

# HOW BAD ARRESTS LEAD TO BAD PROSECUTION: EXPLORING THE IMPACT OF PRIOR ARRESTS ON PLEA BARGAINING

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*Arrests and arrest records play an important role in the criminal justice system. Police agencies customarily use suspects' prior record for investigative purposes, and courts use this information to set bail. Yet many arrest practices, and particularly stop-and-frisk, have long been criticized for disproportionately targeting young black and Latino men, and for their overall negative effect on communities of color. Not surprisingly then, arrest practices have received much attention, including among legal scholars and social scientists. However, what effect a prior arrest record has on other decision points, including prosecutorial decision making, is relatively unknown. In particular, we have a limited understanding about the relationship between prior arrest and plea bargaining.*

*In this Article, we present three arguments—legal, moral, and cost arguments—to demonstrate the negative consequences of arrests and arrest records. We use a unique empirical study of the relationship between prior arrests and plea offers in the New York County District Attorney's Office, to support two propositions: (a) arrests should be viewed as a last resort to be used whenever issuing warnings, citations, or summonses would be inadequate safeguards of public safety; and (b) prosecutors' offices should not use prior arrest as a factor by default when making plea offer determinations unless they are able to show that using prior conviction record alone would not be sufficient to serve the purposes of justice, safety, and fairness. We argue that using nonconviction prior arrest in determining punishment in subsequent nonrelated cases is contrary to the principles of the presumption of innocence, race-neutral decision making, and wise criminal justice expenditure.*

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## INTRODUCTION

While arguments about how arrests, especially cyclical arrests of young men of color, can lead to poor criminal justice and social outcomes are frequently made,<sup>1</sup> the relationship between arrests and plea bargaining is less obvious and inadequately researched.<sup>2</sup> Arrest is a common response to the majority of crimes, including for first-time nonviolent offenses, a practice that many would argue is responsible for both a high—although declining—incarceration rate and the overrepresentation of minorities in jails and prisons.<sup>3</sup> A quick look at the arrest history over the past decade shows that misdemeanor arrests in New York City (NYC) are on the rise.<sup>4</sup> Between 2005 and 2014, although felony arrests decreased by about 5%, misdemeanor arrests increased by over 13%, with the highest increase occurring with respect

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<sup>1</sup> See, e.g., K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. OF L. & SOC. CHANGE 271 (2009) [hereinafter Howell, *Broken Lives from Broken Windows*]; K. Babe Howell, *From Page to Practice and Back Again: Broken Windows Policing and the Real Costs to Law-Abiding New Yorkers of Color*, 34 N.Y.U. REV. OF L. & SOC. CHANGE 439 (2010); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015).

<sup>2</sup> See e.g., Besiki L. Kutateladze et al., *Does Evidence Really Matter? An Exploratory Analysis of the Role of Evidence in Plea Bargaining in Felony Drug Cases*, 39 L. & HUM. BEHAV. 431 (2015) [hereinafter Kutateladze et al., *Does Evidence Really Matter*].

<sup>3</sup> See, e.g., Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151 (2004); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311 (1997).

<sup>4</sup> See N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: 2005–2014 (2015), <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/NewYorkCity.pdf> (depicting arrest rates for New York City).

to property misdemeanor offenses (almost 46%).<sup>5</sup> The New York Police Department's (NYPD) stop-and-frisk practice has long been questioned in terms of its actual impact on public safety, especially as compared to its negative collateral consequences to the black and Latino individuals and communities particularly affected by this practice.<sup>6</sup> A recent report by the New York State Attorney General showed that close to half of all stop-and-frisk arrests did not result in a conviction, and just one in fifty arrests led to a conviction for possession of a weapon or for perpetration of a violent crime.<sup>7</sup>

Beginning in 2014, the NYPD enacted significant changes to cut down on stop-and-frisk. For example, as a result of the federal class action lawsuit, *Floyd v. City of New York*, officers are now prohibited from conducting stops solely based on "furtive movements" or mere presence in a high crime area.<sup>8</sup> Officers are also required to specifically describe the suspicious nature of the "furtive movements."<sup>9</sup> Furthermore, because law enforcement arrest practices with respect to drug use have long been viewed as discriminatory towards people of color,<sup>10</sup> the possession of small amounts of marijuana can no longer trigger arrests, but are instead punishable by a fine.<sup>11</sup>

Although arrest practices have received much attention, including among media, legal scholars, and social scientists,<sup>12</sup> relatively little is known about plea bargaining and the relationship between prior arrest records and plea bargaining. It is well known that plea bargaining is the

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<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., GREG RIDGEWAY, RAND CORP., ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT'S STOP, QUESTION, AND FRISK PRACTICES (2007), [http://www.rand.org/content/dam/rand/pubs/technical\\_reports/2007/RAND\\_TR534.pdf](http://www.rand.org/content/dam/rand/pubs/technical_reports/2007/RAND_TR534.pdf); Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813 (2007); Jain, *supra* note 1.

<sup>7</sup> CIVIL RIGHTS BUREAU, N.Y. STATE OFFICE OF THE ATT'Y GEN., A REPORT ON ARRESTS ARISING FROM THE NEW YORK CITY POLICE DEPARTMENT'S STOP-AND-FRISK PRACTICES I (2013), [https://www.ag.ny.gov/pdfs/OAG\\_REPORT\\_ON\\_SQF\\_PRACTICES\\_NOV\\_2013.pdf](https://www.ag.ny.gov/pdfs/OAG_REPORT_ON_SQF_PRACTICES_NOV_2013.pdf).

<sup>8</sup> See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); see also Memorandum from the Police Commissioner, N.Y. Police Dep't, to All Commands, N.Y. Police Dep't. (Mar. 2, 2015), [http://www.nyc.gov/html/ccrb/downloads/pdf/finest-message-stop-frisk%20pursuant-to-floyd\\_20150302.pdf](http://www.nyc.gov/html/ccrb/downloads/pdf/finest-message-stop-frisk%20pursuant-to-floyd_20150302.pdf).

<sup>9</sup> See Memorandum from the Police Commissioner, *supra* note 8.

<sup>10</sup> See, e.g., AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-re11.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-re11.pdf); Andrew Golub et al., *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POL'Y 131 (2007).

<sup>11</sup> See N.Y. PENAL LAW § 221.05 (McKinney 2008).

<sup>12</sup> See, e.g., Joseph Ferrandino, *Minority Threat Hypothesis and NYPD Stop and Frisk Policy*, 40 CRIM. JUST. REV. 209 (2015); see also Arthur H. Garrison, *NYPD Stop and Frisk, Perceptions of Criminals, Race and the Meaning of Terry v Ohio: A Content Analysis of Floyd, et al. v City of New York*, 15 RUTGERS RACE & L. REV. 65 (2014); Howell, *Broken Lives from Broken Windows*, *supra* note 1; *Don't Shoot*, ECONOMIST, Dec. 13, 2014, at 27.

driving force behind the justice system.<sup>13</sup> There are numerous estimates of how often cases are disposed of through guilty pleas, but data from the Bureau of Justice Statistics, referring to both federally and locally disposed cases, puts this number at ninety-five percent.<sup>14</sup> Yet, research on plea bargaining is lacking, largely due to the absence of or the lack of access to data.<sup>15</sup> Unlike some other discretionary decisions, such as case acceptance for prosecution or sentencing, which are likely to be captured more systematically, plea offers are made at various points between arraignment and final disposition and prosecutors do not typically make systematic notes or entries into the data system.<sup>16</sup> A 2012 Vera Institute of Justice review showed that comparatively few studies focused on plea bargaining and that most studies looked into the initial case screening and sentencing.<sup>17</sup> As a result, plea bargaining and the factors that contribute to specific plea offers remain a deeply misunderstood part of the justice system, despite being perhaps the most important aspect.

An arrest is not only a factor in the disposition of the case for which the arrest was made, but it may also play a significant role in all subsequent criminal cases involving the same defendant. For example, using prior arrest records in sentencing is a common practice. States that have adopted determinate sentencing statutes have long used prior arrest record as a factor for the determination of a sentence.<sup>18</sup> But not all priors are the same because some arrests result in conviction and others do not (what we call a “nonconviction prior arrest”). The former type can be used as a factor for subsequent sentencing decisions, while the latter should be used more sparingly in a manner that takes into account the type of offense (e.g., domestic violence or not; violent or not) and defendants’ characteristics (e.g., age of a defendant and the length of time since previous arrests). Furthermore, prior arrests may be a factor in other types of decisions, including pretrial detention and charge offers.<sup>19</sup>

In this Article, we present three arguments—legal, moral, and cost arguments—to demonstrate the negative short-term and long-term

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<sup>13</sup> See, e.g., Kutateladze et al., *Does Evidence Really Matter*, *supra* note 2; Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008).

<sup>14</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 418 (Ann L. Pastore & Kathleen Maguire eds., 2005) [hereinafter U.S. DEP’T OF JUSTICE, SOURCEBOOK].

<sup>15</sup> Kutateladze et al., *Does Evidence Really Matter*, *supra* note 2.

<sup>16</sup> *Id.*

<sup>17</sup> See BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES (2012).

<sup>18</sup> See Alexis M. Durham III, *Justice in Sentencing: The Role of Prior Record of Criminal Involvement*, 78 J. OF CRIM. L. & CRIMINOLOGY 614 (1987).

<sup>19</sup> See, e.g., Kutateladze et al., *Does Evidence Really Matter*, *supra* note 2.

consequences of arrests and arrest records, and to argue that using nonconviction prior arrest in determining punishment in subsequent nonrelated cases is contrary to the principles of the presumption of innocence, race-neutral decision making, and wise criminal justice expenditure. In the three Parts that follow, we review existing case law, provide data and statistical analyses of criminal cases recently disposed of in New York County, and examine the literature on the costs of arrest and detention to support our argument.

## I. LEGAL ARGUMENT

It is well known among researchers and criminal justice practitioners that arrest records play an important role in law enforcement and that police agencies customarily use suspects' prior records for investigative purposes.<sup>20</sup> This use seems reasonable in a number of scenarios. For example, if a defendant has multiple prior domestic violence arrests, the police and courts may use this information to make a new domestic violence arrest, hold a defendant in pretrial detention, and to predict future behavior.<sup>21</sup> However, it is not perfectly clear how prior arrest information is used at other points in the justice system, and especially in prosecutorial decision making.<sup>22</sup> Legislators have placed very few, if any, meaningful limitations on access to arrest records, thereby encouraging the use of these records in the interest of law enforcement and public safety.<sup>23</sup> The lack of oversight is further exacerbated by the failure of statutory and case law to fill this gap, as described below.

The Federal Sentencing Guidelines explicitly prohibit using a prior arrest record itself for "purposes of an upward departure" in sentencing;<sup>24</sup> however, according to the D.C. Circuit, this means that a defendant's arrest history can be considered when imposing a sentence within or below the applicable range.<sup>25</sup> Moreover, since 2005, these

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<sup>20</sup> See, e.g., James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2008).

<sup>21</sup> See, e.g., Douglas A. Smith & Jody R. Klein, *Police Control of Interpersonal Disputes*, 31 SOC. PROBS. 468 (1984).

<sup>22</sup> But see Kris Henning & Lynette Feder, *Criminal Prosecution of Domestic Violence Offenses: An Investigation of Factors Predictive of Court Outcomes*, 32 CRIM. JUST. & BEHAV. 612 (2005) (providing an example of one of the few investigations into the area).

<sup>23</sup> Note, *The Impact of Arrest Records on the Exercise of Police Discretion*, LAW & CONTEMP. PROBS., Autumn 1984, at 287, 289 (1984).

<sup>24</sup> U.S. SENTENCING GUIDELINES MANUAL § 4A1.3(a)(3) (U.S. SENTENCING COMM'N 2015) ("Prohibition.—A prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement.").

<sup>25</sup> *United States v. Brown*, 516 F.3d 1047, 1053 (D.C. Cir. 2008).

guidelines have only been viewed as advisory, even for an upward departure.<sup>26</sup> New York State laws do not specifically address this issue. Although New York Penal Law on sentencing makes references to prior conviction,<sup>27</sup> it says nothing about using prior arrest in the determination of sentences.

The case law is richer, but still ambiguous. The admissibility of evidence of a defendant's prior uncharged crimes was first addressed in 1901,<sup>28</sup> when the New York Court of Appeals established that, generally speaking, evidence of prior uncharged crimes—that is, any crime not alleged in the current indictment—is not admissible, although prosecutors can still try to introduce such evidence by requesting a Molineux hearing.<sup>29</sup> This ruling has established the important principle that one cannot be presumed guilty of a particular crime simply due to the possibility that he may have committed similar crimes in the past.<sup>30</sup> More than seventy years later, in *People v. Sandoval*,<sup>31</sup> the Court of Appeals provided a few guidelines to allow the prosecution to impeach the defendant on specific “prior . . . criminal, vicious or immoral acts.”<sup>32</sup> The court ruling, however, fell short of articulating the difference between prior arrest and prior conviction, and whether these two forms of prior record should be distinguished in determining how they may be permissibly used against a defendant as impeachment evidence. Furthermore, these cases refer to uncharged crimes, making it unclear how these rules would apply to arrests which, despite leading to formal charges, did not result in conviction.

The cases that do address the use of a defendant's prior arrest focus on sentencing decisions, but even there the impact of prior arrest is not clear. A Fifth Circuit case held that “an arrest, without more, is quite consistent with innocence,”<sup>33</sup> and that it is an error for a district court to consider a defendant's bare arrest record at sentencing.<sup>34</sup> The Seventh Circuit has historically taken a similar position. In *United States v.*

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<sup>26</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2005).

<sup>27</sup> Sentences of Imprisonment, N.Y. PENAL LAW §§ 70.00–70.85 (McKinney 2009).

<sup>28</sup> *People v. Molineux*, 168 N.Y. 264, 291–94 (1901).

<sup>29</sup> *Id.* Similar to Molineux hearings, Ventimiglia hearings also determine whether prior uncharged crimes can have a prejudicial effect if the defendant testifies at his trial. *People v. Ventimiglia*, 52 N.Y.2d 350 (1981).

<sup>30</sup> See HAROLD SCHECHTER, *THE DEVIL'S GENTLEMAN: PRIVILEGE, POISON, AND THE TRIAL THAT USHERED IN THE TWENTIETH CENTURY* (2007).

<sup>31</sup> 34 N.Y.2d 371 (1974).

<sup>32</sup> *Id.* at 374 (“The nature and extent of cross-examination have always been subject to the sound discretion of the Trial Judge. We now hold that in exercise of that discretion a Trial Judge may, as the Trial Judge in this case did, make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility.” (citations omitted)).

<sup>33</sup> *United States v. Labarbera*, 581 F.2d 107, 109 (5th Cir. 1978).

<sup>34</sup> *Id.*

*Guajardo-Martinez*,<sup>35</sup> the court said that “a sentencing court may not rely on the prior arrest record itself in deciding on a sentence.”<sup>36</sup> Most recently, however, the same court held, in *United States v. Drain*,<sup>37</sup> “that a substantial history of arrests, especially if they are similar to the offense of conviction, can be a reliable indicator of a pattern of criminality, suggesting a recidivism risk, and may be considered” as a factor during the imposition of a sentence.<sup>38</sup> *Drain* had “adult convictions for possessing cocaine and marijuana, carrying a gun, and resisting law enforcement” and “juvenile adjudications for battery. Thirteen of the unadjudicated arrests were for those very crimes.”<sup>39</sup> Considering the scope of arrest history in this case, the court said that “the number of prior arrests, and/or the similarity of prior charges to the offense of conviction, becomes so overwhelming and suggestive of actual guilt that they become exceedingly difficult to ignore.”<sup>40</sup> However, how many prior arrests are needed for the record to become a factor,<sup>41</sup> how similar those arrest charges should be to the present case,<sup>42</sup> and how big of a factor prior arrest should be in sentencing are simply unknown and will likely be determined on a case-by-case basis.

The ambiguity of case law raises questions about whether the presumption of innocence can be applied to plea bargaining, which is de facto how most sentences are determined due to the prevalence of plea dispositions.<sup>43</sup> Simply put, the presumption of innocence establishes that a defendant should be considered innocent until he can be proven guilty. Therefore, we argue that using prior arrest(s), especially one(s) that did not result in conviction, in determining sentences in subsequent cases, is in many cases unreasonable and potentially prejudicial, especially in light of mounting evidence of how existing

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<sup>35</sup> 635 F.3d 1056 (7th Cir. 2011).

<sup>36</sup> *Id.* at 1059; see also *United States v. Johnson*, 648 F.3d 273, 276–77 (5th Cir. 2011); *United States v. Berry*, 553 F.3d 273, 284 (3d Cir. 2009); *United States v. Torres*, 977 F.2d 321, 330 & n.4 (7th Cir. 1992).

<sup>37</sup> 740 F.3d 426 (7th Cir. 2014).

<sup>38</sup> *Id.* at 432.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* (quoting *Berry*, 553 F.3d at 284).

<sup>41</sup> Compare *United States v. Lopez-Hernandez*, 687 F.3d 900, 904 (7th Cir. 2012) (forty-one similar arrests), and *United States v. Walker*, 98 F.3d 944, 947 (7th Cir. 1996) (twenty-three similar arrests), with *Johnson*, 648 F.3d at 278 (concluding that five similar arrests, without the underlying facts, were not indicative of actual guilt), *Berry*, 553 F.3d at 284 n.9 (concluding that a “couple” of minor arrests did not suggest actual guilt), *United States v. Zapete-Garcia*, 447 F.3d 57, 61 (1st Cir. 2006) (concluding that a single prior arrest was improperly considered).

<sup>42</sup> It is also important to note that arrest charges can be grossly inaccurate because the police may overcharge or undercharge any given defendant. For example, instead of drug possession, the police may charge someone with possession with intent to sell, which would elevate the charge from a misdemeanor to a felony in most jurisdictions.

<sup>43</sup> An estimated ninety-five percent of cases are resolved by guilty plea. See U.S. DEP’T OF JUSTICE, SOURCEBOOK, *supra* note 14.

arrest practices unfairly target racial and ethnic minorities, the homeless, individuals with mental illness, young people, and other vulnerable populations. In *United States v. Lopez-Hernandez*, the defendant argued that “the judge couldn’t allow *any* of the arrests that did not result in convictions to influence the sentence—that due process of law required him to find by a preponderance of the evidence that the defendant had actually committed the crimes for which he had been arrested.”<sup>44</sup> In essence, the defendant was claiming his right to be presumed innocent for past nonconviction arrests. Disregarding the presumption of innocence, the Seventh Circuit disagreed, claiming that it was the defendant’s burden to challenge the accuracy of any arrest report.<sup>45</sup> As the circuit judge wrote:

In light of the defendant’s failure to challenge the accuracy of anything in his lengthy arrest record, the judge was entitled to assume that the 41 arrests considered as a whole, when coupled with the defendant’s five convictions, gave a more accurate picture of the likelihood of recidivism than the convictions and arrest summaries alone and justified a sentence at the top of the guidelines range.<sup>46</sup>

This is a dangerous precedent for a number of reasons, but especially because of its implications for racial and ethnic fairness in the justice system, as described in the next Part.

## II. MORAL ARGUMENT<sup>47</sup>

It is a well-established fact that racial and ethnic disparities in arrest and incarceration are astronomical. Despite being only 13% of the national population,<sup>48</sup> blacks comprise 28% of people arrested<sup>49</sup> and 35% of the country’s jail population.<sup>50</sup> In New York City, out of 75,528 arrests made in 2014, the arrest rates for Asians and whites per 100,000

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<sup>44</sup> *Lopez-Hernandez*, 687 F.3d at 903.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Except where indicated otherwise, the original findings presented in this Part are from a unique dataset that was extracted from a larger set, which is described in BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY—TECHNICAL REPORT (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/247227.pdf>. The complete dataset will be available at ICPSR, <https://www.icpsr.umich.edu/icpsrweb/landing.jsp> (last visited Jan. 19, 2016).

<sup>48</sup> USA QuickFacts, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Dec. 2, 2015).

<sup>49</sup> *Crime in the United States 2013: Persons Arrested*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/persons-arrested/persons-arrested> (last visited Jan. 19, 2016).

<sup>50</sup> TODD D. MINTON & ZHEN ZENG, U.S. DEP’T OF JUSTICE, NCJ 248629, JAIL INMATES AT MIDYEAR 2014, at 1 (2015), <http://www.bjs.gov/content/pub/pdf/jim14.pdf>.

residents were 371 and 397, respectively, as compared to the rate of 1,001 for Hispanics and 1,792 for blacks.<sup>51</sup> The city jail population in 2012 contained 1% Asian and 7% white inmates, but 33% Hispanic and 57% black inmates.<sup>52</sup>

While the police are under constant scrutiny for their contribution to racial disparities in the justice system,<sup>53</sup> judicial actors—prosecutors, judges, and defense counsel—all play roles in this process as well. Our recent research from New York County showed that minority defendants face additional disadvantages in prosecution and sentencing.<sup>54</sup> Based on a sample of 185,275 diverse criminal cases disposed of by the New York County District Attorney's Office (DANY) in 2010 and 2011, significant disparities were found in case dismissals, pretrial detention, plea bargaining, and sentencing.<sup>55</sup> More specifically, compared to similarly situated white defendants, black and Latino defendants were more likely to be detained, to receive a custodial plea offer, and to be incarcerated; however, they were also more likely to benefit from case dismissals.<sup>56</sup> In terms of offense categories, blacks and Latinos were particularly likely to be held in pretrial detention for misdemeanor person offenses, followed by misdemeanor drug offenses.<sup>57</sup> Disparities in custodial sentence offers (as part of the plea-bargaining process) and ultimate sentences imposed were most pronounced for drug offenses, where blacks and Latinos received especially punitive outcomes.<sup>58</sup> On the other hand, blacks and Latinos were also most likely to have their cases dismissed for misdemeanor drug offenses.<sup>59</sup> Finally, Asian defendants appeared to have the most favorable outcomes across all discretionary points, as they were less

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<sup>51</sup> N.Y.C. POLICE DEP'T, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY (2015), [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/enforcement\\_report\\_year\\_end\\_2014.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/enforcement_report_year_end_2014.pdf). Rates are calculated per 100,000 residents from each racial and ethnic category using population data from the 2013 American Community Survey. *See id.* at B-1; *see also American Community Survey*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/acs> (last visited Dec. 20, 2015).

<sup>52</sup> N.Y.C. INDEP. BUDGET OFFICE, NYC'S JAIL POPULATION: WHO'S THERE AND WHY? (2013), <http://ibo.nyc.ny.us/cgi-park2/?p=516>.

<sup>53</sup> *See, e.g.,* Joseph Ferrandino, *Minority Threat Hypothesis and NYPD Stop and Frisk Policy*, 40 CRIM. JUST. REV. 209 (2014).

<sup>54</sup> Besiki L. Kutateladze et al., *Cumulative Disadvantage: Examining Racial and Ethnic Disparity in Prosecution and Sentencing*, 52 CRIMINOLOGY 514 (2014) [hereinafter Kutateladze et al., *Cumulative Disadvantage*].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* It is possible that higher dismissal rates for defendants of color are triggered by not declining to prosecute cases that could have been rejected at screening. Note that the DANY's office has a ninety-six percent case acceptance rate. *See* KUTATELADZE & ANDILORO, *supra* note 47.

<sup>57</sup> Kutateladze et al., *Cumulative Disadvantage*, *supra* note 54.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; *see also infra* Part III.

likely to be detained, to receive custodial offers, and to be incarcerated relative to white defendants.<sup>60</sup> Asian defendants received particularly favorable outcomes for misdemeanor property offenses.<sup>61</sup>

A. *A Review of Prior Record of a Sample of New York City Defendants*

One of the goals of the research described herein was to look into the relationship between prior record and plea bargaining, and to investigate whether any inferences regarding racial and ethnic differences can be drawn from this relationship. To do so, we used a unique dataset consisting of 213,547 cases disposed of by DANY in 2010 and 2011.<sup>62</sup> Defendant race was unknown in 2,491 cases, leaving us with a final sample of 211,056 cases. Using these data, we examined multiple forms of prior record and identified marked variations by defendants' race and ethnicity. Overall, a greater percentage of black defendants had prior arrests, felony arrests, convictions, felony convictions, prison sentences, jail sentences, and noncustodial sentences when compared to other racial groups. This was true for all black defendants, whether they were currently charged with felonies, misdemeanors, or violations. On average, blacks had more prior arrests (mean = 5.05) and incarcerations (mean = 2.50), compared to Latinos (2.53 and 0.92, respectively), whites (1.90 and 0.83, respectively), and Asians (0.85 and 0.23, respectively). Overall, nearly twice as many blacks had a prior arrest as whites, and nearly three times as many as Asians. Latinos were also more likely to have a prior arrest relative to both whites and Asians; however, when compared to blacks, the data suggests that they are less likely to have a prior arrest, and this is true across all offense categories.

Across all offense levels, blacks were two-to-three times more likely to have felony arrests than were whites, and three-to-five times more likely than were Asians. Although the percentages were smaller for Latinos, they were noticeably more likely to have prior felony arrests in comparison to whites or Asians.

Black defendants were also considerably more likely to have a prior conviction and prior custodial or noncustodial sentence. The difference in terms of prior prison sentence was particularly large between blacks and Asians: blacks were about twelve-to-fifteen times more likely to have a prior prison sentence (see Table 1).

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<sup>60</sup> Kutateladze et al., *Cumulative Disadvantage*, *supra* note 54.

<sup>61</sup> *Id.* For additional information on this study, see KUTATELADZE & ANDILORO, *supra* note 47; see also Kutateladze et al., *Does Evidence Really Matter*, *supra* note 2, at 434; Besiki Luka Kutateladze et al., *Opening Pandora's Box: How Does Defendant Race Influence Plea Bargaining?*, JUST. Q. (2014), <http://www.tandfonline.com/doi/pdf/10.1080/07418825.2014.915340>.

<sup>62</sup> See *supra* note 56.

	Any Prior Arrest (%)	Prior Felony Arrest (%)	Any Prior Conviction (%)	Prior Felony Conviction (%)	Prior Prison Sentence (%)	Prior Jail Sentence (%)	Prior Non-Custodial Sentence (%)	Total N
<b>Felonies (N = 26,069)</b>								
White	34.2	20.8	29.7	9.8	5.2	15.2	25.5	3,018
Black	57.0	40.1	51.3	23.7	15.2	29.0	44.8	13,124
Latino	51.9	34.5	44.5	17.8	10.3	20.9	39.2	8,917
Asian	22.6	11.5	16.4	2.3	1.1	4.5	15.3	733
Other	21.1	13.2	23.7	5.3	2.6	7.9	21.1	38
<b>Misdemeanors (N = 159,206)</b>								
White	25.0	11.9	21.3	5.0	2.8	11.6	20.1	23,907
Black	57.9	34.2	52.6	18.8	12.2	31.3	49.1	72,592
Latino	45.8	24.3	37.8	11.4	6.3	16.7	34.8	53,075
Asian	20.3	7.2	14.6	1.4	0.7	3.3	14.0	7,532
Other	33.8	16.0	26.0	4.5	1.9	11.9	24.9	269
<b>Violations (N = 25,781)</b>								
White	44.3	18.9	41.9	7.0	3.5	23.2	40.1	3,268
Black	68.8	39.2	66.6	21.9	13.9	42.4	63.3	12,843
Latino	44.9	22.3	41.2	10.6	6.1	20.7	38.8	8,668
Asian	29.0	9.3	25.6	3.7	1.3	11.6	23.9	535
Other	52.2	17.4	45.7	15.2	2.2	26.1	45.7	46
Total N								208,565

Table 1: Prior Record by Defendant Race and Offense Level<sup>63</sup>

### B. Plea-Bargaining Guidelines in New York County

As described above, the vast majority of prosecutions end in a plea bargain. Plea bargains require a defendant to admit culpability on a particular charge, either the highest charged offense or a lower charge. In New York County, plea offers include offers to a lesser charge and sentencing recommendations.<sup>64</sup> Plea offers are made by the prosecutor, and all agreements must be approved by the presiding judge.<sup>65</sup> Prosecutors can make plea offers at any point before a trial verdict, but the most favorable plea offers for the defendant are generally made at arraignment, with offers becoming less favorable with subsequent adjournments.<sup>66</sup>

Although it is unclear how many prosecutor's offices in the United States have plea guidelines, it is safe to say that most states have a set of criminal procedure law rules which individual prosecutor's offices supplement with a set of principles used to train new prosecutors in handling the plea offer and negotiation process. In New York State, some basic rules about plea offers are included in sections 220.10 through 220.60 of the New York Criminal Procedure Law, but the law does not define what the role of prior arrest should be in making plea

<sup>63</sup> Please note: race information for 2,491 (1.2%) cases is unknown. KUTATELADZE & ANDILORO, *supra* note 47, at 74.

<sup>64</sup> See *id.* at 16 ("These [recommendations] can include: a recommendation of jail time, time served in pretrial detention, restitution, fine, and community service, among others. Custodial plea offers and offers including time served will be considered as more punitive sentence offers, although they may not always be perceived as such." (citation omitted)).

<sup>65</sup> See *id.*

<sup>66</sup> See *id.* at 115.

offers.<sup>67</sup> In practice, however, prior arrest is one of the factors used in plea determination, with its use explicitly recommended in some circumstances. In New York County, plea offers for defendants with one or no prior arrests are determined with reference to DANY's Plea Offer Guidelines.<sup>68</sup> The guidelines use defendants' arrest history and the most severe of their pending charges to make recommendations.<sup>69</sup> These two factors, then, may be particularly important to examine in exploring racial and ethnic disparities in plea offers. The guidelines recommend that only defendants who have no history of prior arrests should be offered a plea to a lesser charge; reduced charge offers should not be made to defendants who do have such a history.<sup>70</sup> The guidelines also suggest that recommended sentences should be increased for defendants who have been re-arrested on the same or similar offenses, although they do not include recommendations specific to defendants with two or more arrests.<sup>71</sup>

C. *The Impact of a Prior Record on Plea Bargaining Outcomes in New York County*

While DANY's guidelines make plea recommendations for defendants with one or no previous arrests, they do not cover defendants with longer criminal histories. Plea offers are left to the discretion of the prosecuting Assistant District Attorney (ADA) when the defendant has more than one prior arrest. In order to examine what impact this increase in discretion has, this Section disaggregates data by defendants' arrest records. Table 2 shows the frequencies and percentages of guilty pleas made by defendants, broken down by race and defendants' number of prior arrests.

For *felonies*, and among defendants with *no prior arrest*, a slightly greater percentage of whites had their cases disposed through prosecutorial plea offers (55% for whites, 53% for Asians, 52% for blacks, and 51% for Latinos). A greater difference was observed among defendants with *one prior arrest* (for any offense), with 67% of cases involving white defendants disposed by plea (as compared to 53% for

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<sup>67</sup> N.Y. CRIM. PROC. LAW §§ 220.10–220.60 (McKinney 2014)

<sup>68</sup> KUTATELADZE & ANDILORO, *supra* note 47, at 115.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Supervising prosecutors will also make plea recommendations when assigning felony cases to junior assistant district attorneys (ADAs). Supervising prosecutors must sign off on initial offers made in felony and non-domestic violence misdemeanor cases. The Early Case Assessment Bureau (ECAB) supervisors make initial offer recommendations for rookie ADAs. Guidelines are generally not used postarrestment, and do not exist for felony or misdemeanor domestic violence cases. KUTATELADZE & ANDILORO, *supra* note 47, at 116.

Asians, 52% for blacks, and 51% for Latinos). Among defendants with *two or more arrests*, the differences in rates of final disposition by plea were slightly greater, with whites again having the highest percentage (72% for whites, 67% for Asians, 66% for blacks, and 64% for Latinos). Overall, regardless of their prior record, whites were more likely to have their case disposed of as a guilty plea. However, we did not find noticeable differences by race in terms of pleas at arraignment versus post arraignment. Nearly all felony defendants, regardless of their race, enter guilty pleas after arraignment.

Prior Arrests		Pleas at Arraignment (%)	Pleas post Arraignment (%)	Guilty Pleas Total # (%)	% of all Cases Disposed of as Guilty Pleas	Total Cases Disposed (%)
<b>Felonies (N = 26,069)</b>						
White	None	3.1	96.9	1,134 (100%)	55.3	1,986 (100%)
	One	0.8	99.2	246 (100%)	66.7	369 (100%)
	Two or More	3.4	96.6	477 (100%)	72.1	662 (100%)
Black	None	1.3	98.7	2,969 (100%)	52.0	5,639 (100%)
	One	1.8	98.2	1,076 (100%)	58.7	1,084 (100%)
	Two or More	2.9	97.1	3,746 (100%)	66.3	5,650 (100%)
Latino	None	1.6	98.4	2,203 (100%)	51.4	4,284 (100%)
	One	1.0	99.0	798 (100%)	59.3	1,345 (100%)
	Two or More	2.8	97.2	2,108 (100%)	64.1	3,287 (100%)
Asian	None	4.0	96.0	302 (100%)	53.3	567 (100%)
	One	1.9	98.1	52 (100%)	61.9	84 (100%)
	Two or More	5.5	94.5	55 (100%)	67.1	82 (100%)
Other	None	0.0	100.0	11 (100%)	36.7	30 (100%)
	One	0.0	100.0	1 (100%)	33.3	3 (100%)
	Two or More	0.0	100.0	1 (100%)	20.0	5 (100%)
<b>Misdemeanors (N = 159,206)</b>						
White	None	31.1	68.9	7,703 (100%)	43.0	17,923 (100%)
	One	41.7	58.3	1,194 (100%)	61.9	1,930 (100%)
	Two or More	58.3	41.7	3,310 (100%)	81.7	4,052 (100%)
Black	None	37.6	62.4	15,045 (100%)	49.3	30,526 (100%)
	One	46.5	53.5	5,659 (100%)	61.2	9,253 (100%)
	Two or More	57.9	42.1	25,076 (100%)	76.4	32,809 (100%)
Latino	None	33.4	66.6	12,854 (100%)	44.7	28,745 (100%)
	One	39.2	60.8	3,896 (100%)	55.0	7,084 (100%)
	Two or More	50.7	49.3	11,523 (100%)	66.8	17,246 (100%)
Asian	None	32.5	67.5	2,834 (100%)	47.2	6,004 (100%)
	One	33.3	66.7	408 (100%)	59.9	681 (100%)
	Two or More	39.7	60.3	556 (100%)	65.6	847 (100%)
Other	None	26.6	73.4	79 (100%)	44.4	178 (100%)
	One	28.6	71.4	14 (100%)	45.2	31 (100%)
	Two or More	46.3	53.7	41 (100%)	68.3	60 (100%)
<b>Violations (N = 27,303)</b>						
White	None	85.1	14.9	397 (100%)	21.8	1,819 (100%)
	One	89.3	10.7	205 (100%)	62.9	326 (100%)
	Two or More	90.1	9.9	892 (100%)	79.4	1,123 (100%)
Black	None	83.8	16.2	1,532 (100%)	38.3	4,003 (100%)
	One	85.5	14.5	963 (100%)	63.3	1,521 (100%)
	Two or More	89.4	10.6	5,803 (100%)	79.3	7,319 (100%)
Latino	None	86.3	13.7	963 (100%)	20.2	4,775 (100%)
	One	85.7	14.3	518 (100%)	57.4	903 (100%)
	Two or More	87.0	12.9	2,153 (100%)	72.0	2,990 (100%)
Asian	None	71.0	29.0	31 (100%)	8.2	380 (100%)
	One	87.5	12.5	16 (100%)	42.1	38 (100%)
	Two or More	95.0	5.0	80 (100%)	68.4	117 (100%)
Other	None	100.0	0.0	4 (100%)	18.2	22 (100%)
	One	33.3	66.7	3 (100%)	50.0	6 (100%)
	Two or More	100.0	0.0	17 (100%)	94.4	18 (100%)

Table 2: Frequency and Percentage of Guilty Pleas Made at and After Arraignment by Defendants with None, One, or Two or More Prior Arrests<sup>72</sup>

<sup>72</sup> Please note: Information on case disposition is missing for fifteen cases and information on race is missing for 2,491 (1.2%) cases. See *id.* at 124.

For *misdemeanors*, the differences were more noticeable, and whites were no longer most likely to have their case disposed by guilty plea for all three prior record categories, as was the case for felonies. Among defendants with *no prior arrest*, a greater percentage of blacks had their cases disposed by guilty plea (49%), closely followed by Asians (47%), then by Latinos (45%), and then by whites (43%). There were almost no differences among defendants with *one prior arrest*, and whites, once again, had a greater percentage of guilty plea dispositions among the defendants with *two or more arrests* (82% for whites, 76% for blacks, 66% for Latinos, and 66% for Asians). Furthermore, compared to blacks with *no prior arrest*, whites with *no prior arrest* were more likely to enter guilty pleas after their arraignment (69% of whites as opposed to 62% of blacks).

Finally, for *violations*, racial differences in case disposition by guilty plea were striking. For example, among defendants with *no prior arrest*, 38% of blacks, 22% of whites, 20% of Latinos, and 8% of Asians had their case disposed by guilty plea. These differences decreased among defendants with a prior record, although Asians were still least likely to have cases disposed by guilty plea.

Additionally we conducted a series of multi-variate analyses to examine the impact of prior arrest versus prior prison sentence on sentence and charge offers for misdemeanor offenses<sup>73</sup> which took into account differences attributable to other factors, such as: defendant age, gender, race, and ethnicity; severity of the charges and number of counts; type of crime (person, property, or drug); pretrial custodial status; type of defense counsel (court-appointed, Legal Aid, NY Defender Services, Neighborhood Defender Service, or private counsel).<sup>74</sup>

These analyses suggested that racial and ethnic differences increase markedly in plea offers whenever prosecutors consider prior arrest, as opposed to prior sentence. If prior prison sentence were to be considered, blacks would be 12% more likely and Latinos 6% more likely to receive a custodial plea offer; however, if prior arrest is used as a factor instead, blacks become 20% more likely and Latinos 10% more likely to receive a punitive plea offer (i.e., an increase of 8% and 4%, respectively). This influence of *prior arrest* on sentence offers is consistent with the DANY Plea Offer Guidelines, described earlier, and suggests that if these guidelines were based on *prior sentences*, as opposed to *prior arrest*, much of the difference between black and white,

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<sup>73</sup> Plea offers in felony cases are not typically made at arraignment and were not available for our review; however, the research team collected additional information from paper files for a sample of felony cases. See *id.* at v.

<sup>74</sup> See *id.* at 223.

and between Latino and white defendants would be reduced, at least in misdemeanor cases.

### III. COST ARGUMENT

There are a number of fiscal, personal, and legal costs associated with the increased use of prior arrests as a factor in plea bargaining, and such costs are especially problematic when the arrests were for low-level, nonviolent crimes, since the costs may be disproportionate to the crimes.<sup>75</sup> As the New York County data showed, blacks and Latino defendants were most likely to have their cases dismissed,<sup>76</sup> and although the case dismissal may have been beneficial to them at that point, a higher dismissal rate may also mean that these defendants have incurred higher and avoidable costs of unnecessary arrest and detention. Indeed, while the costs of conviction and incarceration have received much more focus, being arrested in and of itself has numerous costs; these costs are then compounded when arrests make prosecutors more likely to offer more punitive plea offers and defendants more likely to take them.<sup>77</sup> When the decision to incarcerate and for how long has been based on noncustodial arrests, the costs of arrest may be particularly excessive. In this Part, we summarize recent research on the financial and social impact of arrest and detention to support our earlier argument that the use of arrests, and subsequent arrest records, in criminal case processing should be minimized to save criminal justice dollars and avoid unfair and costly treatment of all defendants, especially those targeted by aggressive and inequitable arrest practices.

Loss of time and money are two direct costs to the criminal justice system. First, police, prosecutors, defense attorneys, judges, and other court actors must expend time processing these cases, even when the ultimate result is dismissal. Police officers must spend time processing arrests, regardless of whether they are for felonies or low-level misdemeanors, which leads to extensive overtime costs to the department; but even when processing occurs during regular working hours, this is time that the police officer is no longer on the streets.<sup>78</sup> Second, the increased number of defendants also results in higher caseloads for prosecutors and defense attorneys, and longer case

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<sup>75</sup> See, e.g., Howell, *Broken Lives from Broken Windows*, *supra* note 1; Jain, *supra* note 1.

<sup>76</sup> In non-domestic violence felony cases, 38% of Latinos, 35% of blacks, 33% of Asians, and 32% of whites had their case dismissed; for non-domestic violence misdemeanor cases, 18% of Latinos, 17% of Asians, 15% of blacks, and 12% of whites had their case dismissed. See KUTATELADZE & ANDILORO, *supra* note 47, at 111.

<sup>77</sup> See, e.g., Kutateladze et al., *Does Evidence Really Matter*, *supra* note 2.

<sup>78</sup> Howell, *Broken Lives from Broken Windows*, *supra* note 1, at 307.

processing time as courts become increasingly flooded. In all of these scenarios, the time spent on each case translates to higher financial costs due to personnel expenses.

There are also financial costs involved in housing and caring for detainees. First, all arrestees must be confined while they await arraignment. While the right to a speedy trial requires that all cases be arraigned within twenty-four hours, it is not unusual for them to take longer.<sup>79</sup> Thus, at a minimum, the vast majority of arrestees must be housed and fed for twenty-four hours. Holding cells are often overcrowded and conditions deplorable.<sup>80</sup> Injuries due to the resulting violence or health problems resulting from lack of needed medical treatment or infectious disease<sup>81</sup> may lead to additional medical costs either in jail, if the arrestee is detained, or in the community, in the case of dismissal. If the person is further detained pretrial or posttrial, the costs associated with treating both new and previously existing conditions may be high, particularly for those with mental health or substance abuse problems.<sup>82</sup>

The costs of housing detainees postarraignment and postconviction are much higher even for low-level crimes. In fact, the NYC Independent Budget Office (IBO) estimated that as of 2012, the average annual cost per Rikers inmate was \$167,731.<sup>83</sup> These costs could be greatly reduced if case-processing times were reduced: high numbers of arrests necessarily contribute greatly to case-processing times as they increase the number of cases to be processed. In New York City, average length of stay was fifty-four days in 2014,<sup>84</sup> but it can be far longer. However, 76% of detainees are being held pretrial.<sup>85</sup> The annual costs of detaining defendants pretrial are considerable, and in many cases, unnecessary, as when defendants are held solely because they are unable to make bail.<sup>86</sup> The IBO estimated that the annual cost of detaining defendants pretrial solely because they were unable to make bail was

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<sup>79</sup> *Id.* at 293.

<sup>80</sup> *Id.*

<sup>81</sup> See Allen S. Keller et al., *Diabetic Ketoacidosis in Prisoners Without Access to Insulin*, 269 J. AM. MED. ASS'N 219 (1993); see also PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES (Robert B. Greifinger ed., 2007).

<sup>82</sup> See PUBLIC HEALTH BEHIND BARS, *supra* note 81.

<sup>83</sup> N.Y.C. INDEP. BUDGET OFFICE, *supra* note 52.

<sup>84</sup> MAYOR'S OFFICE OF OPERATIONS, THE CITY OF N.Y., MAYOR'S MANAGEMENT REPORT (2014), [http://www.nyc.gov/html/ops/downloads/pdf/mmr2014/2014\\_mmr.pdf](http://www.nyc.gov/html/ops/downloads/pdf/mmr2014/2014_mmr.pdf).

<sup>85</sup> See N.Y.C. INDEP. BUDGET OFFICE, *supra* note 52.

<sup>86</sup> In these cases, the defendants would be released if they were able to pay the bail assigned to them; thus, the only reason for their detention is their lack of necessary funds. See, e.g., Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html>; Mary T. Phillips, *A Decade of Bail Research in New York City*, N.Y.C. CRIMINAL JUSTICE AGENCY, INC. (2012), [http://www.nycja.org/lwdcms/doc-view.php?module=reports&module\\_id=604&doc\\_name=doc](http://www.nycja.org/lwdcms/doc-view.php?module=reports&module_id=604&doc_name=doc).

roughly \$125 million—\$25 million *higher* than the annual cost of housing defendants remanded without bail.<sup>87</sup> Additional costs are incurred transporting defendants to court and holding them while they await their appearance before a judge:<sup>88</sup> according to reports, the City's Department of Correction spends \$30.3 million annually on transportation costs alone.<sup>89</sup>

Personal costs are myriad, may affect not only the arrestee, but the arrestee's family, and are not limited to arrests resulting in custodial sentences.<sup>90</sup> While multiple arrests may increase the chance that the defendant will take a plea offer or be convicted at trial, even when the detainee is not ultimately convicted, he may face lengthy confinement times due to case processing delays. The gravest consequences of these delays were recently given a public face in the case of Kalief Browder. Browder committed suicide at the age of twenty-two after being jailed for three years without trial or conviction; his charges were eventually dropped for lack of evidence.<sup>91</sup> The crime for which Browder had been arrested was stealing a backpack.<sup>92</sup>

Perhaps it is not surprising, then, that it is often far easier for an arrestee to plead guilty than to fight his conviction.<sup>93</sup> Even if case-processing times were reduced, fighting a conviction requires additional court dates, and thus additional time away from work or school, which may increase the likelihood of even the innocent pleading guilty.<sup>94</sup> Furthermore, a prior record is likely to lead to harsher sanctions;<sup>95</sup> thus, both defendants and defense attorneys may be more inclined to view plea offers favorably regardless of the circumstances of the crime or the conditions of the offer. However, once a defendant has pleaded guilty,

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<sup>87</sup> Letter from George V. Sweeting, Deputy Dir., N.Y.C. Indep. Budget Office, to Melissa Mark-Viverito, Member, N.Y.C. Council (Sept. 30, 2011), <http://www.ibo.nyc.ny.us/iboreports/pretrialdetainneltrsept2011.pdf>.

<sup>88</sup> Martin F. Horn, Opinion, *Fixing the Jail Where Kalief Browder Was Held*, MARSHALL PROJECT (June 9, 2015, 12:10 PM), <https://www.themarshallproject.org/2015/01/21/fixing-the-jail-where-kalief-browder-was-held>.

<sup>89</sup> *Cost of Inmate in NYC Almost as Much as Ivy League Tuition*, N.Y. DAILY NEWS (Sept. 13, 2013, 10:37 AM), <http://www.nydailynews.com/new-york/cost-inmate-nyc-ivy-league-tuition-article-1.1471630>.

<sup>90</sup> See, e.g., Howell, *Broken Lives from Broken Windows*, *supra* note 1; Jain, *supra* note 1.

<sup>91</sup> See Michael Schwirtz & Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html>; see also Jennifer Gonnerman, *Kalief Browder, 1993–2015*, NEW YORKER (June 7, 2015), <http://www.newyorker.com/news/news-desk/kalief-browder-1993-2015>.

<sup>92</sup> See Schwirtz & Winerip, *supra* note 91; Gonnerman, *supra* note 91.

<sup>93</sup> Jain, *supra* note 1, at 821.

<sup>94</sup> *Id.* at 821–22.

<sup>95</sup> See, e.g., Kutateladze et al., *Cumulative Disadvantage*, *supra* note 54; Cassia Spohn & Susan Welch, *The Effect of Prior Record in Sentencing Research: An Examination of the Assumption that Any Measure Is Adequate*, 4 JUST. Q. 287 (1987).

he may incur financial costs (e.g., fines) in addition to a criminal record and all of its attendant consequences.<sup>96</sup> These consequences—some of which can also result from simply an arrest—may include deportation, loss of custody, loss of property, ejection from public and other housing, loss of current employment or eligibility for current employment, difficulty obtaining future employment, driver's license suspension, and lengthy incarceration when a low-level crime results in parole or probation violation.<sup>97</sup> Time spent signing up for and then performing community service may result in the loss of work or school days and unemployment, and even an arrest that results in dismissal can affect employment (e.g., by leading to unexplained absences).<sup>98</sup> There may also be serious health consequences: although inmates are at risk of disease while incarcerated, many enter the justice system with serious health problems due to poor health care prior to arrest<sup>99</sup> and their health may then further deteriorate while imprisoned. Those with chronic conditions may be at particular risk of health consequences, given that jails and prisons tend to limit care largely to treatment of acute complaints.<sup>100</sup>

Although increasing the frequency of arrests for low-level crimes has long been used as a tactic to reduce crime and serve as a deterrent, these types of public nuisance or quality-of-life arrests may also have negative effects on public safety for two reasons: first, because they harm police-community relationships, and second, because the time spent incarcerated may make detainees more likely to commit crimes after release.<sup>101</sup> Frequent arrests for low-level offenses are often viewed as unjust and discriminatory; as a result, they decrease trust in police and the criminal justice system, and beliefs in their legitimacy.<sup>102</sup> Research shows that residents of highly-policed communities may be less likely to report crime and to cooperate with law enforcement.<sup>103</sup> Paradoxically, such policies may even increase the likelihood of some individuals

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<sup>96</sup> See Howell, *Broken Lives from Broken Windows*, *supra* note 1.

<sup>97</sup> See *id.*; see also Jain, *supra* note 1; Mark Pogrebin et al., *The Collateral Costs of Short-Term Jail Incarceration: The Long-Term Social and Economic Disruptions*, CORRECTIONS MGMT. Q., Fall 2001, at 64.

<sup>98</sup> Howell, *Broken Lives from Broken Windows*, *supra* note 1, at 296.

<sup>99</sup> See Robert B. Greifinger, *Thirty Years Since Estelle v. Gamble: Looking Forward, Not Wayward*, in PUBLIC HEALTH BEHIND BARS, *supra* note 81, at 1, 3.

<sup>100</sup> *Id.* at 5.

<sup>101</sup> Tom R. Tyler & Jeffrey Fagan, *The Impact of Stop and Frisk Policies upon Police Legitimacy*, in KEY ISSUES IN THE POLICE USE OF PEDESTRIAN STOPS AND SEARCHES: DISCUSSION PAPERS FROM AN URBAN INSTITUTE ROUNDTABLE 30 (Nancy La Vigne et al. eds., 2012); see also Howell, *Broken Lives from Broken Windows*, *supra* note 1.

<sup>102</sup> Tyler & Fagan, *supra* note 101; see also Howell, *Broken Lives from Broken Windows*, *supra* note 1.

<sup>103</sup> Tyler & Fagan, *supra* note 101.

committing crimes.<sup>104</sup> In addition to the problems related to decreased trust in the police, the loss of employment and difficulties involved with obtaining gainful employment may make engaging in criminal activity upon release more likely.<sup>105</sup> Furthermore, family and community connections may have been eroded, while connections to others involved in criminal activity will have increased, simply due to the fact of incarceration.<sup>106</sup>

### CONCLUSION

Criminal justice decision making has been long described by social scientists and legal scholars as racialized and unequal.<sup>107</sup> The NYPD, just like numerous other police agencies across the country, has been under fire for disproportionately arresting minority defendants, especially for low-level drug offenses.<sup>108</sup> The opposite end of the case processing—sentencing—has also been scrutinized. Researchers have historically focused on sentencing disparities typically associated with judicial discretion.<sup>109</sup> Efforts to demonize judges' sentencing discretion led to a number of initiatives in the 1970s and 1980s with the U.S. Congress and many state legislatures passing laws to impose fixed sentences for specific offenses, most often for drug offenses. Among these initiatives, the U.S. Sentencing Guidelines is perhaps the most notable example.<sup>110</sup> The idea behind creating these guidelines in 1987 was to vastly curtail previously unfettered judicial discretion by determining types and length of sentences for more than 2,000 offenses that federal judges could use in sentencing.<sup>111</sup> These initiatives, however, may in fact have had the opposite effect: instead of ensuring greater fairness through tightly regulating judicial discretion, the guidelines awarded prosecutors

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<sup>104</sup> See Howell, *Broken Lives from Broken Windows*, *supra* note 1, at 271–72.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> See, e.g., CASSIA C. SPOHN, *HOW DO JUDGES DECIDE? THE SEARCH FOR FAIRNESS AND JUSTICE IN PUNISHMENT* ch. 5 (2d ed. 2009); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013).

<sup>108</sup> See Saki Knafo, *NYPD Still Arresting Large Numbers of Minorities for Low-Level Marijuana Offenses*, HUFFINGTON POST (Oct. 20, 2014, 6:59 PM), [http://www.huffingtonpost.com/2014/10/20/new-york-marijuana-arrest\\_n\\_6016700.html](http://www.huffingtonpost.com/2014/10/20/new-york-marijuana-arrest_n_6016700.html); see also *Don't Shoot*, *supra* note 12.

<sup>109</sup> See TUSHAR KANSAL, *SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE* (2005); see also NAZGOL GHANDNOOSH, *SENTENCING PROJECT, RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES* (2014).

<sup>110</sup> U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2015).

<sup>111</sup> See, e.g., Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

with even greater leverage for charging and plea decisions. This poses a number of challenges that are well documented elsewhere,<sup>112</sup> but, from the research perspective, because prosecutorial decisions are not as transparently made as judicial ones, identifying decision points that contribute to unequal treatment of defendants is difficult. The lack of transparency is particularly apparent with regard to the plea-bargaining process, making it difficult to delineate the factors that prosecutors consider when deciding what type of offer to make, or how much to negotiate that offer.

The study described as part of the Moral Argument<sup>113</sup> represents a rare effort to use actual prosecutorial data and to document an empirical relationship between arrest record and plea offer types. The data showed that prior arrests influence sentence offers more than prior prison sentences. This significant influence of prior arrests on sentence offers is consistent with the DANY Plea Offer Guidelines<sup>114</sup> which recommend more severe punishments for defendants with prior arrest history. The findings also suggest, however, that if these guidelines were based on prior sentences, as opposed to prior arrests, much of the difference between black and white, and Latino and white defendants would have disappeared, at least in misdemeanor cases.

In addition to contributing to unfair and unequal decision making, the use of prior arrest record for cases that did not result in conviction also seems to contradict the principle of the presumption of innocence. If arrests have not led to conviction, defendants are presumed innocent, and therefore, these records should not be used as the basis for making sentences for subsequent cases more punitive, no matter how long the arrest history might be. However, as noted in the Legal Argument,<sup>115</sup> the use of prior record in case processing is insufficiently regulated by both statutory and case laws, which leaves the door wide open for prosecutor's offices to choose which factors to consider during the plea negotiations.

Furthermore, as described under the Cost Argument,<sup>116</sup> unnecessary arrest and detention does substantial damage to the criminal justice system and the general public: it is wasteful when criminal justice funds are desperately needed elsewhere; it imposes higher caseloads on justice professionals who are already overworked; and, most importantly, arrests lead to harsher plea offers, longer

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<sup>112</sup> See, e.g., Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>.

<sup>113</sup> See *supra* Part II.

<sup>114</sup> See *supra* notes 68–70 and accompanying text.

<sup>115</sup> See *supra* Part I.

<sup>116</sup> See *supra* Part III.

subsequent sentences, and even additional arrests, which plagues communities of color and damages public trust in the justice system. For all of these reasons, we argue that (a) arrests should be viewed as a last resort, to be used whenever issuing warnings, citations, or summonses would be inadequate safeguards of public safety, and (b) prosecutors' offices should not use prior arrest as a factor by default when making plea offer determinations unless they are able to justify how using prior conviction record alone does not serve the purposes of justice, safety, and fairness, which these very offices are created to ensure.