. The Task Force discussed multiple ways of achieving this goal and below are four examples of ways in which the volume and impact of low-level offenses can be reduced throughout the New York State criminal justice system.

## **2. Suggested Solutions**

### **a) Decriminalize Low-Level Offenses<sup>102</sup>**

The simplest way to reduce the number of low-level cases in criminal court and low-level charges on criminal complaints is to remove at least some of those low-level criminal charges

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<sup>100</sup> Office of the Chief Clerk of the New York City Criminal Court, *2017 Annual Report* (October 2018), at 17, available at <https://www.nycourts.gov/COURTS/nyc/criminal/2017-Annual-Report.pdf>.

<sup>101</sup> Samuel R. Gross, *Errors in Misdemeanor Adjudication*, 98 B.U. L. REV. 999, 1008 (2018).

<sup>102</sup> Although the Task Force recommends decriminalizing a number of low-level offenses, the Task Force recognizes that certain low level offenses may still require a remedy outside of the criminal justice system.

from the New York State and New York City criminal codes. Reducing the number of misdemeanor cases and charges would have a direct effect on the ability of people accused of crimes to adjudicate their cases and demonstrate their innocence. Moreover, the imposition of civil fines as a substitute for incarceration may have the unintended effect of saddling an individual with debt.<sup>103</sup>

Some examples of promising legislative decriminalization and legalization efforts include:

- In 2019, New York State repealed the gravity knife provision of the misdemeanor of strict liability possession of a weapon (N.Y. Penal Law §§ 265.01(1) and 265.00(5)).<sup>104</sup> This “gravity knife” possession crime had been used to prosecute tens of thousands of New Yorkers, for both misdemeanors and felonies, often for possessing knives that they used for work. In 2018, more than 85% of arrests for gravity knife possession in NYC were of Black or Latino men or women.<sup>105</sup>
- In 2019, Illinois became the 11th state to legalize the possession of marijuana, and the first to do so through the legislative process.<sup>106</sup> The Illinois law legalizes recreational possession and sale of marijuana by adults, and also provides for the pardon and/or automatic expungement of previous low-level convictions for marijuana. This Illinois law stands in contrast to the weaker 2019 law passed in

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<sup>103</sup> See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VANDERBILT L. REV. 1055, 1093 (2015).

<sup>104</sup> Jesse McKinley, *The “Gravity Knife” Led to Thousands of Questionable Arrests. Now Its Legal*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/2019/05/31/nyregion/ny-gravity-knife-law.html>

<sup>105</sup> See Julie Ciccolini, *Gravity Knife Arrests in New York City From January 1, 2018 – June 29, 2018*, THE LEGAL AID SOCIETY (March 7, 2019), available at [https://static1.squarespace.com/static/59578aade110eba6434f4b72/t/5c8130d8e5e5f04b9a2dd4fa/1551970520709/gravity\\_knife\\_analysis\\_press.pdf](https://static1.squarespace.com/static/59578aade110eba6434f4b72/t/5c8130d8e5e5f04b9a2dd4fa/1551970520709/gravity_knife_analysis_press.pdf).

<sup>106</sup> Meghan Keneally, *Illinois Becomes the 11<sup>th</sup> State to Legalize Marijuana*, ABCNEWS.COM (Jun. 25, 2019, 12:22 PM), available at <https://abcnews.go.com/US/illinois-set-11th-state-legalize-marijuana/story?id=63929963>

New York State, which partially decriminalized but does not legalize marijuana possession.<sup>107</sup>

**b) Decline to Prosecute Low-Level Offenses**

The charging decision is a significant opportunity for a prosecutor to exercise discretion. Charging decisions always should reflect an honest and informed analysis of the sufficiency of the evidence.<sup>108</sup> But even when there may be a justifiable basis for charging, a prosecutor has wide discretion to decline to do so.<sup>109</sup>

The decision not to charge has several other salutary efficiency and economic benefits: reducing criminal court cases; allowing prosecutors to devote resources to serious crimes; and avoiding multiple, often financially and psychologically damaging court appearances by defendants. Most importantly, the upfront decision to decline prosecution eliminates any incentive for a defendant to plead guilty.

Several prosecutors around the country, including several District Attorneys here in New York City, are reviewing and establishing policies of declining to prosecute specific crimes, specific types of crime (*i.e.*, non-violent conduct or quality of life crimes) or specific levels of criminal charges.<sup>110</sup> These practices not only divert low-level and non-violent crimes out of the court system, but also acknowledge that some arrests reflect racial disparities and/or conduct connected to poverty. The Task Force applauds the efforts of several of the New York City District Attorney's Offices that have taken the initiative to decline to prosecute certain types of

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<sup>107</sup> See N.Y. Legis. S. S06579, Reg. Sess. 2019-2020. (N.Y. 2019) (amending N.Y. Pen. L. §§ 221.05 & 221.10; N.Y. C.P.L. §§1.20, 440.10 & 460.50; N.Y. Pub. Health L. §1399-n).

<sup>108</sup> See ABA CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (4<sup>th</sup> ed.), Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges.

<sup>109</sup> See *id.*

<sup>110</sup> See Alexandra Natapoff, *Misdemeanors*, No. 2017-41 U. CAL. IRVINE S. L. LEGAL STUD. RESEARCH PAPER SERIES 73, 93 (Aug. 15, 2017); *Justice 2020 Report*, *supra* note 23, at 14-17.

low-level non-violent conduct.<sup>111</sup> The Task Force recommends that all prosecutors explore ways to expand the use of their discretion to decline prosecution and enact policies that make the terms of this discretion clear to all assistant prosecutors.

**c) Diversion without Charging or Guilty Pleas**

Diversion is generally understood to mean alternatives to incarceration where social services replace traditional punishment in cases where the root cause of the criminal activity might be substance abuse, mental health problems or youth. Today, many courts have robust post-charging diversion programs which are supported by prosecutors' offices. Most focus on minor crimes, but in some instances, the criminal charges might be more serious and even violent. New York's Center for Court Innovation sponsors and implements many diversion alternatives.<sup>112</sup> The Center for Court Innovation also tracks initiatives which could provide additional models in New York.<sup>113</sup>

The Task Force is heartened by prosecutors' recognition that diversion can be an effective alternative to incarceration. We suggest that law enforcement and prosecutors consider the circumstances that would justify the implementation of diversion prior to charging. For example, the Brooklyn District Attorney has plans to offer pre-plea alternatives for all drug possession charges.<sup>114</sup> Another example is the Center for Court Innovation's Project Reset Program,<sup>115</sup> which provides participants the possibility to avoid court and a criminal record by

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<sup>111</sup> See *Justice 2020 Report*, *supra* note 23, at 12.

<sup>112</sup> Center for Court Innovation, <http://www.courtinnovation.org> (last visited July 16, 2019).

<sup>113</sup> Michael Rempel et.al., *NIJ's Multisite Evaluation of Prosecutor-Led Diversion Programs*, CENTER FOR COURT INNOVATION, available at [https://www.courtinnovation.org/sites/default/files/media/document/2017/Pretrial\\_Diversion\\_Overview\\_ProvRel.pdf](https://www.courtinnovation.org/sites/default/files/media/document/2017/Pretrial_Diversion_Overview_ProvRel.pdf)

<sup>114</sup> See *Justice 2020 Report*, *supra* note 23, at 12.

<sup>115</sup> See Center for Court Innovation, *Project Reset*, available at <https://www.courtinnovation.org/programs/project-reset> (last visited September 27, 2019).

completing community-based programming. Project Reset now operates in Brooklyn, Manhattan and the Bronx.

Court-based diversion programs should *not* require a guilty plea as a condition for entering a program and avoiding incarceration, except perhaps in the most serious cases. First, a defendant might be induced to plead guilty regardless of actual guilt simply to gain admission to the diversion program rather than face a more severe punishment. Second, even if the defendant succeeds in meeting all of the conditions of the program, a guilty plea has far reaching collateral consequences. Instead, diversion programs could, when possible, take the lead and address the immediate needs of the individual. For example, provide subway fares, assist in obtaining benefits, and refer to social services without requiring the defendant to repeatedly return to court. Compliance with the conditions of diversion can be monitored with written submissions to the court.

**d) Expungement & Declining to Consider Past Convictions**

Many New Yorkers who are accused of crimes come into criminal court at an extreme disadvantage in the plea-bargaining process. Indeed, studies demonstrate that it is often past convictions that dictate, even more than the facts of the case itself, how a prosecutor will treat a case in New York City criminal court, especially in misdemeanor cases.<sup>116</sup> This disadvantage can be cured through (i) legislative action to facilitate expungements; (ii) executive action through mass pardons; and/or (iii) district attorney policies to seek expungements and to decline to consider past convictions in plea bargaining decisions.

Legislative action: The New York State legislature and the New York City Council can aim to pass laws that facilitate, and where possible

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<sup>116</sup> See generally ISSA KOHLER-HAUSSMAN, MISDEMEANORLAND (Princeton University Press) (2018) (conducting a long-term empirical study of the use of criminal records in misdemeanor cases in NYC).

automate, expungements of past convictions, including for serious felonies after a certain period of time.

Executive clemency: The Governor of New York can use his or her clemency powers to engage in mass pardons of low-level convictions and older felony convictions.

Prosecutorial discretion to seek expungements & not to consider past convictions: District Attorneys in New York City should be on the frontlines of efforts to ensure that past convictions do not interfere with plea bargaining. They can do so in at least two ways. First, District Attorneys can themselves facilitate the expungement of past convictions using existing laws; and second, they can enact policies under which they decline to consider past low-level offenses (and related warrants) during bail proceedings and plea bargaining negotiations if those offenses are no longer crimes, would no longer be prosecuted today, and/or are related to poverty, addiction, or racialized policing.<sup>117</sup>

## V. CONCLUSION

From the inception of our Republic, a fair trial has been the guiding principle of our criminal justice system. In the subsequent 200 years, the basic way in which people are convicted of a crime has substantially changed; plea agreements predominate, while the trial by jury has become a decreasingly viable “right.” One of the unplanned effects of the ubiquity of plea bargaining has been that unacceptable numbers of innocent people are pleading guilty and being criminally punished. The proposals set forth in this Report should not be particularly

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<sup>117</sup> For more on the connections between prosecutors and expungements, see Brian M. Murray, *Unstitching Scarlet Letters: Prosecutorial Discretion and Expungement*, 86 *FORDHAM L. REV.* 2821, 2825 (2018).

controversial. The Task Force considered over 100 proposals. Feasibility and impact were our guiding principles. The overwhelming consensus of the Task Force was that these six proposals are achievable and corrective.

The Task Force believes that the recommendations put forward in this Report will have a direct impact on the dignity and self-respect of individuals going through the criminal justice system and will help alleviate the tragic, unjust decision an individual makes when they plead guilty to a crime they did not commit. More, they will assure the integrity of the criminal justice process, in itself a goal of paramount importance at a time of public cynicism and eroding confidence in lawyers and the courts. A system that tolerates and even encourages incorrect and unfair results demeans all who participate in it. This Report outlines what the Task Force believes are reasonable reforms. The time to implement them is now.



**EXHIBIT A**

**Members of the Plea Bargaining Task Force of the NYCLA Justice Center**

<b><u>Steering Committee</u></b>	
Belen	Hon. Ariel E.
Freedman	Hon. Helen
James	Seymour
Kerr	Chet
Kobak	James
Kolb	Dan
McKay	Hon. Kevin
Tesser	Lewis
Younger	Stephen
<b><u>Steering Committee Secretaries</u></b>	
Kerr	Jackson
Tesser	Randy
Eppes	Colyn
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Bierer	Sabrina
Bova	Anthe
Bress	Frank
Caplow	Stacy
Chan	Monica
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King	Charles
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Levine	Kate
Lippke	Rick
Macedonio	Elizabeth
Mariani	Gilda
McCoy	Candace
McEnany	John
Mitchell	Gina
Mushlin	Michael
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Nevins	Elizabeth M.
Northrup	Eli
Olderman	Justine
Patton	David
Potkin	Vanessa
Reiss	Meg
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