

BRENNAN
CENTER
FOR JUSTICE

REFORMING FUNDING TO
REDUCE MASS INCARCERATION

Inimai Chettiar, Lauren-Brooke Eisen, and Nicole Fortier
with Timothy Ross

Foreword by Peter Orszag

ABOUT THE BRENNAN CENTER FOR JUSTICE

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

ABOUT THE BRENNAN CENTER'S JUSTICE PROGRAM

The Brennan Center's Justice Program seeks to secure our nation's promise of "equal justice for all" by creating a rational, effective, and fair justice system. Its priority focus is to reduce mass incarceration — by reducing the size and severity of the overall criminal justice system with a focus on reducing the influx of people into the system. The program's secondary goal is to ensure a fair civil legal system.

ABOUT THE BRENNAN CENTER'S PUBLICATIONS

Red cover | Research reports offer in-depth empirical findings.

Blue cover | Policy proposals offer innovative, concrete reform solutions.

White cover | White papers offer a compelling analysis of a pressing legal or policy issue.

ACKNOWLEDGEMENTS

The Brennan Center gratefully acknowledges the Democracy Alliance Partners, Ford Foundation, Open Society Foundations, the Vital Projects Fund, and the William B. Wiener, Jr. Foundation for their support of the Justice Program.

The authors are especially indebted to Michael Waldman, whose expertise and substantive engagement helped guide this report at each stage, and to John Kowal, for his invaluable input and assistance. The authors thank both of them for their overall leadership and support of the Justice Program.

The authors also thank the following Brennan Center colleagues: Julia Bowling, Abigail Finkelman, Jessica Eaglin, Oliver Roeder, Victoria Volpe, Rebecca Maller, Bruce Reilly, Thomas Giovanni, Gabriel Solis, John Ablan, Kevin James, and Ben Notterman for their research assistance; Frederick A. O. Schwarz, Jr., Jeanine Plant-Chirlin, Nicole Austin-Hillery, Desiree Ramos Reiner, Jim Lyons, Naren Daniel, Lena Glaser, Kimberly Lubrano, Danyelle Solomon, Sophia Kerby, Myrna Pérez, Michael Price, Vivien Watts, Jennifer Weiss-Wolf, and Jaemin Kim for their feedback.

They are grateful as well to Patricia Bauman, Richard Revesz, Daniel Kolb, James Johnson, Maya Harris, Seema Gajwani, Laurie Robinson, Patrick Lester, Gary Bass, Timothy Murray, Michael Livermore, Jasmine Tyler, Christopher Durocher, Jim Specht, Mark Simmelkjaer, and Vanita Gupta for their thoughts.

Finally, they extend their sincere gratitude to Foreword author Peter Orszag for his contribution to this publication, members of the Blue Ribbon Panel who generously shared their time to help refine the performance measures, and our peer reviewers for their time and contributions.

ABOUT THE AUTHORS

Inimai Chettiar is director of the Justice Program at the Brennan Center for Justice. She has expertise in and has published extensively on implementing legal reforms grounded in economics principles to reform the justice system. Ms. Chettiar was previously counsel at the ACLU, where she led state legislative efforts to end overincarceration. She also served as a fellow at NYU's Institute for Policy Integrity, a leadership fellow at the Center for American Progress, and a litigation associate at Debevoise & Plimpton LLP. Ms. Chettiar clerked for the Hon. Lawrence M. McKenna in the Southern District of New York. She holds a B.A. from Georgetown University and a J.D. from the University of Chicago School of Law.

Lauren-Brooke Eisen is counsel in the Justice Program at the Brennan Center for Justice. Previously, she was a Senior Program Associate at the Vera Institute of Justice in the Center on Sentencing and Corrections. Ms. Eisen also served as an Assistant District Attorney in New York City in the Sex Crime and Special Victims Bureau, Criminal Court Bureau, and Appeals Bureau. She holds an A.B. from Princeton University and a J.D. from Georgetown University Law Center.

Nicole Fortier is associate counsel in the Justice Program at the Brennan Center for Justice. Previously, she was a legal intern and researcher for the Justice Program. Ms. Fortier holds a B.A. from the University of Massachusetts Amherst and a J.D. from Fordham University School of Law, where she received the Archibald R. Murray Award for devotion to public service and represented criminal defendants at Lincoln Square Legal Services.

ABOUT THE CONTRIBUTOR

Timothy Ross is managing partner of Action Research Partners. He has over 20 years of experience in applied research, policy, and evaluation. Prior to founding Action Research, he directed the child welfare program and the parenting and family dynamics group at Child Trends. Dr. Ross worked for a decade at the Vera Institute of Justice, served as its Research Director, and in 2009 was named the first Vera Affiliated Scholar. Dr. Ross also teaches research methods at the NYU Silver School of Social Work, has authored numerous research reports, articles, and book chapters, and advises several leading foundations and service providers. He holds a B.A. from Williams College and received his doctorate in government and politics from the University of Maryland.

TABLE OF CONTENTS

Foreword by Peter Orszag	1
Introduction	3
Methodology	6
I. Part One: Success-Oriented Funding: A Policy Framework	9
A. Criminal Justice Incentives Today	9
B. Reorienting Incentives Through Funding	12
II. Part Two: Success-Orienting JAG: A Policy Proposal	18
A. The Edward Byrne Memorial Justice Assistance Grant (JAG) Program Today	18
B. Reorienting JAG	28
Conclusion	33
Appendix A: Proposed Performance Measures for JAG	34
Endnotes	49

FOREWORD

Peter Orszag

Millions of Americans have felt the direct effects of the recent government shutdown, just the latest in a series of fiscal standoffs that have threatened our economic recovery and distracted leaders from the country's real challenges. With partisan leaders perpetually miles apart on overall spending levels, and with no agreed-upon method for carving up the federal pie, failure seems forever on the horizon. This is an opportune moment to reconsider how we spend federal dollars. Criminal justice policy is an important place to start.

In 2002, Billy Beane, general manager of the Oakland A's and creator of the "Moneyball" approach to baseball, found a way to get better results with fewer resources, building a team that successfully took on its big-budget competitors despite a substantial financial disadvantage.

Could Washington do the same?

We can use this new era of fiscal scarcity to make Washington work better. By taking a cue from Billy Beane and implementing key tactics, policymakers can make better decisions, get better results, and create more areas of bipartisan agreement — and even help avert future crises.

The approach is simple.

First, government needs to figure out what works. Second, government should fund what works. Then, it should stop funding what doesn't work.

"Moneyball" encourages success. It encourages results and innovation. It spends dollars wisely. And it is grounded in the most basic economic principles.

Based on rough calculations, less than \$1 out of every \$100 of government spending is backed by even the most basic evidence that the money is being spent wisely. With so little performance data, it is impossible to say how many of the programs are effective. The consequences of failing to measure the impact of so many of our government programs — and of sometimes ignoring the data even when we do measure them — go well beyond wasting scarce tax dollars. Every time a young person participates in a program that doesn't work but could have participated in one that does, that represents a human cost. And failing to do any good is by no means the worst sin possible: Some state and federal dollars flow to programs that actually harm the people who participate in them.

This Brennan Center report marks an important step toward implementing this funding approach in Washington and beyond. This report's policy framework, termed "Success-Oriented Funding" starts with the justice system. It applies this framework to put forth a concrete policy proposal to reform the nation's single largest source of funding for criminal justice. Funding what works and demanding success is just as critical in this context as for other spending — perhaps even more so considering what is at stake: the safety of the public and a deprivation of liberty for defendants.

Embracing Success-Oriented Funding will move us toward a more effective, socially beneficial, and efficient criminal justice system.

Orszag is the former director of the White House Office of Management and Budget and the Congressional Budget Office. He is currently the vice chairman of global banking at Citigroup.

INTRODUCTION

The criminal justice system in the United States is vast. It touches every state and locality, creating a web of law enforcement and legal agencies. As with all complex enterprises, this system is honeycombed with incentives that steer or deter behavior, for good or ill.

Changes to criminal law can only do so much in a justice system that relies heavily on the discretion of individual actors. One key factor affects individual behavior and agency policies: money. Funding structures of criminal justice agencies — direct budgets and grant awards — can create powerful incentives. This is true at all levels — federal, state, and local.

Federal spending is one focal point. Washington spends billions of dollars each year to subsidize state and local criminal justice systems. Specifically, the Justice Department administers dozens of criminal justice grants. In 2012, just some of the largest programs, including the Community Oriented Policing Services and Violence Against Women Act grants, received more than \$1.47 billion.¹

The Edward Byrne Memorial Justice Assistance Grant (JAG) program is the largest nationwide criminal justice grant program. Although JAG represents a small percentage of nationwide dollars spent on criminal justice, it retains an outsize influence on activities and policy. Because it funds a wide array of areas, rather than funding one kind of activity, JAG extends its reach across the entire system. Its dollars flow to local police departments, prosecutor and public defender offices, courts, and others. State and local actors rely on JAG funds year in and year out. JAG, in its original form, was created almost 30 years ago. Not surprisingly, it provides funding driven by criteria developed at a time of rising and seemingly out-of-control crime.² JAG has not faced substantial overhaul since then.

Today, the country faces very different criminal justice challenges. On the one hand, crime and violence have fallen sharply across the country. Fears for safety, and crises such as the crack epidemic, have receded into history. The murder rate is almost at its lowest rate in a century.³

At the same time, however, a far more disturbing trend has emerged: the growth of mass incarceration in the United States. With less than 5 percent of the world's population, we have almost 25 percent of its prisoners.⁴ More than 68 million Americans — a quarter of the nation's population — have criminal records.⁵ Over half the people in prison are there for drug or nonviolent crimes.⁶ One in three new prison admissions are for parole violations.⁷ The cost to taxpayers has soared: Today, the nation spends more than \$80 billion annually to sustain mass incarceration.⁸ True social costs, such as the harms to families, communities, and the economy, are far higher.⁹

Fortunately, in recent years policymakers and the public have begun to advance a new approach to criminal justice, one that fights crime and violence but turns away from thoughtless criminalization and overincarceration. A wave of innovative reforms, pioneered in cities and states, is starting to reshape criminal justice policy. These new approaches, grounded in data, seek to align public policies to target major public safety goals while reducing unintended consequences. They focus on major, violent crime without mindlessly punishing people. Significantly, these changes are uniting activists and leaders of all political ideologies.¹⁰

A handful of these new policies have shown the power of tying funding for criminal justice agencies to “success” — clear goals and hard-nosed measurements of what works to meet the twin goals of reducing crime *and* alleviating mass incarceration.

Currently, JAG, managed by the Department of Justice (DOJ), does not align with these modern criminal justice goals and policies. By statute, DOJ cannot condition funding based on whether grant recipients meet specified goals.¹¹ However, state and local recipients are required to report on whether the funds meet certain performance measures.¹² Current measures inadvertently incentivize unwise policy choices. Federal officials ask states to report the number of arrests, but not whether the crime rate dropped. They measure the amount of cocaine seized, but not whether arrestees were screened for drug addiction. They tally the number of cases prosecuted, but not whether prosecutors reduced the number of petty crime offenders sent to prison. In short, today’s JAG performance measures fail to show whether the programs it funds have achieved “success:” improving public safety without needless social costs. These measures send a signal to states and localities that the federal government desires more arrests, more cocaine busts, and more prosecutions at the expense of other more effective activities.

It is time to update JAG to ensure that its measures fit today’s problems, and more importantly, that they promote effective, efficient, and just policies. JAG is an incredibly valuable tool. This report reviews this key federal program and offers a proposal to reorient the incentives it offers to state and local decisionmakers.

Part One of this report sets out a conceptual framework for criminal justice funding broadly, drawing on experimental models and pathbreaking understandings of how public actors make decisions and respond to incentives. The concept is simple: Scarce public resources should be steered toward policies that measurably work. This approach — what the Brennan Center calls “Success-Oriented Funding” — would link dollars spent on criminal justice to clear, precise goals. Ideally, Success-Oriented Funding would be implemented through widespread laws conditioning dollars spent on criminal justice on meeting clear objectives. If this direct link is not possible, governments can still provide straightforward benchmarks for use of the funding. As is often the case, what gets measured gets done.¹³ Setting clear goals for success — through performance measures — can “nudge” the behavior of recipients toward more effective and just practices.¹⁴

Part Two applies this approach to JAG through a concrete policy proposal. DOJ does not have authority to directly link JAG funding to success. Such action would need to come from Congress. Therefore, this proposal asks DOJ to redraw the performance measures it uses to query grant recipients on their activities. JAG’s performance measures should be reoriented to encourage states to modernize their criminal justice practices with more effective, successful ways to reduce crime while also reducing mass incarceration. Appendix A proposes, in detail, new performance measures that would implement Success-Oriented Funding in this critical federal grant program.

But JAG is just one starting point. Recasting JAG so it advances the thousands of state and local programs it funds toward new, clear goals can help spur further reform across the country. This shift could reverberate nationwide, moving the country away from business as usual in the criminal justice system — and away from mass incarceration.

It can also serve as a model of Success-Oriented Funding for states and localities. The true power of Success-Oriented Funding comes from strong reforms nationwide tying budgeting for criminal justice agencies directly to achievement of clear performance measures. This report's array of new performance measures can serve as a starting point for states and local governments to build upon to fashion more tailored performance measures.

METHODOLOGY & BLUE RIBBON PANEL

From August 2012 to October 2013, the authors and Brennan Center researchers conducted more than 100 off-the-record interviews with members of the criminal justice community. The transcripts and summaries of these conversations are on file at the Brennan Center for Justice. These interviewees are stakeholders in the U.S. Department of Justice's Edward Byrne Memorial Justice Assistance Grant (JAG) program or similar criminal justice grant programs. They include:

- representatives from local police departments who received JAG funds; current and former sheriffs of counties throughout the country; former and current police chiefs; research staff and leadership at leading police foundations;
- local prosecutors; local and state defense attorneys receiving JAG funding; national criminal defense bar leadership;
- research staff at the Government Accountability Office; federal and local government performance measures experts;
- former government economists and budget experts;
- officials and former officials at the United States Department of Justice who administered or oversaw JAG; current and former officials at the Office of Management and Budget;
- congressional staff interested in reforms to JAG;
- staff at the National Criminal Justice Association who work with JAG recipients; technical assistance providers to states and localities receiving JAG funding;
- former and current state and local JAG recipients from varied states, including California, Georgia, Illinois, Massachusetts, Nevada, New York, Oregon, Pennsylvania, Tennessee, Texas, Washington State, and Wisconsin; research staff located within State Administering Agencies who manage reporting on JAG performance measures to the federal government;
- policy and legal staff at progressive and conservative advocacy organizations that support criminal justice reform;
- think tank experts, academics, and researchers with expertise in economics, financial models, or criminal justice.

To prepare the proposed JAG performance measures, the authors retained Timothy Ross, the former Director of Research at the Vera Institute of Justice, to assist in research and analysis.

The Brennan Center also convened a Blue Ribbon Panel of experts and JAG stakeholders on October 8, 2013 in Washington, D.C., to review and provide feedback on a draft of the proposed performance measures, now in final form in Appendix A. The authors refined the measures based on the panel's feedback. The findings of this Brennan Center report should not necessarily be ascribed to panelists; these individuals served as experts and stakeholders providing feedback.

Panelists included:*

- **Jason Baker**, Director of Government Affairs, National District Attorneys Association
- **Jim Bueermann**, President, Police Foundation; former Chief of Police, Redlands Police Department, California; former Executive Fellow, National Institute of Justice, Department of Justice

- **Maurice Classen**, Program Officer, Community & Economic Development, John D. and Catherine T. MacArthur Foundation; former Senior Deputy Prosecuting Attorney, Seattle, Washington
- **Cabell Cropper**, Executive Director, National Criminal Justice Association; former Director of Management and Administration, American Prosecutors Research Institute; former Probation Specialist and Probation Officer, Denver, Colorado District Court
- **Michael Crowley**, former Senior Criminal Justice Policy Analyst, Justice Branch, Office of Management and Budget, Executive Office of the President
- **Jack Cutrone**, Executive Director, Illinois Criminal Justice Information Authority; President, National Criminal Justice Association
- **John Firman**, Director of Research, International Association of Chiefs of Police; former Associate Director, Illinois Criminal Justice Information Authority
- **Mark Houldin**, Defender Counsel, National Legal Aid & Defender Association
- **James Johnson**, Partner, Debevoise & Plimpton LLP; former Undersecretary, U.S. Department of the Treasury; former Assistant U.S. Attorney and Deputy Chief of the Criminal Division, Southern District of New York
- **Catharine Kilgore**, Administrator/Drug Court Coordinator, Dauphin County Pennsylvania Criminal Justice Advisory Board
- **David LaBahn**, President and CEO, Association of Prosecuting Attorneys; former Director, American Prosecutors Research Institute; former Director of Research and Development, National District Attorneys Association; former Deputy District Attorney, Orange and Humboldt Counties, California
- **Nancy La Vigne**, Justice Policy Center Director, Urban Institute; former Founding Director, Crime Mapping Research Center, National Institute of Justice; former Special Assistant to the Assistant U.S. Attorney General, Office of Justice Programs; former Research Fellow, Police Executive Research Forum
- **Jerry Madden**, Senior Research Fellow, Right on Crime; former House Representative, Texas State Legislature; Chairman, Texas House Corrections Committee
- **Erin Murphy**, Professor of Criminal Law, New York University School of Law
- **Elizabeth Pyke**, Director of Government Affairs, National Criminal Justice Association
- **Norman Reimer**, Executive Director, National Association of Criminal Defense Lawyers
- **Jiles Ship**, President, National Organization of Black Law Enforcement Executives; former Administrator of Criminal Investigations and Lieutenant State Investigator, New Jersey Attorney General's Office; former Director of Public Safety, Plainfield, New Jersey; former Patrolman Division and Investigations, Edison Police Department, Edison, New Jersey
- **Richard Stanek**, Sheriff, Hennepin County, Minnesota; President, Major County Sheriffs' Association
- **Chuck Wexler**, Executive Director, Police Executive Research Forum

In addition, several sheriffs from the Major County Sheriffs' Association provided comments on the measures.

This report was reviewed in detail by: Michael Crowley, former Senior Criminal Justice Policy Analyst, White House Office of Management and Budget; Elizabeth Fine, former Principal Deputy Assistant Attorney General, U.S. Department of Justice; Jim Bueermann, President of the Police Foundation; and Maurice Classen, Program Officer at the John D. and Catherine T. MacArthur Foundation.

*Organizational affiliations are included for identification purposes only.

I. PART ONE: SUCCESS-ORIENTED FUNDING: A POLICY FRAMEWORK

JAG program funding is part of the complex web of incentives found throughout the criminal justice system. Part One of this report provides an overview of incentives in criminal justice today and puts forth a conceptual framework for reform.

A. Criminal Justice Incentives Today

Today's overgrown criminal justice system is the result of the policies of the 1980s and 1990s that overcriminalized and overpunished behavior. In the preceding decades, a dramatic uptick in crime created widespread public fear.¹⁵ Lawlessness and social breakdown were matters of national concern. Lawmakers responded by increasing penalties, giving prosecutors more power, removing sentencing discretion from judges, and criminalizing previously legal behavior.¹⁶ Fear of widespread drug abuse, particularly of crack cocaine in the 1980s, intensified the "war on drugs." The federal government also expanded national criminal laws and used its money to encourage state and local governments to enact harsher crime laws.¹⁷

The political system's response to the crime epidemic yielded long-term systemic impacts that outlasted the original problem. It prompted an explosion in the number of people arrested, jailed, prosecuted, imprisoned, on parole, and with criminal records. Since 1970, the United States prison population grew by 700 percent.¹⁸ Urban communities of color bore the brunt: African-American men are now incarcerated at a rate over six times their white male counterparts.¹⁹ Put bluntly, these policies resulted in mass incarceration.

Along with this growth came a flood in spending. Corrections is the second fastest growing area of state spending.²⁰ The country now spends \$80 billion per year on state and federal corrections. Including judicial, legal, and police costs, this amount climbs to \$260 billion.²¹ Until recently, governments largely spent without concern.

Once the fiscal crisis hit state budgets in 2008 — and then Washington — governments paused to rethink this spending. Decades of research have paved the way for the current data-driven policies that rely less on punishment, while still promoting public safety.²² Bipartisan lawmakers in several states have come together to enact these policies. This modern approach seeks to shrink the criminal justice system without compromising the country's safety. These policies encourage citations instead of arrests for petty crimes, reduce sentences for nonviolent crimes, offer treatment options instead of prison for those with drug addiction, provide non-prison sanctions for technical parole violations, and parole eligibility for elderly prisoners.²³ They have dispelled the myth that harsher punishments always lead to less crime. Not only are these policies more efficient, they are also more effective and more just. It turns out that all that spending was not necessary to keep down crime.

New Policing Approaches

Local police departments are increasingly modernizing their practices. Traditional models of policing emphasize after-the-fact, reactive responses to crime.²⁴ Modern police approaches, on the other hand, employ tactics that not only respond to crime, but are effective at preventing it. They use techniques that are proven to work, rather than simply responding with the harshest punishment on the theory that harsher is always better. Leading police associations, including the International Chiefs of Police (IACP), Police Foundation, and Police Executive Research Forum (PERF), have urged a widespread move toward such approaches.²⁵

One such modern approach is “community policing,” which focuses on working collaboratively with communities as partners. It focuses on solving the underlying causes of crime and the conditions that create it.²⁶ Although police departments may implement community policing differently, this approach can work. For example, in the 1990s, San Diego implemented a community policing model that effectively controlled crime while reducing arrests and police misconduct.²⁷

Another approach, termed “evidence-based policing,” incorporates empirically tested approaches into policing practices. Police experiment, collect data on performance, and implement the most effective strategies. For example, the Los Angeles Police Department’s “predictive-policing model” analyzes data to predict where crimes will occur and targets resources in those areas before crime occurs.²⁸ In 2011, predictive policing was implemented in the Foothill area of Los Angeles. Within six months, crime fell by 12 percent from the previous year.²⁹ Another example is the “pulling levers tactic,” used in the federal Project Safe Neighborhoods (PSN) initiative since 2001. There, law enforcement warns offenders and potential offenders that gun-related violence will be responded to with all available “legal levers” to bring “swift and certain” punishments. PSN target areas in Chicago experienced a more rapid decline in murders, and an even faster decline in gun homicides, than the city as a whole.³⁰ Jim Bueermann, president of the Police Foundation, describes evidence-based policing as “an approach to controlling crime and disorder that promises to be more effective and less expensive than the traditional response-driven models, which cities can no longer afford. With fewer resources available, *it simply does not make sense for the police to pursue crime control strategies that science has proven ineffective.*”³¹

These reforms are helping reduce the country’s incarceration problem. Some reforms have been more systemic. For example, in 2011, Kentucky required the use of the latest social science tools (termed “risk assessments”) to determine the safety risk posed by an individual and deploy the most effective corresponding response.³² In 2010, South Carolina enacted a comprehensive package of sentencing and corrections legislation, which improves parole decision making, strengthens supervision for probationers and parolees, and makes sentencing laws more proportional. Through these reforms, the state reduced the number of supervisees revoked to prison and saved \$4.2 million in prison costs.³³

But most reforms have provided modest fixes and short-term relief. Generally, legislatures give wide latitude — sometimes necessary, sometimes not — to agencies and actors to implement these new laws. For example, in 2011 Louisiana gave elderly low-level, low-risk prisoners the right to a parole hearing so the parole board could decide who to release.³⁴ New Jersey allowed judges to send more offenders with drug addiction to drug courts; originally, it provided prosecutors veto power over this decision but removed it in 2012.³⁵ Maryland passed legislation in 2012 permitting some probationers and parolees who exhibited exemplary behavior to earn credit toward ending their supervision, but credit earned is only awarded at the discretion of judges.³⁶

Each reform produced tangible gains. But each was incomplete, because system actors had few incentives to reorient their actions to implement the ultimate goal of these policies — to reduce mass incarceration. Because of similar limitations, overall state reforms primarily *slowed* the growth of prison populations (and, at times, increased other parts of the correctional population, such as parolees), instead of reducing them.³⁷

The execution of criminal justice depends heavily on the discretion of individual actors. Any movement to reform the system must find a way to reorient this discretion. The criminal justice system is filled with generally well-meaning actors. But the incentives created for them are often misaligned with sensible policy. Many of them create perverse incentives that implicitly or inadvertently continue to entrench mass incarceration. The result is a system that, despite recent reforms, continues on the old auto-pilot. Too many people are still being pulled into and kept in the criminal justice system.

Making matters worse, agencies tend not to coordinate and even, in some cases, shift costs to one another. When it comes to reducing mass incarceration, entire sectors of the criminal justice system are not aligned and often work in counterproductive ways. The current system does not provide a way for individual actors to realign these incentives on their own. Todd Clear, dean of Rutgers University School of Criminal Justice, explains the problem succinctly: “It would be inconceivable for the private sector to operate under such a stifling set of disincentives for efficiency and innovation; yet we sustain this structure in criminal justice.”³⁸

Examples abound:

- Probation officers (often paid by counties) can revoke their supervisees to prison (usually paid for by states) for technical violations of conditions — e.g. missing a meeting or testing positive for drugs. When that revocation happens, counties shift financial burdens to the state.³⁹ Probation officers reduce their own workloads and their agencies’ costs by sending more people to prison. It can result in more prisoners. In Mississippi, for example, nearly one-third of prison admissions were for nonviolent parolees revoked to prison for technical violations (not new crimes).⁴⁰ And in California, until recently, almost two-thirds of prison admissions were for technical parole violations.⁴¹
- Some prosecutors are promoted or rewarded for securing convictions. For example, in Arapahoe County, Colorado, prosecutors receive cash rewards and promotions for successful convictions (excluding plea bargains and mistrials).⁴² In Harris County, Texas, the first three assistant district attorneys to try 12 cases and win half are given the “Trial Dawg Award.” Prizes have included an afternoon off and taking the lead on a murder trial.⁴³ According to one study in the *American Law and Economics Review*, federal prosecutors who secure longer prison sentences in their cases are more likely to become federal judges and partners in private law firms.⁴⁴ They are also more likely to enjoy higher pay grades.⁴⁵

- In most states and under federal law, police departments can keep some or all of the proceeds from civil forfeitures (i.e. seizures of private property).⁴⁶ This incentive has led to concerns that police departments may pursue forfeitures to increase revenue at the expense of other policing priorities.⁴⁷ In a survey of nearly 800 law enforcement executives, nearly 40 percent of police agencies reported that civil forfeiture proceeds were a *necessary* budget supplement.⁴⁸ A report on agencies in Texas found that, on average, asset forfeiture proceeds account for roughly 14 percent of police budgets,⁴⁹ with rural jurisdictions earning an average of 18 percent of police budgets from seized property.⁵⁰ Even starker, a 2007 study found that for every 1 percent increase in forfeiture proceeds retained by law enforcement, there was a 0.66 percent increase in drug arrests.⁵¹
- The most common example of perverse incentives is found in private prison contracts. A 2013 report from In the Public Interest, a resource center on privatization across sectors, examined 62 private prisons contracts in 21 states. It found that the majority guarantee that states will supply enough prisoners to keep between 80 and 100 percent of the private prisons' beds filled. If a state fails to fulfill this "goal," it must pay a fine to the company running the prisons.⁵²

In fact, as these examples suggest, the ways in which criminal justice policies are implemented often have the unintended consequence of fueling mass incarceration. The challenge: How can lawmakers provide direct incentives that drive toward a modern, more sensible approach to justice?

B. Reorienting Incentives Through Funding

The criminal justice system needs a new set of incentives – one that aligns actors' incentives with larger, smarter public policy goals.

A better approach, termed "Success-Oriented Funding" by this report, would use the power of the purse to shift the criminal justice system. Grounded in economic principles and built on discrete models in other policy areas, it would condition government dollars on whether agencies or programs meet specific, measureable goals.⁵³ These goals would drive toward what policymakers increasingly see as a new justice system, one that effectively reduces crime and alleviates mass incarceration. This cost-effective framework would ensure government is getting a good return on its investment in criminal justice. It could be applied throughout the criminal justice system — federal, state, and local — to all funding streams. Weaving together dollars, incentives, and policy goals can serve as a potent lever for change. The result: a web of sturdy funding structures that outlast the current fiscal crisis and ensure that mass incarceration does not revive in more prosperous times.

Economic theory indicates that actors provided with clear positive rewards will usually alter their behavior to match these incentives. Former Chairman of President George W. Bush's Council of Economic Advisors and Harvard University Professor N. Gregory Mankiw articulates this fundamental tenet in "Principles of Economics" — one of the most widely-used introductory economics textbooks. He recognizes a summary of the discipline: "People respond to incentives. The rest is commentary."⁵⁴ Mankiw goes on to note that "[w]hen policymakers fail to consider how their policies affect incentives,

they often end up with results they did not intend.”⁵⁵ In the case of criminal justice, these unintended consequences have helped fuel, and entrench, mass incarceration.

The Brennan Center’s Success-Oriented Funding framework builds and expands on existing experimental models drawing from this literature. The framework encourages incentive-oriented funding for all dollars sent to the criminal justice system, whether they are publicly financed or privately funded. Figure 1 (page 12) compares existing experimental models with Success-Oriented Funding.

By setting clear goals for success or failure of government agencies and programs, Success-Oriented Funding would achieve the “results-driven government” advocated for by former OMB Director Peter Orszag and former Domestic Policy Counsel Director John Bridgeland.⁵⁶ It would allow the government to “begin to identify what works – and just as importantly, what doesn’t,” and shift funding accordingly.⁵⁷ It would encourage governments to enact and agencies to execute the new generation of criminal justice policies. And, it would direct the discretion of individual actors working in these agencies (the parole officer, police officer, prosecutor on-the-ground executing policies) toward ending mass incarceration — a feat criminal laws cannot achieve on their own.

Success-Oriented Funding is most powerful when agencies are given a handful of clear goals. Examples of goals include: *reducing recidivism, reducing crime, reducing prison sentences, or reducing incarceration*. Goals would vary depending on the target of the dollars. Appendix A sets forth an array of measures for a variety of criminal justice agencies that governments can use as a starting point when seeking concrete goals.

Success-Oriented Funding can be implemented for funding streams across the justice system:

- Congressional appropriations for federal agencies (e.g., Bureau of Prisons);
- Federal grant programs for federal, state, or local activities (e.g., JAG, Community Oriented Policing Services, and Violence Against Women Act grants);⁵⁸
- State budgets providing funding for state or local agencies (e.g., prisons, courts, community corrections);
- Local budgets providing funding for local agencies (e.g., prosecutors, police, jails);
- State and local grant programs for criminal justice agencies;
- Government contracts to private prisons or privately run programs.

The approach can link incentives and funding in three different forms: direct to existing dollars, direct to bonus dollars, or indirect. Practical, legal, fiscal, and political considerations can drive which form may be most appropriate for specific funding streams.

1. Condition existing funding on achieving specific goals

The most direct form involves tying existing funding *directly* to goals. This could take the form of conditioning program and agency budgets or grants on achievement of concrete, measurable outcomes. If agencies do not achieve “success,” the consequences would be a reduction in funding, some other negative impact, or possible termination.

Recently implemented programs and policies incorporate similar approaches; Success-Oriented Funding expands on these. In one innovative approach, called “social finance,” government partners with non-profits or private companies and pays them to achieve concrete social outcomes.⁵⁹ The Obama administration is encouraging application of this model to federally funded, socially beneficial programs.⁶⁰

One example of social financing is the “social impact bond.” In 2012, New York City introduced the first social impact bond in the country for criminal justice. Goldman Sachs holds a \$9.6 million bond for a four-year program to reduce recidivism among juveniles at Riker’s Island jail. The financial structure of these bonds is complex. However, Goldman’s incentives are clear: the lower the program’s recidivism rate, the greater the interest paid. Specifically, Goldman stands to earn up to \$2.1 million in profit if it cuts participant recidivism by more than 10 percent. But, should recidivism rise above 10 percent, Goldman would lose as much as \$2.4 million.⁶¹ Social impact bonds could be a positive development in the criminal justice system. They “bet on the success” of prisoners instead of using the typical model of privatization, in which private prisons generally bet on failure (i.e. the more prisoners, the better).

These structures for non-profit and private financing are promising models.⁶³ However, models that rely on private funding cannot bring the vast change needed to reform the justice system. Success-Oriented Funding would apply this concept of clear funding incentives to *public* funding as well. These same clear goals can be provided for the public agencies and actors who execute criminal justice. For example, grants to law enforcement could be conditioned on reducing violent crime, dollars to prisons on reducing the three-year recidivism rate of exiting prisoners, or funding to prosecutors based on reducing the number of low-level offenders sent to prison. In this way, government can take responsibility for ensuring the effectiveness of its own policies, agencies, and actors.

There are existing federal grants that provide incentives to public programs. The Department of Education’s Investing in Innovation Fund (i3) is a well-cited example. It funds programs proven to improve student achievement, while also fostering innovative programs that could become successful.⁶⁴ To receive funding, i3 applicants must provide evidence that their programs meet one of four broad goals, such as “[t]urning around persistently low-performing schools” or “[i]mproving the use of data to accelerate student achievement.”⁶⁵ The Department weighs applicants and chooses those that most strongly make their case. Success-Oriented Funding differs from this type of competitive federal grant in two key ways. i3 fund does not provide recipients with the specific, concrete, measurable goals that Success-Oriented Funding would. And, competitive federal grants generally award money to discrete programs, whereas Success-Oriented Funding would apply broadly not only to programs but also to broad funding streams and budgets.

This most potent form of Success-Oriented Funding provides the strongest incentive because the link between funding and concrete goals is the strongest.

Figure 1: Comparison of Funding Incentive Models

Model	Example	How it Works	Who is Incentivized	Affected Entity	Implemented by
Social Impact Bond (often called “Pay for Success”)	NYC Riker’s Island	Private investor finances a public program; government pays interest to investor for success of program.	Private/non-profit entities, which receive full payment only if goals are met.	Discrete public programs	Federal, state, and local governments
Performance Incentive Funding	IL, CA, PA	States give bonus dollars to local agency budget when agency saves state money.	Public agencies, which receive bonus dollars if states save money.	Public parole & probation budgets	State governments
Social Innovation Funds ⁶²	Federal Social Innovation Fund	Federal government provides funds to “intermediaries” that match federal dollars with private funds to support local programs.	Non-profit entities, which receive federal and private funds only if there’s evidence their programs are effective and innovative.	Discrete non-profit programs	Federal government
Competitive Federal Grants	i3	Federal government provides grants to state or local programs that provide evidence of results.	Public entities, which receive grants only if evidence their program meets broad goals.	Public programs	Federal government
Success-Oriented Funding	Brennan Center JAG Proposal	Government: (1) only provides funding if entities meet specific, measureable goals; (2) gives bonus dollars for meeting such goals; or (3) steers recipients toward public policy goals with clear performance measures.	Applicable to all criminal justice entities (public, private, nonprofit), which receive additional money (budget, grant, or prize) or positive performance evaluations only if they meet goals. Encompasses and expands on existing models.	Applicable to all criminal justice dollars (budgets, grants, programs)	Applicable at all government levels (federal, state, local)

2. Offer “Prize” Money for Achieving Goals

Where it is impractical to condition an entire agency budget on meeting specific goals, governments can offer additional bonus dollars on top of standard budget or grant amounts when agencies achieve concrete goals.

This concept has percolated into the criminal justice system. States have experimented through a model called “performance incentive funding” that awards “prize” money (a portion of the cost savings an agency participated in) to programs that achieve specific results. Already, Illinois and California enacted laws to reward probation agencies with a share of prison cost savings when they revoke fewer probationers to prison for violations. As of 2011, California’s program saved the state \$278 million in prison costs and

reduced revocations by nearly one-third.⁶⁶ In 10 counties in Illinois, its program cut participant recidivism by as much as one-fifth, and saved \$16 million in avoided prison costs in just two years.⁶⁷ Many states have enacted some type of similar reform for community corrections agencies.⁶⁸

This year, Pennsylvania implemented this approach for community corrections centers.⁶⁹ When announcing the reform, Bret Bucklen, the director of planning, research, and statistics for the state's Department of Corrections stated: "We want to measure performance. We want quantifiable performance We want to force the system to think hard on how to reduce the recidivism rate."⁷⁰

By implementing Success-Oriented Funding to create prize incentives broadly, criminal justice actors throughout the system will be required to "think hard" on how to achieve their goals. Thus far, prize funding in criminal justice has been limited to community corrections. Although it is true that precise measurable goals are challenging to design for other criminal justice agencies, the task is not impossible. This concept of prize money can be implemented widely in criminal justice. The measures in Appendix A can be a starting point.

3. Implement Performance Measures to "Nudge" Recipients Toward Goals

The third form of Success-Oriented Funding involves providing funding to criminal justice agencies along with clear goals, but without mandating them.

This subtler approach is grounded in principles of behavioral economics. This research teaches that it is not necessary to order policy changes through "command and control" regulations to have the desired impact. Behavioral economics indicates that insights into psychology can explain and guide (i.e. "nudge") decision-making in a certain direction.⁷¹ Positive reinforcement and indirect suggestions influence the decisions of individuals, just as effectively as — or sometimes more effectively than — mandates.⁷² Former Office of Information and Regulatory Affairs Administrator Cass Sunstein and University of Chicago Business School Professor Richard Thaler explain in their pivotal 2008 book "Nudge," such policies "preserve freedom of choice while also nudging people in directions that will improve their lives."⁷³ They alter individuals' incentives by implicitly signaling the desired action. This approach has already borne fruit — from tax policy to nutrition to environmental law.⁷⁴

Building on these principles, the third form of Success-Oriented Funding would tie funding to goals in the form of robust "performance measures." Performance measures would accompany funding, but awards would not be directly conditioned on meeting them.

The U.S. Government Accountability Office (GAO) defines "performance measures" as numeric assessments that inform the government whether a program or agency "has achieved its objectives, expressed as measurable performance standards."⁷⁵ They document success, what is working and what is not, and shed light on how to make improvements. Performance measures can improve effectiveness, accountability, and efficiency of government programs.⁷⁶ According to the Performance Institute, a think-tank that specializes in government performance management, high-quality performance measures are specific, measurable, accountable, and calculated over a specific period of time (e.g. quarterly or annually).⁷⁷

The White House's performance.gov website measures the performance of federal agencies. It explains the importance of goals in the form of measures:

A goal is a simple but powerful way to motivate people and communicate priorities. Leaders in states, local governments, Federal programs, and in other countries have demonstrated the power of using specific, challenging goals (combined with frequent measurement, analysis, and follow-up) to improve performance and cut costs.... The Federal Government operates more effectively when agency leaders, at all levels of the organization, starting at the top, set clear measurable goals aligned to achieving better outcomes.... This leads to the discovery of what works and what does not – guiding agency action and investment.⁷⁸

Research has shown the mere act of measuring can affect the behavior of actors.⁷⁹ The adage of management experts and government performance experts is simple: *What gets measured gets done.*⁸⁰ Performance measurements can act as signposts in setting policy.

Police are among the most outspoken criminal justice actors calling for more information on their own performance. In a 1997 congressional report, Lawrence Sherman, the founder of evidence-based policing, examined the effectiveness of federal crime prevention strategies.⁸¹ He noted the absence of information on performance and called for more rigorous social science evaluations:

The effectiveness of most crime prevention strategies will remain unknown until the nation invests more in evaluating them.... The inadequacy of that investment to date prevents a judgment for or against the effectiveness of the \$3 billion in federal crime funds, at least to a reasonable degree of scientific certainty.... [A] review of over 500 impact evaluations reveals only a handful of conclusions that can be generalized from those studies to similar programs around the nation. By scientific standards, there are very few “programs of proven effectiveness.”⁸²

Strong performance measures can help provide this type of data to lawmakers on success of policies and programs. As in many fields, it is challenging to devise effective performance measures for criminal justice. Results can be hard to measure. And there are many factors beyond the control of criminal justice agencies that contribute to changes in crime and violence. Yet those most deeply involved in criminal justice recognize that better-crafted performance measures can move outcomes. Among others, leading police organizations, such as IACP, PERF, and the Police Foundation have called for more robust performance measures.⁸³

Part Two of this report takes up this challenge of devising performance measures for criminal justice. It puts forth a policy proposal to implement this third form of Success-Oriented Funding for a concrete funding stream: the federal JAG program. It provides an array of proposed performance measures for various criminal justice activities including policing. “Nudging” funding recipients toward goals through performance measures can be useful for funding streams like JAG for which agency officials wish to implement clear goals, but legislative bodies have left funding purposes too broad.

It is time to transform funding to help curb mass incarceration. Reform can begin with the nation's largest criminal justice grant program.

II. PART TWO: SUCCESS-ORIENTING JAG: A POLICY PROPOSAL

In February 1988, Edward Byrne, a 22-year-old New York City police officer, was monitoring the home of a drug case witness. Two men approached his patrol car. One shot the officer five times, killing him. The incident was featured in TIME magazine. More than 10,000 police officers attended Byrne's funeral. New York mayor Edward Koch called Byrne a "martyr in what amounts to a war for national survival."⁸⁴ The tragedy shifted the nation's focus to that war — the "War on Drugs" — and the broader war against rising crime.

In response to Byrne's death and in the hopes of preventing more brutal crimes, Congress created the Edward Byrne Memorial State and Local Law Enforcement Assistance Program.⁸⁵ It replaced and expanded a 1968 law that provided funding for local law enforcement.⁸⁶ In 2005, when reauthorizing the Violence Against Women Act (VAWA), Congress merged the Byrne program with another law enforcement grant to create the Edward Byrne Memorial Justice Assistance Grant program.⁸⁷ This is today's JAG program.⁸⁸ JAG's predecessor programs focused on funding for law enforcement. But JAG today is the largest single source of federal funding for state and local criminal justice activities.⁸⁹ Because its funds flow to thousands of agencies across the country, its influence is far greater than its relatively small budget. A change to JAG could reverberate nationwide.

This section provides an overview of the current JAG program, explains its current challenges, and puts forth a concrete policy proposal to implement Success-Oriented Funding. Although Success-Oriented Funding is more easily implemented in smaller scale programs or specific agency budgets, the framework can also apply to large funding streams such as JAG.

A. The Edward Byrne Memorial Justice Assistance Grant (JAG) Program Today

Administration & Funding

JAG dollars flow from the federal government to all 50 states, territories, and more than 1,000 localities. The funding level for the program averages between \$300 to \$500 million yearly. In 2009, JAG received a one-time infusion of \$2 billion as part of the American Recovery and Reinvestment Act (commonly referred to as the stimulus package). Over the past two years, however, Congress cut JAG funding by 34 percent to \$352 million this year due to the "sequester."⁹⁰

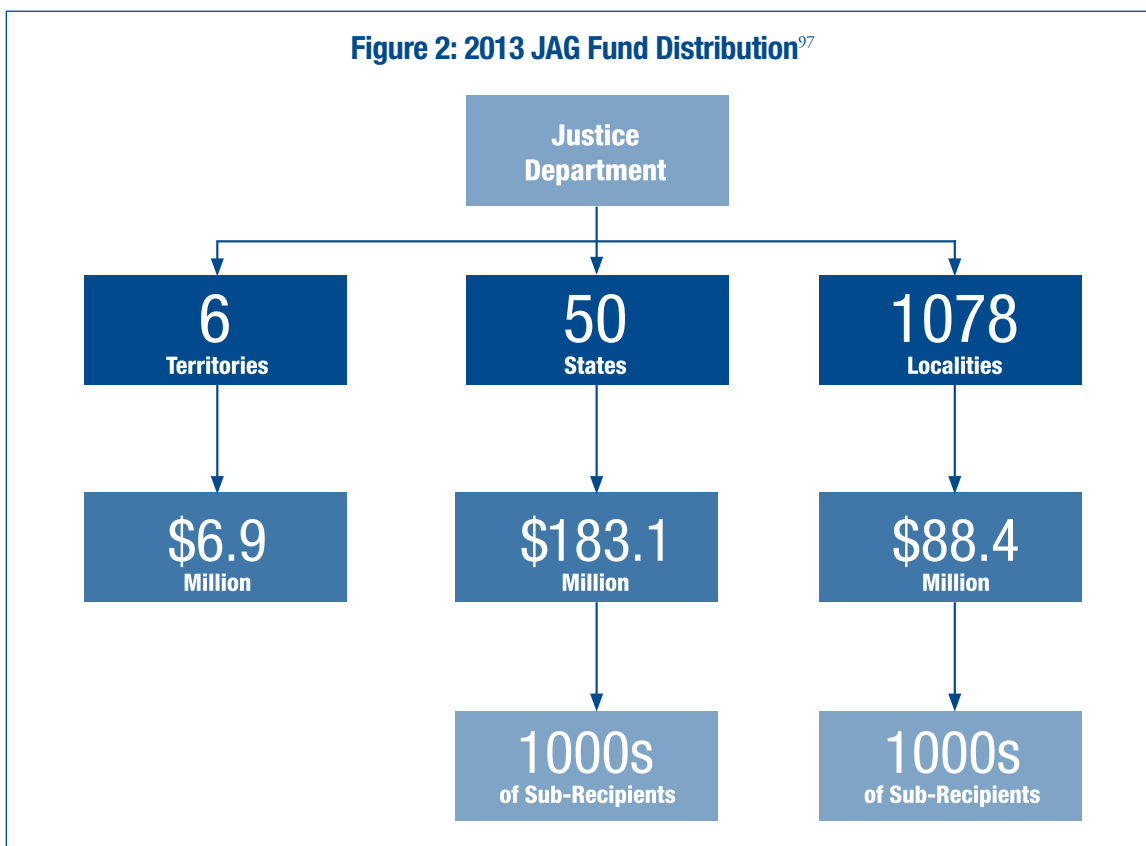
Congress gave the Justice Department authority to administer the program. DOJ does so through its Bureau of Justice Assistance.⁹¹ Under the statute creating JAG, DOJ must award funds to states and localities based on a strict formula. State recipients do not compete for the funds. They receive funding based on this formula, which considers a state's share of the number of violent crimes nationwide and its share of the national population.⁹² By statute, DOJ must send 60 percent of a state's allocation directly to state governments. DOJ sends the remaining 40 percent to each state's local governments.⁹³

Because of the formula's dual consideration of violent crime and population rates, JAG allocations can vary widely. The five largest total state awards in 2013 included California (\$30.8 million), Texas (\$21.4 million), Florida (\$18.0 million), New York (\$15.4 million), and Illinois (\$11.2 million). The JAG legislation also mandates a minimum allocation level for each state or territory equal to 0.25 percent of the total JAG

allocation, regardless of its population or crime average. North Dakota, Vermont, and Wyoming each received this level of funding, getting about \$696,000 in 2013. Local governments can also receive sizable amounts. For example, New York City, Chicago, Philadelphia, Houston, and Los Angeles were eligible to receive between \$1.7 million and \$4.0 million each in 2013.⁹⁴

JAG's Outsize Impact

State and local governments pass JAG funds on to an array of sub-recipients, who typically must compete for the dollars locally.⁹⁵ Decisions about sub-recipient funding are controlled by state agencies or designated local officials.⁹⁶ In this way, JAG dollars find their way into thousands of programs and activities across the country.



These dollars flow across the country and throughout the criminal justice system — from police task forces to indigent defense to re-entry programs.⁹⁸ For example, in 2011, New York State sent JAG funds to 87 sub-recipients just in the law enforcement category alone. These funds went to varied purposes including funding for crime analysis centers and equipment for electronic fingerprinting.⁹⁹

Because JAG is federal money — additional to and apart from state and local budgets for these agencies — JAG funding is essentially “found money.” JAG also provides money for activities that states often do not, making JAG funds even more critical. For example, JAG money supplements most police multijurisdictional drug task forces nationwide.¹⁰⁰ Although local jurisdictions pay officer salaries, JAG provides additional funding for operations, equipment, and overtime.¹⁰¹

Recipients are vocal about the pivotal role JAG funds play in supporting their activities even if they constitute a seemingly small amount of their overall budgets. For example, JAG funds account for less than 5 percent of Boston and Chicago Police Department budgets.¹⁰² Nevertheless, every year, leading law enforcement groups submit a letter to Congress in support of JAG's reauthorization. Supporters include PERF, Major Cities Chiefs, Major County Sheriffs' Association, National Sheriffs' Association, National Alliance of State Drug Enforcement Agencies, and the International Union of Police Associations. Their 2013 letter described JAG as "the much-needed spark which allows state and local governments, as well as our organizations and local partners, to test new initiatives and coordinate across the justice system to find solutions that work."¹⁰³

A 2013 report from the National Criminal Justice Association (NCJA, an organization that works with states on criminal justice funding, including JAG) also pointed to the outsize impact of the program. Although JAG funds represent only a small percent of criminal justice spending nationwide, "these dollars represent an opportunity to fund initiatives that can positively impact the work of multiple system partners, enhance public safety, and if used effectively, will ultimately reduce justice system costs and save the taxpayers money."¹⁰⁴

It is not surprising that states, strapped for cash, will clamor for federal funding and reorient their priorities to obtain it. As explained in Section 2, DOJ has set forth implicit goals to recipients, and JAG recipients often respond to DOJ signals on how to spend JAG funds. Precisely because JAG funds provide money at the margins to thousands of agencies across the country, JAG's influence on criminal justice policy reverberates far beyond its actual dollars.

Funded Activities

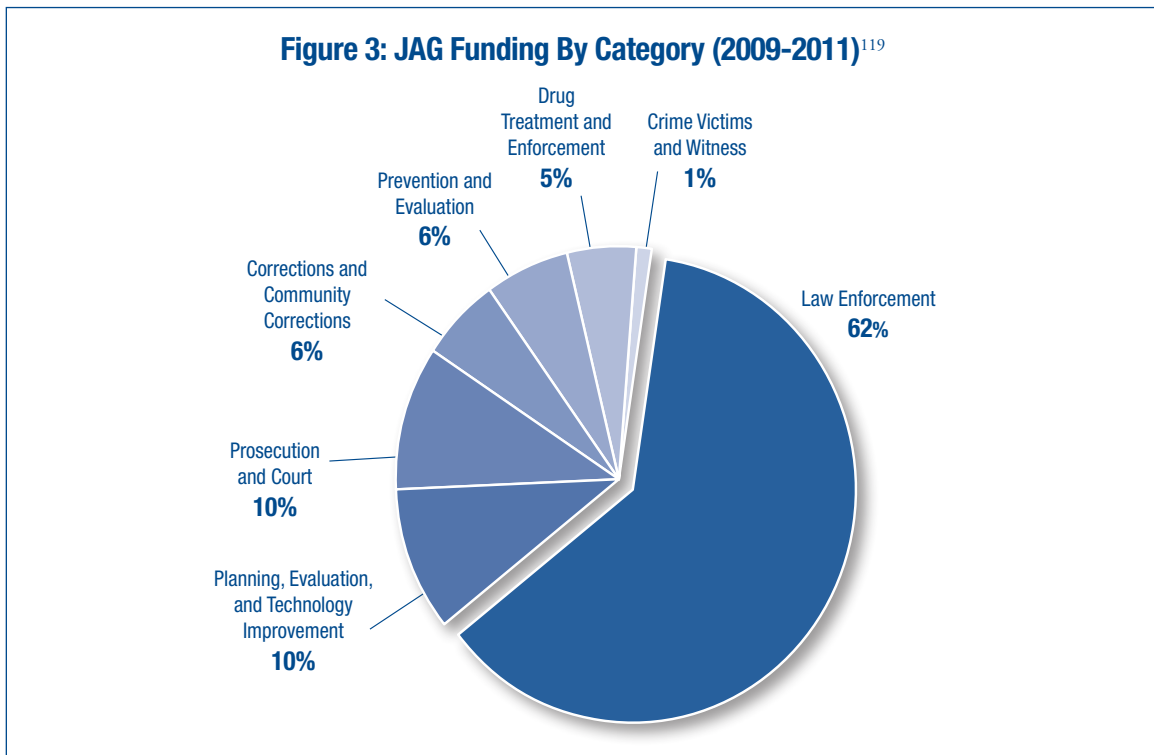
Recipients can use JAG funds to support almost any criminal justice activity. The statute broadly provides that JAG dollars can be used "for criminal justice." It then enumerates seven categories of specific uses (listed below).¹⁰⁵ Recipients can apply funds toward "personnel, equipment, supplies, contractual support, training, technical assistance, and information systems" within these categories.¹⁰⁶ It provides only a few limits on how JAG dollars can be spent. Recipients cannot buy the following items without special permission from DOJ: non-police vehicles, boats, or aircraft; luxury items; real estate; or construction of non-correctional buildings.¹⁰⁷

DOJ cannot mandate that states spend JAG funds on any specific category. Instead, states have complete discretion to direct the money toward one or more of the seven categories:

1. **Law enforcement programs.** Most recipients in this category are local police. Latest data shows that 62 percent of total JAG funds from 2009-11 were spent in this area.¹⁰⁸ This large allocation likely reflects the original focus on law enforcement of JAG's predecessor grant programs. In 2012, almost half of state law enforcement JAG funds went to drug and gang enforcement, and 34 percent went to equipment and operations.¹⁰⁹
2. **Prosecution and court programs.** This category includes actors in the criminal court system: prosecutors, standard courts, specialty courts (e.g. drug courts and other non-traditional courts), and general defense and indigent defense. Of total JAG funds spent from 2009-11, 10 percent were within this category.¹¹⁰ In 2012, nearly half (44 percent) of state JAG funds in this area went to prosecution, 18 percent to specialty courts and pretrial services, and 4 percent to indigent defense.¹¹¹

3. **Prevention and education programs.** This category includes crime prevention or public education programs. Examples include drug education programs in schools and counseling programs for ex-offenders to help prevent future crime. Of total JAG funds spent from 2009-11, 6 percent were spent in this area.¹¹²
4. **Corrections and community corrections programs.** Jails, prisons, probation, and parole agencies fall into this category. Of total JAG funds spent from 2009-11, 6 percent were spent in this area.¹¹³ In 2012, 20 percent of state funds in this area went to corrections, 19 percent to community corrections and supervision services, and 21 percent to re-entry programs.¹¹⁴
5. **Drug treatment and enforcement programs.** Drug treatment, assessment, and counseling programs can be funded through this category. Notably, it overlaps with the law enforcement category. Of total JAG funds spent from 2009-11, 5 percent were spent in this category.¹¹⁵
6. **Planning, evaluation, and technology improvement programs.** This includes planning efforts to determine the best use of JAG funds, evaluations of local programs, and improvements in technology. Of total JAG funds spent from 2009-11, 10 percent were spent in this area.¹¹⁶
7. **Crime victim and witness programs.** This includes services to crime victims, such as domestic violence services, and witnesses in enforcement and prosecutions. Of total JAG funds spent from 2009-11, 1 percent was spent in this area.¹¹⁷ A 2010 survey revealed that 55 percent of funds for this area went to victim services and 26 percent to forensics.¹¹⁸

JAG funding can support criminal justice at its best, but it can also buttress criminal justice at its worst. Under the current system, there is often no way for DOJ to tell the difference.



Track Record of Success for the Program

Historically, JAG funds have often been used to identify and promote innovative and effective programs.¹²⁰ Recently, JAG funding has supported some new, data-driven programs that protect public safety without encouraging mass incarceration. These programs demonstrate just how effective JAG money can be when spent wisely.

- *Hawaii Opportunity Probation with Enforcement Initiative.* Commonly known as HOPE, the program is lauded as a national model. It imposes swift and certain sanctions (usually short jail stays) in response to every detected violation of probation conditions. In this matter, it prevents the usual pattern of multiple violations with no sanctions until a frustrated officer finally revokes an individual back to prison. HOPE participants were 55 percent less likely to be arrested for a new crime, 72 percent less likely to use drugs, and 53 percent less likely to be revoked back to prison. The program saved millions in avoided prison costs since its inception in 2004.¹²¹
- *Illinois Adult Redeploy.* This program sends nonviolent offenders to specialty courts or probation rather than prison. Illinois uses an approach similar to Success-Oriented Funding by providing counties with more dollars when they agree to send 25 percent fewer people to prison. In 10 counties, since 2011, the program cut participant recidivism by as much as 20 percent, kept more than 800 people out of prison, and saved \$16 million in avoided prison costs.¹²²
- *Massachusetts Domestic Violence High Risk Team.* The program, run by a multi-agency team of police, probation, prosecutors, and social workers, aims to prevent domestic violence murders. Using risk assessments, the program determines which domestic violence offenders are most at risk of killing their partners and provides them with services to help them not recidivate. If offenders violate restraining orders or commit assaults, they receive swift sanctions such as terminating child visits or imposing electronic monitoring. Between 2005 and 2011, pilot programs delivered positive results: no participants were charged with murder and 92 percent of victims had not been re-assaulted.¹²³ In 2013, JAG funds helped expand the program across the state.¹²⁴

Challenges with the Grant

The nation's criminal justice system relies heavily on incarceration. Advocates across the political spectrum have urged a reconsideration of this approach. And many states, both red and blue, have begun to recognize that current levels of incarceration are ineffective and unaffordable, instituting policies to reduce those levels.

In this vein, JAG has come under scrutiny. This section highlights some of the problems with JAG. The program's performance measures do not drive toward specific, measureable goals. Instead, they pose vague questions, fail to ask about programmatic success, and may steer recipients toward using punitive strategies, rather than ones that increase public safety. By law, DOJ has full authority over the content of the performance measures.¹²⁵

Further, JAG recipients are often not held accountable for their spending choices, and the reports on their performance are not publicly available. This makes it impossible for Congress, DOJ, or the public to measure the effectiveness of the program. In the past few years, DOJ has made some adjustments to the measures, but various policymakers encourage a wholesale rethinking of the approach used to determine JAG funding.

Existing Performance Measures Nudge Toward Mass Incarceration

JAG funding is accompanied by a quarterly report filled out by recipients. This 39-page, 154-question long questionnaire created by DOJ, asks recipients to report on certain data and information to determine if they meet the performance measures established by DOJ.¹²⁶ (Once a year, recipients are also required to fill out a narrative questionnaire, seeking information on their accomplishments and difficulties.)¹²⁷

These performance measures suffer from three overarching problems. First, many existing questions are vague, or call for narrative explanations. For example, the measures ask law enforcement the following question about their programs:

Check all that apply:

- Alcohol/Tobacco Enforcement
- Broken Windows
- Child Abuse Investigation
- Community Policing
- Crime Prevention
- Domestic Violence Enforcement¹²⁸

It goes on to list additional programs. But it is unclear from this question what these categories mean, and there are no follow-up questions asking whether these programs achieved any goals. This question may tell DOJ that Connecticut has used JAG funding for child abuse investigations, but it does not convey whether it resulted in faster investigations or successful prosecutions. These questions do not provide information that allows DOJ to understand fully how funds are used or to assess the impact of the funding.

Second, performance measures that do ask for specific data do not ask about the success of programs. A sampling of the current performance measures for two of the seven categories are below.

Figure 4: Sample of Current JAG Performance Measures

CURRENT POLICE PERFORMANCE MEASURES INCLUDE:¹²⁹

- Number of arrests
- Number of gun crime charges
- Number of warrants
- Number of task force cases

CURRENT PROSECUTOR PERFORMANCE MEASURES ARE ONLY:¹³⁰

- Number of cases prosecuted
- Number of cases involving indigent defendants

These sample measures focus police on increasing the volume of arrests, warrants, and charges. Similarly, prosecutors' measures focus on increasing the volume of cases. Measures for other categories suffer from the same problems.¹³¹ Current measures are roughly analogous to a hospital counting the number of emergency room admissions, instead of considering the number of lives saved. Or, a transportation department looking at the number of potholes filled without assessing the condition of the roads or the number of accidents. *They measure activity, not productivity.* Measures for other categories suffer from the same problems.

George Kelling, the criminologist who introduced the “broken windows” theory of policing in 1982, has noted that counting arrests is not an effective way to assess police performance. He has noted, “It is far easier to count how many arrests officers make than how effective they are educating citizens or organizing a community.”¹³² While these numbers are easy to record, they miss the point. They reveal very little about reducing crime or lowering the prison population.

The focus of measures should be *outcomes*. Current JAG measures almost never ask the bottom line question of whether funded activities achieved goals. Whether the funds improved public safety or the justice system is unasked and unanswered. Instead of cataloging the number of arrests, measures should focus on impact: Did all the arrests make the public safer? Were all the prosecutions warranted and successful? Most importantly, are these federal dollars helping states and localities achieve criminal justice goals? The existing measures limit the value of the information DOJ can report to Congress and the public on the success of JAG.

Finally, these measurements are not merely inaccurate or irrelevant. *They can drive policy by distorting incentives.* They can contribute to mass incarceration.

The JAG measures have the imprimatur of the DOJ. They signal what the Department feels is important. These measures signal — correctly or incorrectly — that the federal government *de facto* prioritizes volume over other criminal justice goals. If much of what is measured is increased volume into the criminal justice system then that is where effort will be concentrated.

Further, though the Department may see its performance measures as merely a way to collect information, it is implicitly conveying its policy aspirations to recipients. By linking — even if indirectly or inadvertently — JAG funding to measures of the number of arrests or prosecutions, the measures risk creating or risk entrenching existing perverse incentives that encourage a widening of the pipeline to prison. The measures encourage police departments to focus on increasing arrests and prosecutors to focus on increasing convictions — even in situations where alternative actions may be better responses. Even worse, police may focus their efforts on easier to make low-level arrests, believing that reporting higher numbers justifies the funding they receive from DOJ. Prosecutors may similarly feel they need to prosecute more cases and imprison more people, instead of dropping charges or diverting offenders to drug or mental health treatment when appropriate.

Interviews conducted for this report with 30 state and local JAG recipients provide evidence that these signals are sometimes received. Although funds come with almost no conditions attached, the performance measures subtly “nudge” recipients toward the goals embedded in them:¹³³

- One state recipient said performance measures “could drive to a certain degree what gets funded and what the priorities are.” Another recipient in a southern state said “the performance measures the feds ask for are counting activity and not counting impact.” Many recipients made similar statements.
- One former police chief of a large city, who also administered JAG funds for a midwestern state, noted that “law enforcement needs to justify budgets by pointing to accomplishments.” JAG gives police a list of “accomplishments that are easy to track but meaningless.” “How many traffic citations issued or how many burglars you arrested are seldom reliable measures of police contribution. . . . When we start looking for performance measures, I can see why the easy response is to look at things we can count as opposed to a more qualitative measure of reducing crime. It is a big mistake to say there were 200 burglaries last year and this year there are 250.”
- A recipient who managed JAG funds for a large state commented that the current measure of “dollars seized or forfeited to police” was “ridiculous.” The issue, he said, is not the amount of money collected, but to what degree police “deprive bad guys of fruits of crimes to stop them from conducting criminal activity.” This measure could incentivize police to chase the suspect with the most amount of money instead of the suspect who is most dangerous.
- One recipient said he believed that, given the current measures’ focus on task forces, his state was not focused on DOJ priorities because his state did not allocate funds to drug task forces. He thought this could be held against his state when applying for other DOJ grants in the future.¹³⁴
- Many recipients provided more funding for evidence-based programs and indigent defense services after DOJ encouraged recipients to do so in grant applications. NCJA also worked with states to help build their capacity to fund such activities. This insight aligns with current data. State JAG funding for indigent defense increased from \$1.9 million in 2011 to \$2.9 million in 2012.¹³⁵

- Interviewees who thought that JAG performance measures were not pivotal in setting their agencies' overall goals nonetheless acknowledged that they looked to the measures when deciding how to spend JAG funds.

Interviewees across the board felt JAG needed more robust performance measures. Many cited the need to improve effectiveness and accountability of the program, and the need for helpful data:¹³⁶

- Most recipients requested clarity on how DOJ decides whether JAG money is well spent. One recipient from a large state said JAG dollars were often seen as “free money” because funding was not linked to success.
- Many recipients expressed a desire for DOJ to use performance measures that they have found to work in their localities. Virtually all JAG recipients interviewed expressed the view that the current measures do not accurately reflect the successes they achieved.
- Uniformly, recipients expressed a desire for DOJ to make the data from all JAG performance measures reports available so they could learn from other states about which programs are achieving results.
- Many recipients thought it critical for DOJ to ensure that states used funds to improve public safety and reduce incarceration rates and costs.

Lack of Information on Performance and Accountability

JAG's performance measures suffer from data collection challenges, impeding DOJ's ability to analyze the program's effectiveness. This lack of data makes it difficult for Congress or the public to assess whether JAG is achieving its own goal of funding effective programs. And it can make JAG a ripe target for funding cuts and to attack by advocates.

The reporting mechanism compounds the issue. Recipients choose how to send information to DOJ. As a result, thousands of reports from sub-recipients are sent to DOJ, often only reporting back on portions of the overall performance measures. Some states report back on behalf of sub-recipients and some do not. In some instances, states that provide funding to sub-recipients are not privy to what their sub-recipients report to DOJ.¹³⁷

By some accounts, as many as 30 percent of JAG recipients do not submit quarterly reports to DOJ.¹³⁸ But because of the lack of data, the true percentage may be much higher. A 2010 DOJ Audit Report, which sampled 12 state and local direct JAG recipients, emphasized this lack of accountability.¹³⁹ For example, the Atlanta Police Department did not monitor its sub-recipients and had no procedures for doing so. Indiana did not have staff members to manage its JAG funds, which flowed to 173 sub-recipients over three years. A direct recipient in South Carolina submitted only one annual report between 2004 and 2008 and was “not aware of the requirements for submitting progress reports.” The statute creating JAG severely limits DOJ's ability to withhold funding due to non-reporting, though occasionally DOJ has imposed special conditions on chronic non-reporters. It is exploring its options to improve reporting.¹⁴⁰

Further, DOJ does not have permanent staff capacity to analyze all the data collected in these reports, relying heavily on a rotating assortment of consultants. As a result, an analysis or aggregation of the key findings from performance data is not available for Congress, advocates, or the public. For example, DOJ reported to Congress that 62 percent of JAG funds went to law enforcement between 2010 and 2012. But it did not report the percent of funds each state spent on law enforcement or how exactly those funds were used.¹⁴¹

In 2005, the OMB noted that JAG “with limited ability on [DOJ’s] part to target or withhold funding – does not provide many options for holding recipients accountable to program goals.”¹⁴² In 2005, President George W. Bush’s Fiscal Year 2006 Budget called for reduction or elimination of funding for programs that “do not have a record of producing results,” including JAG.¹⁴³

Stirrings of Reform

Recognizing these problems, diverse stakeholders, including DOJ, have attempted to improve JAG.

Before 2009, JAG measures largely focused on two overall goals: enforcing gang laws and anti-methamphetamine policies.¹⁴⁴ In 2009, DOJ implemented 86 new performance measures. The new measures focused on task force activities and the number of individuals hired by JAG dollars.¹⁴⁵ In 2010, DOJ added questions about evaluation methods, technology, and the number of people in funded programs.¹⁴⁶ It also launched an online portal so grant recipients could fill out JAG reports.¹⁴⁷ That same year, a GAO report found that JAG measures lacked “several key attributes of successful performance measurement systems, such as clarity, reliability, linkages with strategic or programmatic goals, objectivity, and the measurability of targets.”¹⁴⁸ While GAO investigated the JAG performance measures specifically linked to Recovery Act funding, these measures were substantively the same as the performance measures used by JAG as a whole that year.¹⁴⁹ Since then, DOJ has produced new versions of the measures.¹⁵⁰ But, JAG’s performance measures still lack linkage to the *success* of funded activities. They still ask about volume and means without asking the ultimate question: whether funded programs achieved their goals. Although DOJ is gathering more data, it is still not gathering the right kind.

Over the past few years, DOJ has encouraged states to direct funds toward certain preferred activities. In collaboration with NCJA, DOJ has worked with states to help them engage in thorough planning processes before deciding how to spend JAG funds.¹⁵¹ In 2010, DOJ started enumerating areas it prefers that recipients spend JAG funds on in its call for grant applications.¹⁵² These priorities have included funding for indigent defense, planning, and “evidence-based” programs (i.e. data-driven programs that provide evidence of achieving their goals).¹⁵³

Advocacy groups such as the Heritage Foundation have urged Congress to eliminate the program outright. Others, such as the ACLU, have criticized the program for fueling racial disparities and low-level drug arrests.¹⁵⁴ Congress has shown an interest in undertaking some type of reform to JAG, but no legislation has been enacted. For example, Rep. Steve Cohen (D-Tenn.) introduced the Byrne/JAG Program Accountability Act in 2010 and 2011. That Act would have required recipients to identify and reduce racial disparities in their justice systems.¹⁵⁵ In 2013, Sens. Patrick Leahy (D-Vt) and John Cornyn (R-Texas) co-sponsored the Justice for All Reauthorization Act. Supported by groups ranging from the Pretrial Justice Institute to the

National Association of Police Organizations, the bill would require states to engage in a thorough planning process before deciding how to spend funds and provide additional funds for planning.¹⁵⁶

The Obama administration also supports JAG reform. The president's 2014 budget proposed using financial incentives to help steer JAG funding to more effective uses.¹⁵⁷ Specifically, it sought to create a new \$40 million program, the Byrne Incentive Grant Program, to provide additional dollars to current JAG recipients who promise to use their existing JAG funding for certain activities. These activities include "evidence-based" programs (in areas such as policing, prosecution, and forensics) and activities to "rebalance" the justice system (i.e. supporting underfunded, cost-effective alternatives that improve public safety while still preserving fairness, such as indigent defense and non-prison alternatives).¹⁵⁸ As of the writing of this report, this new program has not been funded by Congress.

These reforms would be definite improvements, but they would not solve JAG's deep challenges. Many officials, advocates, and recipients remain unhappy with the program's lack of accountability and data and its inability to demonstrate effectiveness.

B. Reorienting JAG

Because JAG touches so many criminal justice agencies and programs, it provides a unique pressure point for change. It also serves as a powerful starting point for policymakers to implement Success-Oriented Funding in criminal justice.

New Performance Measures

The best tool at DOJ's disposal to ensure JAG's effectiveness is the program's performance measures.

DOJ lacks the authority to *condition* JAG funding on the achievement of goals and therefore cannot implement Success-Oriented Funding in its direct and strongest form. However, DOJ does have the full authority to put into practice the more subtle form of Success-Oriented Funding, by way of strong performance measures. Through revamped measures, DOJ can nudge thousands of recipients and sub-recipients across the country toward modern, data-driven policies that effectively control crime while helping shrink the overgrown system. It can also help focus scarce resources on the most serious crimes and encourage proportional criminal justice responses to crime. This rebalancing also aligns with JAG's statute: Congress placed a special focus on violent crime by allocating funding to states based in part on their violent crime rates.

Appendix A provides an array of new proposed performance measures for each of JAG's seven activity categories. These measures are the product of a delicate and thoughtful balancing of a number of factors. The Brennan Center has highlighted what it believes to be priority measures for each category.

Examples of current and proposed measures for police and prosecutors are on the following pages. This is just a sampling of the proposed measures. Appendix A lists several more measures for these categories.

Figure 5: Sample of Current and Proposed JAG Performance Measures

CURRENT POLICE PERFORMANCE MEASURES	PROPOSED POLICE PERFORMANCE MEASURES
<ul style="list-style-type: none"> • Number of arrests • Number of people charged with gun crimes • Number of judicial warrants • Number of new task force cases 	<ul style="list-style-type: none"> • What is your violent crime rate? • What percent of arrests were for violent crimes? What percent of those arrests resulted in violent crime convictions? • What percent of misdemeanor offenses were issued desk appearance tickets or citations instead of booked and jailed? • What percent of people arrested for drugs were screened for drug addiction or abuse?
CURRENT PROSECUTOR PERFORMANCE MEASURES	PROPOSED PROSECUTOR PERFORMANCE MEASURES
<ul style="list-style-type: none"> • Number of cases prosecuted • Number of cases involving indigent defendants. 	<ul style="list-style-type: none"> • What percent of trials were for violent crimes? • What is the yearly percent change in the number of defendants sentenced to incarceration? • What percent of drug charges were diverted to treatment?

Overall, where recipients might feasibly collect the needed data, the proposed measures ask about whether criminal justice activities funded by JAG met their ultimate goals. When measuring the ultimate goal is more intensive and expensive, the measures focus on means to achieve those objectives. In some cases, the language of the measures may seem subtle but still drive toward the end goals.

For example, one goal of police activity is to reduce violent crime. The proposed measures ask recipients to report their violent crime rate, an item missing from the current measures.

However, the crime rate cannot be the only measure. Numerous factors, not just police practices, affect the crime rate. The proposed measures also ask questions on other police achievements and orientation. They ask whether law enforcement is using the most effective and proportional responses to crime.

In this vein, the proposed measures focus on how often police opt to issue a desk appearance ticket or citation for misdemeanor offenses, rather than booking and jailing people. This measure aims to encourage police to consider a proportional response to each situation. Proposed measures also ask prosecutors to report on the change in percent of defendants sentenced to incarceration. This encourages prosecutors to consider alternative, modern responses to crime, including recommending sentences to community service and probation, rather than using prison as a first response.

The proposed measures also ask whether police screen arrestees for drug abuse issues and ask prosecutors what percent of drug charges were diverted to treatment. Treatment has proven a far more effective response than incarceration as a crime control strategy for individuals with drug addiction.¹⁵⁹ These measures aim to encourage police and prosecutors to identify people with addiction issues and provide them with the most effective response.

Finally, the proposed measures encourage criminal justice actors to focus scarce resources on controlling serious, violent crimes, not on responding to petty offenses. This reorientation is in line with a growing

consensus that the criminal justice system has expanded to cover too much behavior.¹⁶⁰ For example, the proposed measures ask about the violent crime rate, rather than the overall crime rate. Similarly, the measures ask police to report the percent of arrestees for violent crimes and conviction rates for those charges, and ask prosecutors what portion of their trials involve violent crimes. These measures encourage police and prosecutors to focus scarce resources on the most pressing public safety priorities.

By signaling to recipients that effectiveness, proportionality, and fairness are DOJ priorities, the proposed measures can help turn off the “automatic pilot” of more punishment — and more incarceration.

DOJ should take the following steps, within its authority:

- *Replace current performance measures with new, more robust Success-Oriented measures.* These new measures would provide clear objectives to more effectively control crime and reduce mass incarceration. DOJ can choose from among the array in Appendix A. Recommended measures are highlighted.
- *Permit a recipient to answer “do not calculate,” but require an explanation about why they are unable to do so.* This change recognizes that some jurisdictions may not have the capacity to collect certain information. However, it encourages states to begin collecting this information by clearly signaling DOJ’s interest in the data.
- *Ensure each direct recipient of funds reports on measures.* Direct recipients (either the state or the locality directly receiving funding from DOJ) should aggregate data for all sub-recipients. This would centralize reporting and reduce the volume of reports sent back to DOJ. Placing reporting responsibility on the direct recipient reduces this burden for smaller sub-recipients.
- *Penalize recipients that do not report on performance measures.* The high number of JAG recipients skirting reporting requirements prevents the public from assessing the program’s effectiveness and leaves it open to criticism. DOJ should determine what penalties are available for it to use and how they should be assessed. The Department should consider withholding all or a portion of funds for non-response.¹⁶¹
- *Encourage recipients to invest more JAG funds to increase reporting capacity.* DOJ should encourage recipients to use funds to implement data-collection systems to gather the new information requested by the proposed measures. DOJ should also provide as much technical assistance and training as possible to recipients. This would make reporting on the performance measures far easier.
- *Make all data in recipient reports publicly available.* Lawmakers, advocates, and the public should have access to an online database that aggregates and analyzes performance reports.
- *Make requirements for robust performance measures permanent.* Although formal regulation is not necessary to implement new performance measures, a DOJ regulation or formal guidance would codify Success-Oriented Funding for JAG.

Additional Congressional Options

DOJ can take steps to implement new, more effective performance measures. However, fully enacting Success-Oriented Funding for JAG requires congressional action.

Congress could implement the strongest form of Success-Oriented Funding by changing JAG from a formula-based allocation to a competitive one. This option would allocate and renew funds based on whether recipients meet specific goals. For example, Congress could award money to states based on whether they reduced recidivism and incarceration rates. These overarching goals could help reorient a state's entire system. Such a strategy would encourage agencies receiving the funds to be more deliberate when arresting, prosecuting, imprisoning, and revoking parole. It could incentivize actors to keep people out of the criminal justice system unless necessary to achieve public safety goals. It could encourage use of citations instead of arrests, increase dismissals of questionable or hard to prove charges, encourage more non-prison sentences, and keep more citizens in their communities. To ensure that smaller states with fewer resources are not at a disadvantage, Congress could create two tiers of competition — one for larger states and one for smaller ones. There could also be another tier for local recipients. This type of funding structure draws on the Department of Education's i3 program, but goes a step further by providing clear performance measures.

Alternatively, Congress could choose to implement the “prize” form of Success-Oriented Funding. It would set a separate funding stream (perhaps totaling 5 to 10 percent of the JAG budget) for supplementary grants to award to states that achieve JAG success measures. While this would draw on the president's Byrne Incentive Grant,¹⁶² it would require DOJ to award this funding *after* states have met specific JAG success measures, rather than rewarding states that have merely promised to meet broader categories of spending. DOJ could make this determination after implementing the proposed success measures. This structure should also provide two tiers for states. Prizes could encourage an “innovation culture” in the criminal justice system and steer recipients toward modern data-driven approaches that more effectively control crime and move away from mass incarceration.

CONCLUSION

Implementing Success-Oriented Funding in JAG could help move the country toward a more effective and just criminal system. States have been leading the way in reducing mass incarceration. It is time for the federal government to send a clear signal encouraging states and thousands of localities to spend federal dollars on what works to reduce crime and alleviate mass incarceration. As a first step, DOJ can implement robust performance measures for the country's largest grant program that affects the breadth of criminal justice system practice across the country.

Applying the Success-Oriented Funding model to JAG can also serve as a model for other grants and budgets at the federal, state, and local level. By implementing direct links between funding and proven results, governments can ensure the criminal justice system is producing results while not increasing unintended social costs. This report's proposed performance measures for JAG are broad enough to serve as a starting point on which to build out measures for other programs and local agencies.

Reform would come at a signal moment for criminal justice policy. Old ideological boundaries are blurring. Policymakers at all levels are recognizing the opportunity to act. Using Success-Oriented Funding to shift incentives could reverberate nationwide, moving the country away from mass incarceration.

APPENDIX A: PROPOSED PERFORMANCE MEASURES FOR JAG

Factors Considered

This Appendix provides an array of possible measures for JAG. These changes are wholly within the purview of DOJ. The format of this Appendix draws on the current “Justice Assistance Grant Program Performance Measures” document.¹⁶³ These measures are also more subtle than the ones that would be used in the direct form of Success-Oriented Funding because they use a more indirect approach. They are the product of extensive research (as explained in the Methodology section on page 6), feedback from our Blue Ribbon Panel, and a delicate and thoughtful balancing of a number of factors:

- ***Tested local measures vs. innovative measures.*** These success measures are grounded in research examining well-tested state and local measures for various criminal justice activities across the country. If tested state and local measures were imprecise, they were modified.
- ***Capacity vs. optimal goals.*** The measures aim to capture quantitative data that jurisdictions can actually measure, while also trying to signal to states the broader goals of more effectively improving public safety while also reducing unnecessary punishment. Some measures that drive toward a modern criminal justice system may contain the risk of inadvertent perverse incentives; the questions attempt to minimize this risk when possible.
- ***Focus on ends vs. means.*** The measures focus as closely as possible on the ultimate goals of each criminal justice category. A focus on end goals provides states and localities with the flexibility to determine how to best achieve goals given their unique challenges. Activities that use dollars to incentivize behavior usually aim to measure ends. When end goals are too difficult to pinpoint or measure, the measures instead focus on the various means that show progress toward the end.
- ***Quantitative vs. narrative measures.*** Quantitative measures show more clear achievement of objectives and create clearer incentives. In cases where recipients thought quantitative measures would be difficult, narrative questions are asked. As with any quantitative measure, these measures could be open to data manipulation; these measures are worded in a way to minimize this.
- ***Uniform national data vs. local flexibility.*** Quantitative data, though limited, can be aggregated across recipients and analyzed to show recipients’ improvement. To allow for local flexibility, the measures ask some qualitative questions. They also provide narrative questions for states to explain their unique accomplishments.
- ***Encouraging recipient innovation vs. funding proven activities.*** The narrative questions provide room for reporting on innovative activities, while specific, measurable quantitative measures apply to activities that are proven or being tested for effectiveness.
- ***Diverse use of funds.*** Even though recipients use funds for various activities, programs, technology, equipment, etc., because use of these funds support criminal justice operations, the funds should still drive toward larger policy goals. To that effect, recipients are required to answer all questions in each category.
- ***Diverse feedback from Blue Ribbon Panel.*** After a half-day discussion among diverse experts, and several weeks of collecting additional feedback, the measures were revised. The revisions attempt to incorporate the different perspectives from the panelists.
- ***Role of planning.*** Planning, though useful, is not an end goal. It is a means by which a recipient can improve its chances of achieving its end goals. Because of the emphasis DOJ and NCJA have placed on strategic planning, the first section of these measures is devoted to it.

Clarification of Procedures and Definitions

The performance measures are in a format similar to the current DOJ performance measures report. Below are a clarified proposed reporting procedure and definitions for terms used in the proposed measures.

1. Procedures

- All *direct* recipients should compile and send DOJ reports for themselves and sub-recipients. The word “your” applies to the ultimate entity using the funds.
- All questions are based on the last fiscal year.
- There are seven categories of questions; these categorical divisions for JAG were created by Congress. Recipients should answer the questions for the category in which they spent JAG funds.
- Recipients should answer all questions (unless otherwise noted) in the section that best fits their activities. All jurisdictions, especially smaller ones, may not be able to respond to all questions. If a recipient cannot answer a question, it should state “Do not collect this data” or “Do not engage in this activity.”
- Questions apply to all activities funded by JAG dollars, even if JAG dollars funded only a percentage of the activities. “Activities” include any expenditure in the specific category including programs, approaches, equipment, technology, or general expenditures, etc.
- If recipients purchased equipment or technology, they should answer the questions in the category for which it purchased equipment or technology. Equipment and technology purchased should be used to further larger criminal justice goals.

2. Definitions

- “Evidence-based” activities: those “where effectiveness has been demonstrated by causal evidence, generally obtained through one or more outcome evaluations.”¹⁶⁴
- “Promising” activities: some evidence exists indicating these activities achieve their intended outcomes. (The level of certainty from available evidence is too low to support generalizable conclusions, but there is some empirical basis for predicting that further research could support such conclusions.)¹⁶⁵
- “Violent crime:” murder, non-negligent manslaughter, forcible rape, robbery, and aggravated assault.¹⁶⁶
- “Risk and needs assessments:” social science tools used to assess an individual’s criminal risk factors and specific needs that, if both addressed, will reduce the likelihood of recidivism. Tools must be validated for the purpose for which they are used and in the specific jurisdiction where they are used.¹⁶⁷
- For commonly understood terms for which definitions are not provided, state definitions apply.

I. General Questions

A. Questions to be answered for each category below (II through VIII)

Please answer the following questions separately for each category:

1. How many JAG dollars funded the activities in this category?
2. How many JAG dollars funded “evidence-based” activities?
3. How many JAG dollars funded “promising” activities? If your activities are not evidence-based or promising please explain why. (500 word limit)
4. Did you use JAG funds for innovative programs or approaches you were testing? If so, please describe (for example, by discussing the program’s goals; whether the program reached its intended goals; and whether you would test a different program or strategy in the future). (500 word limit)
5. How many JAG dollars funded evaluations of activities to see if they met stated goals? (500 word limit)
6. How did JAG dollars contribute to improving “community wellness”?¹⁶⁸ (500 word limit)
7. If you felt the previous questions did not capture successes of your program, please use this space to describe them. (500 word limit)
8. Equipment
 - a. If you purchased equipment or technology, answer the questions in the category for which you purchased equipment or technology. Equipment and technology purchased should be used to further the larger criminal justice goals of each category.
 - b. Please also answer these additional questions on equipment:
 - How many JAG dollars were spent on equipment?
 - How did these purchases improve the effectiveness of law enforcement? (250 word limit)
 - What is the estimated return on the investment in dollars or hours of staff time saved each year? Please explain. (250 word limit)

B. Strategic Planning and Narrative Questions

1. How many JAG dollars funded strategic planning activities?¹⁶⁹
2. Is there a state-level criminal justice strategic plan that includes how to allocate JAG funds? If not, is the development of a plan in process?
3. If so, please answer: (2,000 word limit)
 - a. Describe the goals of your strategic plan. How did you identify those goals as criminal justice priorities in your jurisdiction?
 - b. Describe how you engaged in strategic planning. Which agencies participated in the strategic plan process?
 - c. How did you use JAG funding to meet the goals of your strategic plan?
 - d. If you used this funding for purposes other than those goals, please explain why.

II. Law Enforcement

Definition: “Law enforcement” includes activities conducted by law enforcement organizations, including police departments. Activities may include: improving public safety; crime prevention and intervention; enforcement, apprehension, and detention; and improving relationships with communities. This category does not include: activities of prosecution (please answer questions in section III for those activities) or law enforcement activities related to drug enforcement (please answer questions in section VI for those activities). *Please answer all questions in this section. (The Brennan Center’s priority proposed measures are indicated in bold.)*

A. General Questions

1. Please answer all the general questions in Section I.

B. Specific Questions

*Crime Prevention*¹⁷⁰

2. **What is your violent crime rate?**¹⁷¹
3. What is the number and percent change in “violence-related injuries” for emergency room admissions?¹⁷²
4. What is your crime prevention strategy? What evidence indicates that this is an appropriate strategy? (500 word limit)
5. How many JAG dollars were spent on preventing crime? How did the funding help prevent crime? (500 word limit)
6. How many JAG dollars funded prevention activities aimed at blocking opportunities for crime by “target hardening” (e.g. equipment, training, or outreach related to locks and gates, engine immobilizers, and street lighting)?¹⁷³
7. How many JAG dollars funded prevention activities aimed at increasing perpetrator risks of committing crime, i.e. increasing the chance of being apprehended during a crime (e.g. equipment, training, or outreach related to closed circuit television, traffic barriers, or property markers)?¹⁷⁴
8. How have activities funded by JAG improved how safe people feel visiting public spaces in your jurisdiction? (500 word limit)

Enforcement

9. **What percent of arrests were of individuals arrested for violent crimes? What percent of individuals arrested for violent crimes were convicted of violent crimes?**
10. What percent of individuals arrested were for felony arrests? What percent of those arrests resulted in felony convictions?
11. **What percent of individuals charged with misdemeanor arrestees (i.e. misdemeanor as the highest charge) were issued desk appearance tickets or citations?**
12. **What percent of arrestees were screened for drug abuse issues within 24 hours of arrest? Mental health issues? If you do not conduct these screenings, does another agency do so or do you plan to do so? Please explain. (500 word limit)**

13. (Consider asking: What percent of total arrests were of individuals belonging to each racial category used by the Bureau of Justice Statistics?)¹⁷⁵

Community Relations

14. How many JAG dollars were spent on improving relationships with the community? Please describe how you attempted to strengthen police-community relations (e.g. attending community meetings, citizen outreach, community watch programs). (500 word limit)
15. Do you use community surveys to gauge community attitudes toward the police? If so:
 - a. What percent of residents report satisfaction with police services?
 - b. What percent of residents have a positive view of the police?
 - c. **What percent of residents report feeling safer in their neighborhoods?**
 - d. If you do not use surveys, do you plan to utilize one in the next reporting period?

Collaboration

16. How many JAG funds were spent on activities aimed at collaborating or coordinating with other criminal justice agencies? How is this collaboration leading to more efficient and effective law enforcement? (500 word limit)
17. What types of partnerships did you form with other government agencies? If so, which ones and for what purposes? (500 word limit)

III. Prosecution and Courts

Definition: This category includes actors in criminal courts as listed below. *Please answer only the questions in the subsections that apply to your use of the funding* (e.g. if you only use this funding for Prosecution, you do not need to answer questions for Courts). **(The Brennan Center’s priority proposed measures are indicated in bold.)**

- “Prosecution” refers to prosecutor and district attorney offices.
- “Courts” include standard criminal courts.
- “Specialty courts” include drug courts, mental health courts, re-entry courts, and other non-traditional courts.
- “Defense” includes information on all criminal defendants.
- “Indigent Defense” includes activities by court-appointed legal counsel.¹⁷⁶

A. General Questions

1. Please answer all the general questions in Section I.

B. Prosecution

1. How many JAG dollars funded prosecution activities?

Pre-Trial Detention

2. **For what percent of defendants did prosecutors not object to release on recognizance at first appearance?**
3. What percent of defendants were administered risk assessments to assess flight risk or re-arrest within 24 hours of arrest? For what percent of assessed defendants did the prosecution recommend an action consistent with assessed risk?¹⁷⁷

Public Safety

4. **What percent of misdemeanor cases did prosecutors recommend for dismissal at first appearance?**
5. What percent of active cases involved violent crime charges?
6. What percent of trials were for charges that included at least one violent crime?
7. What percent of original charges resulted in convictions for those charges?
8. **What percent of defendants with drug possession charges (without additional trafficking or violent crime charges) did prosecutors divert (prior to sentencing) from formal court proceedings to treatment? What percent of defendants with only nonviolent charges did prosecutors divert (prior to sentencing) from formal court proceedings?**
9. What percent of defendants with drug charges were sentenced to non-incarceration alternatives? What percent of defendants with only nonviolent charges were sentenced to non-incarceration alternatives?

10. What is the yearly percent change in the number of defendants sentenced to incarceration?¹⁷⁸
11. What percent of defendants were re-arrested within one year after exiting prison? After exiting community corrections or completing other non-prison sanctions?

Efficiency

12. What percent of felony cases were “resolved” within 12 months?¹⁷⁹
13. What percent of misdemeanor cases were resolved within 3 months?
14. How many hours after arrest did prosecutors take to make charging decisions, on average, for felony charges? For misdemeanor charges?

Community Prosecution

15. How many JAG funds are spent on community outreach? If so, please describe. (500 word limit)
16. What percent of police districts in your jurisdiction are assigned a prosecutor to assist with screening and charging?
17. How many JAG funds are spent on prosecutor crime prevention activities? If so, please describe. (500 word limit)
18. What percent of victims in violent cases closed this year reported satisfaction? What percent of victims in property crime cases?
19. What percent of community members reported satisfaction with prosecutor offices?

C. Courts (standard)

Case Management

1. How many JAG dollars funded standard courts?
2. What percent of felony cases were resolved within 12 months of arrest?
3. What percent of misdemeanor cases were resolved within 3 months of arrest?
4. **What percent of defendants were released on recognizance at first appearance?**
5. **What is the yearly percent change in the number of defendants sentenced to incarceration?**
6. What percent of cases were resolved without a criminal adjudication?

Pretrial Detention

7. **What percent of defendants were released on their own recognizance?**
8. What percent of defendants were placed on non-incarceration forms of pre-trial supervision? (e.g. electronic home detention, work release).
9. **What percent of defendants were administered risk and needs assessments to determine flight risk and or re-arrest within 24 hours of arrest? For what percent of defendants were pretrial detention decisions made consistent with assessed risk?**
 - a. What percent of assessments were made available to the court, prosecutor, and defense counsel?

10. What percent of defendants were screened for drug abuse issues within 24 hours of arrest? Mental health issues? If you do not conduct these screenings, does another agency do so or do you plan to do so? Please explain. (500 word limit)
11. **What percent of detainees were released within 24 hours after first appearance?**

D. Specialty Courts

1. How many JAG dollars funded specialty courts? Please list the types and number of specialty courts that your state has (for example, drug court, mental health court, domestic violence court, veterans court). (500 word limit)
2. For mental health courts:
 - a. What percent of participants received a risk and needs assessment?
 - b. What percent of defendants who started the program completed it?
 - c. What percent of program completers did so without a criminal conviction on the underlying charge?
 - d. **What percent of program completers demonstrated improvements in mental health (determined by using validated instruments or clinical assessment processes)?**
 - e. **What percent of program completers were arrested for a new crime within one year of discharge?**
3. For drug courts:
 - a. What percent of participants received a risk and needs assessment? What percent of participants were “high risk”?
 - b. What percent of defendants who started the program completed it?
 - c. What percent of program completers did so without a criminal conviction on the underlying charge?
 - d. **What percent of program completers demonstrated improvements in drug addiction issues (determined by using validated instruments or clinical assessment processes)?**
 - e. **What percent of program completers were arrested for a new crime within one year of discharge?**

E. Defense

1. How many JAG dollars funded defense services (excluding indigent defense)?
2. What percent of arrestees were represented at initial appearance?
3. What percent of defendants met with a defense attorney within 24 hours of arrest?
4. **What is the yearly percent change in the number of defendants sentenced to incarceration?**

F. Indigent Defense

1. How many JAG dollars funded indigent defense services?
2. **What percent of indigent defendants met with a defense attorney within 24 hours of arrest?**

3. What percent of indigent defendants in pre-trial incarceration were there for less than 24 hours?
4. What is the average number of appearances for cases involving indigent defendants until final disposition?
5. What percentage of indigent defendants cases were assigned a social worker? An investigator?
6. **What is the yearly percent change in the number of indigent defendants sentenced to incarceration?**
7. **How many active felony cases were on the public defender system's docket for the year? How many active misdemeanor cases?**
8. What is the yearly public defender system budget? How many public defenders were paid for out of that budget? On average, how many attorney hours were spent on each case?

IV. Prevention and Education

Definition: *Please answer the question only in the subsections that apply to your use of the funding.*

- “Prevention” includes activities conducted (including by law enforcement) to prevent crime. This subsection overlaps with Section II; please report crime prevention activities in both Section II and Section IV. This section does not include activities to prevent drug crime; please report those activities in Section VI.
- “Education” includes: public education and professional education for criminal justice professionals. It does not include educational programming that occurs in corrections or community corrections (see Section V for those activities). **(The Brennan Center’s priority proposed measures are indicated in bold.)**

A. General Questions

1. Please answer all the general questions in Section I.

B. Crime Prevention

1. Please answer the questions in the Crime Prevention section in Section II above.

C. Education

1. How many JAG dollars funded public education activities?
2. **How many JAG dollars funded evidence-based or promising public education activities to prevent violent crime? Please describe these activities. (500 word limit)**
3. How many JAG dollars funded training activities for criminal justice professionals? Please describe these activities. (500 word limit)

V. Corrections and Community Corrections

Definition: *Please answer only the questions in the subsections that apply to your use of the funding.*

- “Corrections” includes jails, prisons, and programs in jails and prisons (including re-entry and treatment programs occurring in these settings).
- “Community corrections” includes activities of probation, parole, administrative supervision, supervised release, or any other supervision occurring outside prisons or jails. It includes programs in these settings (including re-entry and treatment). **(The Brennan Center’s priority proposed measures are indicated in bold.)**

A. General Questions

1. Please answer all the general questions in Section I.

B. Jails

1. How many JAG dollars funded jails?
2. What percent of defendants were administered risk assessments to assess flight risk and or re-arrest within 24 hours of arrest? For what percent of these defendants were pretrial detention decisions made consistent with assessed risk?
 - a. What percent of assessments were made available to the court, prosecutor, and defense counsel?
3. **What percent of defendants were screened for drug abuse issues within 24 hours of arrest? Mental health issues? If you do not conduct these screenings, does another agency do so or do you plan to do so? Please explain. (500 word limit)**
4. What percent of jail inmates have been sentenced to incarceration?
5. How many days a year did the inmate population stay under 120 percent of facility capacity?¹⁸⁰

C. Prisons

1. How many JAG dollars funded prisons?
2. What percent of inmates received risk and needs assessments within 30 days of entry?
3. **What percent of inmates were serving sentences for violent crimes?**
4. What percent of inmates completed educational or job training programming (e.g. vocational certificates, GEDs, other educational degrees, job training)?
5. What percent of inmates completed in-prison treatment programs (e.g. mental health, drug)?
6. **What percent of inmates were not arrested (within the state) in one year of exit from prison? Were not convicted (within the state) in one year?**
7. How many days a year did the inmate population stay under 120 percent of facility capacity?¹⁸¹

D. Community Corrections

1. How many JAG dollars funded community corrections?
2. What percent of defendants sentenced for non-violent crimes were sentenced to community corrections instead of incarceration?
3. What percent of supervisees received a risk and needs assessment within 14 days of entering community corrections? What percent received a re-entry plan within 14 days?
4. What percent of supervisees completed educational or job training (e.g. vocational certificates, GEDs, other degrees or training)?
5. What percent of supervisees completed treatment programs (e.g. mental health, drug)?
6. **What percent of supervisees with reported technical violations of supervision conditions received responses other than revocation to prison (including shock incarceration, non-prison sanction, or no sanction)?**
7. **What percent of supervisees were not arrested for a new crime?**

VI. Drug Treatment and Enforcement

Definition: *Please answer only the questions in the subsections that apply to your use of the funding.*

- “Drug Treatment” includes all drug treatment occurring in the criminal justice system. This overlaps with treatment that occurred in community corrections or corrections, or other settings. It does not include drug courts; report those activities in Section III.
- “Drug enforcement” relates to any law enforcement activities to enforce laws and regulations governing narcotics and controlled substances. Report these only here and not in Section II. This does not include activities of prosecutors. It also includes drug prevention activities. **(The Brennan Center’s priority proposed measures are indicated in bold.)**

A. General Questions

1. Please answer all the general questions in Section I.

B. Drug Treatment

1. How many JAG dollars funded drug treatment activities (excluding drug courts)?
2. What percent of participants received a risk and needs assessment within seven days of entering the program?
 - a. What percent of participants were “high risk”?
 - b. **What percent of participants completed the program?** What percent of participants completed at least 90 days of treatment (excluding treatment for methadone)?¹⁸²
 - c. What percent of participants in methadone treatment programs completed at least 12 months of treatment?
3. What percent of people who participated in the program re-entered drug treatment within one year?
4. **What percent of participants who completed the program were not arrested for a new drug crime within one year?**

C. Drug Enforcement

1. How many JAG dollars funded drug prevention activities? Please describe (500 word limit)
2. What was the yearly percent change in drug-related deaths? (answer if collected by public health authorities)
3. **What percent of drug possession arrests were issued desk appearance tickets or citations (instead of formal booking)?**
4. **What percent of arrests were for drug manufacturing, trafficking and distribution (as opposed to only possession charges)? What percent of these arrests resulted in convictions?**¹⁸³
5. How many illegal drug labs were closed down?

VII. Planning, Evaluation, and Technology Improvements

Definition: *Please answer all questions. You must answer these questions for any effort that was partly or fully funded by JAG dollars.*

- “Planning” includes planning for use of JAG funds, including efforts to conduct strategic planning to distribute the funds.
- “Evaluation” includes activities to evaluate program or use of JAG funds. If evaluation activities were for specific activities, programs, or agencies, please answer the questions in the sections related to those activities.
- “Technology” includes improvement in criminal justice technology for specific activities, programs, or agencies. You must answer the questions in the sections related to those activities.

A. General Questions

1. Please answer all the general questions in Section I.

B. Planning

1. Please answer the questions in the Strategic Planning and Narrative Questions in Section I.

C. Evaluation

1. How many JAG dollars funded evaluation activities? Please describe. (500 word limit)
2. How many JAG dollars funded research activities? Please describe. (500 word limit)

D. Technology

1. How many JAG dollars funded technology improvements? How did this JAG funding improve public safety or reduce unnecessary punishment? (500 word limit)

VIII. Crime Victims and Witnesses

Definition: “Crime Victim and Witness Protection” includes activities conducted by law enforcement, legal, medical, counseling, advocacy, or educational organizations in serving the victims of and witnesses to crimes. Activities may include prevention, intervention, referral, or support for these constituencies. *Please answer only the questions in the subsections that apply to your use of the funding.*

A. General Questions

1. Please answer all the general questions in Section I.

B. Crime Victim Services

1. How many JAG dollars funded victim services activities?
2. What percent of victims who requested services received those services? Of those victims, what percent completed these services?

C. Witness Protection

1. How many JAG dollars funded witness protection activities?
2. How many formal requests for protection were made by witnesses? What percent of these requests were met with offered protection within two days of receipt?
3. Please describe witness protection issues in your jurisdiction and how JAG addressed those issues. (500 word limit)

ENDNOTES

- 1 The following amounts represent the grants DOJ actually sent to states and localities through some of its largest 2012 awards, differing from the amount Congress appropriated for each grant. *See* OFFICE OF JUSTICE PROGRAMS, FY STATE SOLICITATIONS FOR BJA, *available at* <http://grants.ojp.usdoj.gov:85/selector/office?po=BJA&fiscalYear=2012&defaultYear=Y> (distributing over \$288 million to state and localities and providing over \$12 million in Byrne Discretionary grants in 2012); COMMUNITY ORIENTED POLICING SERVICES, U.S. DEP'T OF JUSTICE, GRANTS AND FUNDING, 2012 GRANTEE AWARD PACKAGES, *available at* <http://www.cops.usdoj.gov/Default.asp?Item=2676> (distributing over \$141 million to states and localities in 2012); OFFICE ON VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE, FISCAL YEAR 2012 OVW GRANT AWARDS BY PROGRAM, *available at* <http://www.ovw.usdoj.gov/fy2012-grant-program.htm> (distributing over \$400 million to state and localities through the Office on Violence Against Women grants in 2012); OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, FY STATE SOLICITATIONS FOR BJA, *available at* <http://grants.ojp.usdoj.gov:85/selector/office?po=BJA&fiscalYear=2012&defaultYear=Y> (distributing over \$24 million to states and localities through Second Chance Act funds in 2012); OFFICE FOR VICTIMS OF CRIME, 2013 OVC REPORT TO THE NATION: FISCAL YEARS 2011-2012 (2013), *available at* http://www.ojp.usdoj.gov/ovc/pubs/reporttonation2013/images/Exhibits/rtn_exhibit_1.jpg (last visited Nov. 14, 2013) (reporting Victims of Crime Act, FBI, and U.S. Attorney funding for 2012)(note: the authors calculated the VOCA amount as about \$607 million by deducting the FBI and U.S. Attorney figures as well as the Federal victim notification system amounts from \$649M total in the table shown).
- 2 *See* NATHAN JAMES, CONG. RESEARCH SERV., RS 22416, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT PROGRAM: LEGISLATIVE AND FUNDING HISTORY 1 (2007).
- 3 Between 1993 and 2011, the national homicide rate declined by forty-eight percent. JENNIFER TRUMAN, LYNN LANGTON, & MICHAEL PLANTY, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2012 3 (2013). The crime rate today is comparable to the low levels achieved in the 1960s. *See* FEDERAL BUREAU OF INVESTIGATIONS, UNIFORM CRIME REPORTING STATISTICS, <http://www.ucrdatatool.gov/Search/Crime/Crime.cfm> (last visited Nov. 5, 2013) (noting, for example, that the 1969 violent crime rate (per 100,000 people) was 328.7 and property crime rate was 3,351.3, while the 2012 violent crime rate was 386.9 and the property crime rate was 2,859.2). In 2011 and 2012, there was a small increase in serious violent crime and property crime victimization; however, neither were statistically significant. TRUMAN ET AL., *supra* note 3, at 1.
- 4 *See* ROY WALMSLEY, INTERNATIONAL CENTRE FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 3 (9th ed. 2011), *available at* <http://www.idcr.org.uk/wp-content/uploads/2010/09/WPPL-9-22.pdf> (showing that, as of May 2011, the United States incarcerates 2.29 million of the 10.1 million prisoners around the world).
- 5 The authors calculated this estimate following the methodology used by the National Employment Law Project (NELP) in 2008. *See* MICHELLE N. RODRIGUEZ & MAURICE Emsellem, NATIONAL EMPLOYMENT LAW PROJECT, 65 MILLION 'NEED NOT APPLY': THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27, n. 2 (2011), *available at* http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf (estimating that 65 million adults have criminal records in the United States). According to a 2010 survey of states, there were 97.9 million people with criminal records on file in the states, including those individuals fingerprinted for serious misdemeanors and felony arrests. U.S. BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS tbl.1 2010 (Nov. 2011). According to NELP, misdemeanor arrests for less serious crimes do not require fingerprinting in some states, thus this figure is likely an undercount of people with criminal records. To account for individuals who may have records in multiple states and other factors, and to arrive at a conservative national estimate, NELP reduced the 2008 BJS 92.3 million figure by 30 percent (64.6 million). Consistent with the NELP methodology, the authors reduced the 2010 BJS 97.9 million figure by 30 percent (68.5 million). Thus, as a percentage of the U.S. population over the age of 18 (237,657,645 in 2011 according to the U.S. Census Bureau), an estimated 28.8 percent of the U.S. adult population has a criminal record on file with states. *See* U.S. CENSUS BUREAU, POPULATION ESTIMATES: NATIONAL CHARACTERISTICS VINTAGE 2011, <http://www.census.gov/popest/data/national/asrh/2011/>. This estimate is consistent with a 2001 Department of Justice estimate that "30 percent of the Nation's adult population" has a state rap sheet. U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (2006), *available at* http://www.justice.gov/olp/ag_bgchecks_report.pdf.
- 6 *See* E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 10 tbl.10-11 (2012), *available at* <http://www.bjs.gov/content/pub/pdf/p11.pdf> (showing that 52% of state and federal prisoners were incarcerated for drug or nonviolent/nondrug crimes).

- 7 PAUL GUERINO, PAIGE M. HARRISON, & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 6 (2011), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>.
- 8 See TRACEY KYCKELHAHN & TARA MARTIN, U.S. BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT SERIES, NCJ 237912, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2010 — PRELIMINARY, available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4679> (FY 2010 state and federal corrections expenditure: \$80,241,549,000).
- 9 See John Hagan & Traci Burch, *Social Costs of Incarceration*, 21 RESEARCHING LAW 1, 3-8 (2010) (discussing the broad social effects of incarceration, including felon disenfranchisement, parental incarceration, and reentry challenges).
- 10 See generally, AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011), available at <https://www.aclu.org/files/assets/smartreformispossible.pdf> (analyzing bipartisan reforms implemented in states to reduce crime and incarceration levels) [hereinafter ACLU, SMART REFORM IS POSSIBLE].
- 11 Violence Against Women Act Reauthorization, 42 U.S.C. §§ 3750- 3758 (2005) [hereinafter VAWA Reauthorization].
- 12 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM PERFORMANCE MEASURES 1 (2013), available at <https://www.bjaperformancetools.org/help/JAGMeasuresQuestionnaire.pdf> [hereinafter BJA, (JAG) PROGRAM PERFORMANCE MEASURES].
- 13 This quote is usually attributed to management expert Peter Drucker. See generally *Peter Drucker's Life and Legacy*, THE DRUCKER INSTITUTE, <http://www.druckerinstitute.com/link/about-peter-drucker/> (last visited Nov. 14, 2013). There is a consensus among experts around the benefits of performance measurement to achieve results. See, e.g., ROBERT KAPLAN & DAVID P. NORTON, STRATEGY MAPS: CONVERTING INTANGIBLE ASSETS INTO TANGIBLE OUTCOMES (2003) [hereinafter KAPLAN & NORTON, STRATEGY MAPS] (advocating for incorporation of outcome-based performance measurements into strategic planning); ROBERT KAPLAN & DAVID P. NORTON, THE BALANCED SCORECARD: TRANSLATING STRATEGY INTO ACTION (1996) [hereinafter KAPLAN & NORTON, THE BALANCED SCORECARD]; Julia Melkers & Katherine Willoughby, *Models of Performance-Measurement Use in Local Governments: Understanding Budgeting, Communication, and Lasting Effects*, 65 PUB. ADMIN. REV. 180 (2005) (same); BURT PERRIN, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT IMPLEMENTING THE VISION: ADDRESSING CHALLENGES TO RESULTS-FOCUSED MANAGEMENT AND BUDGETING 6 (2002), available at <http://www.oecd.org/governance/budgeting/2497163.pdf> (“And if as is commonly stated: “What gets measured gets done,” then performance measurement can result in perverse effects, with less rather than more focus on impact”). For more discussion on principles of managing by results, see *Management By Objectives*, THE ECONOMIST, Oct. 21, 2009, available at <http://www.economist.com/node/14299761>. This concept has also been applied in policy. See, e.g., NATIONAL ALLIANCE TO END HOMELESSNESS, A TOOLKIT ON PERFORMANCE MEASUREMENT FOR ENDING HOMELESSNESS (2008), available at [HTTP://B.3CDN.NET/NAEH/A251DBA5D56B8E3748_2QM6BI7CN.PDF](http://B.3CDN.NET/NAEH/A251DBA5D56B8E3748_2QM6BI7CN.PDF); MELISSA BOTEACH & JITINDER KOHLI, CENTER FOR AMERICAN PROGRESS, WHAT GETS MEASURED GETS DONE: HOW A SUPPLEMENTAL FEDERAL POVERTY MEASURE WILL DRIVE SMARTER POLICY (2010), available at <http://www.americanprogress.org/issues/poverty/news/2010/03/02/7364/what-gets-measured-gets-done>.
- 14 A nudge attempts to “alter people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.” RICHARD H. THALER & CASS R. SUNSTEIN. NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 6 (2008).
- 15 See FBI, UNIFORM CRIME REPORTS AS PREPARED BY THE NATIONAL ARCHIVE OF CRIMINAL JUSTICE DATA, <http://www.ucrdatatool.gov/Search/Crime/Crime.cfm> (last visited Nov. 14, 2013). From 1960 to 1980, the violent crime rate (reported offenses per 100,000 population) rose from 160.9 to 596.6. *Id.* The property crime rate rose from 1726.3 to 5353.5 over the same period. *Id.*
- 16 See MARC MAUER, RACE TO INCARCERATE (1999).
- 17 For example, through the use of federal funds, the federal government encouraged states, beginning with Washington State in 1984, to adopt Truth in Sentencing laws, which ensured that violent offenders served more time of their imposed sentences. See PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 1-3 (1999).
- 18 PEW CHARITABLE TRUSTS, PUBLIC SAFETY PERFORMANCE PROJECT, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMER-

ICA'S PRISON POPULATION 2007–2011 i (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/State-based_policy/PSPP_prison_projections_0207.pdf (stating that the prison population grew by 700 percent between 1970 and 2005).

- 19 SOCIAL & DEMOGRAPHIC TRENDS, PEW RESEARCH, KING'S DREAM REMAINS AN ELUSIVE GOAL: MANY AMERICANS SEE RACIAL DISPARITIES (2013), available at <http://www.pewsocialtrends.org/2013/08/22/kings-dream-remains-an-elusive-goal-many-americans-see-racial-disparities/4/#incarceration-rate> (using data compiled by LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE PROGRAMS, NCJ 236319, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010 8 (2011)). See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).
- 20 PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOORS OF AMERICA'S PRISONS 1 (2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/sentencing_and_corrections/State_Recidivism_Revolutioning_Door_America_Prisons%20.pdf ("Total state spending on corrections is now about \$52 billion, the bulk of which is spent on prisons. State spending on corrections quadrupled during the past two decades, making it the second fastest growing area of state budgets, trailing only Medicaid.").
- 21 See KYCKELHAHN & MARTIN, *supra* note 8 (showing that the correctional costs amount to \$79 billion). Total criminal justice system spending, federal and state, is \$260,533,129,000. This number is the sum of judicial and legal costs (\$56.1 billion), police protection costs (\$124.2 billion), and corrections costs (\$80.24 billion). See *id.*
- 22 See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, JUSTICE REINVESTMENT INITIATIVE: EXPERIENCES FROM THE STATES 1 (2013), available at <https://www.bja.gov/Publications/UI-JRI-State-Experiences.pdf> (recognizing the trend amongst states to implement increasingly cost-effective and evidence-based criminal justice strategies).
- 23 For example, the Justice Reinvestment Initiative (JRI) assists states in devising and implementing "data-driven approaches to criminal justice reform designed to generate cost savings that can be reinvested in high-performing public safety strategies." *Id.* JRI has resulted in various policy reforms, including expansion of risk and needs assessments, problem-solving courts, penalty changes, a streamlined parole process and expanded parole eligibility, community based treatment, mandatory supervision requirements, and accountability measures. *Id.* at 2-3.
- 24 See CHRISTOPHER STONE & JEREMY TRAVIS, NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NEW PERSPECTIVES IN POLICING: TOWARD A NEW PROFESSIONALISM IN POLICING 6 (2011), available at <https://www.ncjrs.gov/pdffiles1/nij/232359.pdf> (describing mid-twentieth century policing as "deliberately removed from communities," reliant upon routine activities like "rapid response to calls for service [and] retrospective investigation of crimes," and "top-down" in structure).
- 25 See INT'L ASS'N OF CHIEFS OF POLICE, POLICE-CORRECTIONS PARTNERSHIPS: COLLABORATING FOR STRATEGIC CRIME CONTROL 19 (2007), available at <http://www.theiacp.org/Portals/0/pdfs/Police-Corrections-Partnerships.pdf> (recognizing the "limited concentration on how the police-corrections concept can be tailored, fitted, and organically blended into everyday law enforcement and corrections operations to drive information-led crime reductions;" and challenging police to reach out to "institutional and community corrections to share data and drive smart, strategic crime control efforts."); MARK MOORE & ANTHONY BRAGA, POLICE EXECUTIVE RESEARCH FORUM, THE BOTTOM LINE OF POLICING: WHAT CITIZENS SHOULD VALUE (AND MEASURE!) IN POLICE PERFORMANCE 13, 31 (2003) (emphasizing that "the success of the public police in preventing and controlling crime depends crucially on assistance from individual private citizens" and encouraging additional performance measures to assess the benefits and costs of policing tactics); RACHEL BOBA, POLICE FOUNDATION, PROBLEM ANALYSIS IN POLICING 34 (2003), available at <http://www.policefoundation.org/content/problem-analysis-policing> (suggesting that local police agencies can "begin analyzing and assessing problems in addition to responding to them").
- 26 See CMTY. ORIENTED POLICING SERV., U.S. DEP'T OF JUSTICE, COMMUNITY POLICING DEFINED 3 (2012), available at <http://www.cops.usdoj.gov/Publications/e030917193-CP-Defined.pdf> (defining community policing as "a philosophy that promotes organizational strategies, which support the systemic use of partnerships and problem-solving techniques, to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime.").
- 27 San Diego "laid the groundwork for a department-wide restructuring process coupled with an effort to retrain the entire force in problem-oriented (as opposed to incident-based) policing methods." Judith A. Greene, *Zero Tolerance: A Case Study of Police Policies and Practices in New York City*, 45 CRIME & DELINQUENCY 171, 182-83 (1999). As a result, arrests fell in San Diego by 15 percent and complaints regarding police misconduct fell from 552 in 1993 to 508 in 1996. *Id.*

- 28 Charlie Beck & Colleen McCue, *Predictive Policing: What Can We Learn from Wal-Mart and Amazon about Fighting Crime in a Recession?*, THE POLICE CHIEF MAGAZINE (2009) available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1942&issue_id=112009 (endorsing predictive-policing with Charles Beck, Chief of Police of the Los Angeles Police Department).
- 29 *Predictive Policing: Don't Even Think About It*, THE ECONOMIST (July 20, 2013), available at <http://www.economist.com/news/briefing/21582042-it-getting-easier-foresee-wrongdoing-and-spot-likely-wrongdoers-dont-even-think-about-it> (“Within six months of introducing predictive techniques in the Foothill area of Los Angeles, in late 2011, property crimes had fallen 12% compared with the previous year; in neighbouring districts they rose 0.5%”).
- 30 *See What Are Offender-Based Policing Strategies?*, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, <https://www.bja.gov/evaluation/program-law-enforcement/offender1.htm> (last visited Nov. 11, 2013) (describing the “pulling levers” strategies); see also Andrew V. Papachristos, Tracey L. Mearns & Jeffrey Fagan, *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago*, 4 J. EMPIRICAL LEGAL STUDIES 223, 258-59 (2007), available at http://www.papachristos.org/Why_Do_Criminals_Obey_the_Law_2_files/PSN_papachristos.pdf (finding in study on the effectiveness of Chicago’s PSN strategies that increasing PSN dosage resulted in greater decreases in homicide rates and gun homicide rates).
- 31 Jim Bueermann, *Being Smart on Crime With Evidence-Based Policing*, 269 NIJ J. 12, 12 (2012), available at <http://www.nij.gov/journals/269/evidence.htm> (reflecting on how law enforcement agencies can do a better job of using science to reduce crime) (emphasis added).
- 32 H.B. 463, 11 Reg. Sess. (Ky. 2011) (codified as amended in scattered sections of K.R.S.).
- 33 Donna Lyons, *High Yield Corrections*, 39 STATE LEGISLATURES 22-25 (2013), available at <http://www.ncsl.org/research/civil-and-criminal-justice/justice-reinvestment.aspx>.
- 34 While Louisiana enacted HB 138 in June 2011 allowing some prisoners aged 60 or older the right to a parole hearing, there were numerous eligibility restrictions associated with the bill. See ACLU, SMART REFORM IS POSSIBLE, *supra* note 10, at 54-55.
- 35 N.J. Sess. Law Serv. 23 (2012).
- 36 Earned Compliance Credit and Reinvestment Act of 2012, H.B. 670, S.B. 691, 2012 Leg., (Md. 2013) (the bill does not require the judge to grant the earned credits, but rather permits it at the judge’s discretion).
- 37 See BUREAU OF JUSTICE STATISTICS, U.S. PRISON POPULATION DECLINED FOR THIRD CONSECUTIVE YEAR DURING 2012 (2013), available at <http://www.ojp.usdoj.gov/newsroom/pressreleases/2013/ojppr072513.pdf> The federal prison population slowed to a 0.7 percent increase during 2012, from its average annual increase of 3.2 percent over the past decade. California accounted for 51 percent of the decline in state prison population, due largely to Public Safety Realignment in response to overcrowding. The overall decline is therefore not only relatively small (1.7 percent, 27,770 people out of 2.3 million incarcerated), it does not reflect a national phenomenon. Compare Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N. Y. TIMES, July 25, 2013, at A11, available at <http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html> (celebrating the decline) with Inimai Chettiar, LTE, *The Decline of the Prison Population*, N. Y. TIMES, Aug. 3, 2013, at A18, available at <http://www.nytimes.com/2013/08/03/opinion/the-decline-of-the-prison-population.html> (criticizing premature celebration, claiming “the data do not reflect a systemic movement to decrease unnecessary incarceration permanently”).
- 38 TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA 182 (2014).
- 39 In most states, the costs of incarceration are borne by the state, even as the counties make the decision to revoke and/or incarcerate offenders. See W. David Ball, *Tough on Crime (on the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates – and Why It Should*, 28 GA. ST. U. L. REV. 987, 991 (2012) (explaining that counties control the inflow of prisoners, but states typically bear the burden of administering and paying for prison systems). See also VERA INSTITUTE OF JUSTICE, PERFORMANCE INCENTIVE FUNDING: ALIGNING FISCAL AND OPERATIONAL RESPONSIBILITY TO PRODUCE MORE SAFETY AT LESS COST 6-7 (2012), available at <http://www.vera.org/sites/default/files/resources/downloads/performance-incentive-funding-report.pdf> (describing “misaligned incentives” to punish offenders at the state versus local level).

- 40 THE PEW CHARITABLE TRUSTS, IMPROVING PUBLIC SAFETY AND CONTAINING CORRECTIONS COSTS IN MISSISSIPPI 3 (2013), available at http://www.pewstates.org/uploadedFiles/PCS/Content-Level_Pages/Fact_Sheets/Mississippi%20Pension%20Fact%20Sheet.pdf.
- 41 In California state prisons in 2011, 62.3% of offenders were admitted for parole violations (60,293 parole violators of 96,669 total admissions). E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 5 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf>.
- 42 Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors Who Hit Conviction Targets*, DENVER POST, Mar. 23, 2011, available at http://www.denverpost.com/ci_17686874.
- 43 Brian Rogers, *Harris Co. Prosecutors Outline Rewards for Getting Cases to Trial*, CHRON, Feb. 16, 2011, available at <http://www.chron.com/news/houston-texas/article/Harris-Co-prosecutors-outline-rewards-for-1684726.php>.
- 44 Richard T. Boylan, *What Do Prosecutors Maximize?*, 7 AM. LAW & ECON. REV. 379, 396 (2005).
- 45 Richard T. Boylan, *Salaries, Turnover, and Performance in the Federal Criminal Justice System*, 48 J. L. & ECON. 75, 89 (2004). These incentives – whether financial or professional recognition – encourage prosecutors to view more convictions and higher prison sentences as success. They can encourage prosecutors to work toward these goals even when a different intervention – like treatment, community service, or dropping charges – may be a better response. They also create incentives *not* to choose such options, and can inadvertently encourage more incarceration. See Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J.L. & PUB. POL'Y 53, 80-82 (2012).
- 46 JOHN L. WORRALL, U.S. DEPT OF JUSTICE, COMMUNITY ORIENTED POLICING SERVICES ASSET FORFEITURE 37, app. B (2008), available at <http://www.cops.usdoj.gov/Publications/e1108-Asset-Forfeiture.pdf> (providing complete list of state disposition statutes).
- 47 MARIAN WILLIAMS, ET AL., THE INSTITUTE FOR JUSTICE, POLICING FOR PROFIT 6 (2010), available at http://www.ij.org/images/pdf_folder/other_pubs/assetforfeituretoemail.pdf.
- 48 Jefferson Holcomb, et al., *Civil Asset Forfeiture, Equitable Sharing, and Policing For Profit in the United States*, 39 J. CRIM. JUSTICE 275 (2011) (citing John Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUSTICE 171 (2001)).
- 49 WILLIAMS ET AL., *supra* note 47 (basing figures on data from a random sampling of 52 agencies in Texas).
- 50 *See id.* at 21.
- 51 Katherine Baiker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2132 (2007), available at <http://users.nber.org/~jacobson/BaickerJacobson2007.pdf>.
- 52 *See* IN THE PUBLIC INTEREST, CRIMINAL: HOW LOCKUP QUOTAS AND “LOW-CRIME TAXES” GUARANTEE PROFITS FOR PRIVATE PRISON CORPORATIONS 3 (2013), available at <http://www.inthepublicinterest.org/sites/default/files/Criminal-Lockup%20Quota-Report.pdf> (describing the “low crime tax” provision in private prison contracts).
- 53 Many have written about creating incentives to encourage public policy goals. *See, e.g.*, DAVID OSBORNE AND TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 15 (1993) (“Today’s environment demands institutions that are extremely flexible and adaptable . . . offering choices . . . that lead by persuasion and incentives rather than commands”).
- 54 *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 7 (6th ed. 2012) (quoting STEVEN E. LANDSBURG, THE ARMCHAIR ECONOMIST 3 (2012)).
- 55 *Id.* at 7.
- 56 John Bridgeland & Peter Orszag, Op-Ed., *A Moneyball Approach to Government*, POLITICO, Oct. 18, 2013, available at <http://www.politico.com/story/2013/10/opinion-john-bridgeland-peter-orszaga-moneyball-approach-to-government-98498.html>.
- 57 *Id.*

- 58 *See supra* note 1.
- 59 *See* SONAL SHAH & KRISTINA COSTA, CENTER FOR AMERICAN PROGRESS, SOCIAL FINANCE: A PRIMER 1 (2013) (describing “social finance” as an approach “where evidence, evaluation, and scale capital are brought to bear on intractable social issues” which combines federal and private funds).
- 60 *See* NONPROFIT FINANCE FUND, PAY FOR SUCCESS: INVESTING IN WHAT WORKS I (2012), available at http://payforsuccess.org/sites/default/files/pay_for_success_report_2012.pdf (describing the Obama Administration’s efforts to apply the Pay for Success model federally assisted funding of programs addressing workforce development, education, juvenile justice and care of children with disabilities).
- 61 *See* David W. Chen, *Goldman to Invest in City Jail Program, Profiting if Recidivism Falls Sharply*, N.Y. TIMES, August 2, 2012, at A14, available at <http://www.nytimes.com/2012/08/02/nyregion/goldman-to-invest-in-new-york-city-jail-program.html?pagewanted=all>. “Social “impact bonds are also sometimes called “Pay for Success.” *See generally* NONPROFIT FINANCE FUND, *supra* note 60 (providing more information about “Pay for Success”).
- 63 *See generally supra* notes 59-61.
- 62 The Social Innovation Fund (SIF) combines public and private resources to grow promising community-based, evidence-based solutions. SIF makes grants to grantmaking “intermediaries” within communities that identify promising programs and guide them towards success. As of February 2012, the Social Innovation Fund has partnered with over 150 private philanthropic funders, \$95 million in federal funds have been awarded, and \$250 million in additional private funds have been leveraged through the program. *See* OFFICE OF SOCIAL INNOVATION AND CIVIC PARTICIPATION, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, SOCIAL INNOVATION FUND, <http://www.whitehouse.gov/administration/eop/sicp/initiatives/social-innovation-fund> (last visited Nov. 13, 2013).
- 64 DEP’T OF EDUC., INVESTING IN INNOVATION FUND (13), <http://www2.ed.gov/programs/innovation/index.html> (last visited Nov. 13, 2013).
- 65 DEP’T OF EDUC., INVESTING IN INNOVATION FUND (13): ALIGNED TO GOALS, <http://www.ed.gov/open/plan/investing-innovation-13> (last visited Nov. 13, 2013).
- 66 Once California started offering financial incentives in 2009 to probation offices for decreasing revocations, there was a state-wide drop in the number of probationers sent to prison. By 2011, the rate of probation failure had dropped to 5.4 percent, a reduction of 32 percent from the 7.2 percent probation failure rate during 2006-2008, the two-year baseline period before incentive implementation. CALIFORNIA ADMINISTRATIVE OFFICE OF THE COURTS, SB 678 YEAR 2 REPORT: IMPLEMENTATION OF THE CALIFORNIA COMMUNITY CORRECTIONS PERFORMANCE INCENTIVES ACT OF 2009 (2012), available at <http://www.courts.ca.gov/documents/SB678-Year-2-report.pdf>.
- 67 Adult Redeploy Illinois was established by the Illinois Crime Reduction Act of 2009. *See* 730 ILL. COMP. STAT. § 190/10 (2009).
- 68 VERA INSTITUTE OF JUSTICE, *supra* note 39, at 4 (“In the past several years, eight states . . . have enacted legislation creating performance incentive funding (PIF) programs through which community corrections agencies receive part of the state savings achieved when they improve their outcomes and send fewer offenders to prison”). *See also* Todd Clear, *A Private-Sector, Incentives-Based Model for Justice Reinvestment*, 10 CRIMINOLOGY & PUB. POL’Y 585, 590 (2011) (“Three quarters of the states have some sort of fiscal arrangement to promote community-based corrections, for example, providing state dollars to local agencies on the condition that rates of sentencing to state prison are controlled.”). Similarly, the Justice Reinvestment Initiative (“JRI”) was originally intended to reduce state prison populations and then use savings from prison costs for investments in local communities hard hit by crime and cycles of incarceration. The philosophy was meant to reward states for intentionally reducing incarceration. In recent years, however, JRI has moved away from the “reinvestment” model, though it continues to help states reduce their incarcerated populations. This program, run by the Justice Department, provides funding to organizations that provide research and assistance to states to help them enact legislation and policies to reduce incarceration rates. *Id.* at 587.
- 69 The Pennsylvania Department of Corrections is restructuring the entire Community Corrections System to focus on “outcomes and performance,” including recidivism reduction. Among other efforts, the Department of Corrections intends to restructure correctional contracts such that they will “require service providers to maintain or reduce recidivism and will

provide incentives for successful reduction of recidivism.” *Pennsylvania House Appropriations Committee: Budget Request FY 2013-2014* (statement of Sec. John E. Wetzel, Penn. Dep’t of Corrections) (March 4, 2013), available at <http://www.pabudget.com/Display/SiteFiles/154/Documents/HearingTestimony/CorrectionsTestimony.pdf>.

- 70 Paula Reed Ward, *Pennsylvania will offer incentives to combat recidivism*, PITTSBURGH POST-GAZETTE, Mar. 1, 2013, available at http://www.post-gazette.com/hp_mobile/2013/03/01/Pennsylvania-will-offer-incentives-to-combat-recidivism/stories/201303010145#ixzz2kJKVi5V6.
- 71 See generally Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251 (1986) (exploring behavioral economics); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. ECON. 1149 (2001) (exploring the ability to shift behavior through government policy); Emir Kamenica, *Behavioral Economics and Psychology of Incentives*, 4 ANN. REV. ECON. 13 (2012) (same).
- 72 For example, Brian D. Galle recently compared the relative economic efficiency of “nudges” and other forms of behaviorally-inspired regulation against more common policy alternatives, such as taxes, subsidies, or traditional quantity regulation. Galle found that in some contexts, contrary to popular wisdom, nudges may out-perform traditional tactics such as fines and subsidies. Brian D. Galle, *Tax, Command – or Nudge? Evaluating the New Regulation*, 92 TEX. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318004.
- 73 The theory of framing choices to guide decision-making (“prospect theory”) was developed in 1979 by psychologists Amos Tversky and Daniel Kahneman. Richard Thaler and Cass Sunstein’s *Nudge* morphed framing and preservation of freedom of choice into “choice architecture.” Popularized by its one-syllable title and straightforward concept, *Nudge* took the best of framing (the ability to effect decision making) and got rid of the worst (the impediment on freedom of choice). THALER & SUNSTEIN, *supra* note 14, at 225. See also David Brooks, *The Nudge Debate*, N.Y. TIMES, Aug. 8, 2013, at A19, available at <http://www.nytimes.com/2013/08/09/opinion/brooks-the-nudge-debate.html>.
- 74 See William J. Congdon, et al., *Behavioral Economics and Tax Policy* 62 NAT’L TAX J. 375 (2009) (framing tax cuts as nudging mechanisms); RAJ CHETTY, ET AL., CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE, SUBSIDIES VS. NUDGES: WHICH POLICIES INCREASE SAVING THE MOST? (2013), available at http://crr.bc.edu/wp-content/uploads/2013/03/IB_13-3-508.pdf (explaining how retirement savings plans are nudging mechanisms). See also Galle, *supra* note 72 (applying the lessons of “nudge” to environmental regulations and other contemporary policy controversies, including New York City’s cap on beverage portion sizes, retirement savings, and charitable contributions); Michael M. Grynbaum, *New York Plans to Ban Sale of Big Sizes of Sugary Drinks*, N.Y. TIMES, May 30, 2012, at A1 (discussing New York City’s attempt to nudge individuals towards reducing sugar consumption by banning sale of any sweetened drink over 16 ounces).
- 75 U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-I-646SP, PERFORMANCE MEASUREMENT AND EVALUATION: DEFINITIONS AND RELATIONSHIPS 2 (2011), available at <http://www.gao.gov/assets/80/77277.pdf>.
- 76 Among public administration experts there is a consensus around the benefits of performance measurement. Harvard Business School Professor Robert Kaplan and business strategist expert David Norton have written extensively on the subject advocating for incorporating outcome-based performance measures into strategic planning. See generally KAPLAN & NORTON, STRATEGY MAPS, *supra* note 13; KAPLAN & NORTON, THE BALANCED SCORECARD, *supra* note 13. See also Julia Melkers & Katherine Willoughby, *Models of Performance-Measurement Use in Local Governments: Understanding Budgeting, Communication, and Lasting Effects*, 65 PUB. ADMIN. REV. 180 (2005); Robert D. Behn, *Why Measure Performance? Different Purposes Require Different Measures*, 63 PUB. ADMIN. REV. 586, 586-87 (2003) (discussing the many reasons to measure performance); David B. Muhlhausen, *Get Out of Jail Free: Taxpayer-Funded Grants Place Criminals on the Street Without Posting Bail*, 3361 WEBMEMO 1, 2 (2011), available at <http://www.heritage.org/research/reports/2011/09/get-out-of-jail-free-criminals-on-the-street-without-posting-bail> (“Performance monitoring through systematic and recurrent documentation of important features of program performance is crucial to assessing whether programs are operating as intended.”).
- 77 PERFORMANCE INSTITUTE, THE LOGIC MODEL, [HTTP://WWW.PERFORMANCEINSTITUTE.ORG/SERVICES/LOGIC-MODEL](http://www.performanceinstitute.org/services/logic-model) (last visited Nov. 13, 2013).
- 78 PERFORMANCE.GOV, CLEAR GOALS: USING GOALS TO IMPROVE PERFORMANCE AND ACCOUNTABILITY, http://goals.performance.gov/goals_2013 (last visited Nov. 13, 2013). See also Government Performance and Results Modernization Act of 2010, 31 U.S.C. § 1101 (2013) (requiring “quarterly performance assessments of Government programs for purposes of assessing agency performance and improvement”).
- 79 See, e.g., ALIX PETERSON ZWANE, ET AL., BEING SURVEYED CAN CHANGE LATER BEHAVIOR AND RELATED PARAMETER ESTIMATES (2010), available at <http://economics.mit.edu/files/6765> (finding that surveys about health and microlending played

an important, but context dependent role in consumer choice).

- 80 *See supra* note 13.
- 81 Lawrence W. Sherman, et al., *The Effectiveness of Local Crime Prevention Funding*, in PREVENTING CRIME: WHAT WORKS, WHAT DOESN'T, WHAT'S PROMISING (1998), available at <https://www.ncjrs.gov/works/wholedoc.htm>.
- 82 *Id.* at 493.
- 83 *See* MOORE & BRAGA, *supra* note 25, at 13, 31 (2003); STEPHEN D. MASTROFSKI, POLICE FOUNDATION, IDEAS IN AMERICAN POLICING: POLICING FOR PEOPLE 4 (1999), available at <http://www.policefoundation.org/sites/g/files/g798246/f/Mastrofski%20%281999%29%20-%20Policing%20For%20People.pdf> (criticizing that “virtually all of the federal dollars supporting nationwide collection of data on police performance go to measuring crime, victimization, and fear of crime”).
- 84 *See* Ed Magnuson, *Tears of Rage: Americans Lose Patience with Panama and with a Failed Drug Policy*, TIME, Mar. 14, 1988, available at <http://content.time.com/time/magazine/article/0,9171,148871,00.html> (last visited Nov. 11, 2013); *see also* About Officer Byrne, BUREAU OF JUSTICE ASSISTANCE, <https://www.bja.gov/Programs/OfficerByrne.html> (last visited Nov. 11, 2013).
- 85 *See* Anti-Drug Abuse Act, 42 U.S.C. §§ 3750-3766b (1988).
- 86 The Anti-Drug Abuse Act amended the Omnibus Crime and Control Act of 1968 law. *See* Omnibus Crime and Control Act of 1968, 42 U.S.C. §§ 3750-3758 (1968).
- 87 VAWA Reauthorization, 42 U.S.C. §§ 3750- 3758. In this statute, Congress merged the original Byrne formula grant (incorporated into the Anti-Drug Abuse Act) and the Local Law Enforcement Block Grant to create today's JAG. *See also* 42 U.S.C. § 14141 (1995) (Local Law Enforcement Block Grant).
- 88 There is a program separate from JAG called the Byrne Criminal Justice Innovation Program (BCJI). Started in 2012 as a project of the Neighborhood Revitalization Initiative, BCJI grants are awarded based on a competitive application process. Before receiving the funds, recipients must prove they have the support of local law enforcement, the community leaders and service providers, and a research partner. Recipients must also engage in proactive program management tied to rigorous research, data analysis, and program assessment. *See* BUREAU OF JUSTICE ASSISTANCE, OFFICE OF JUSTICE PROGRAMS, OMB No. 1121-0329, BYRNE CRIMINAL JUSTICE INNOVATION PROGRAM FY 2012 COMPETITIVE GRANT ANNOUNCEMENT, available at <https://www.bja.gov/funding/12bcjisol.pdf>.
- 89 *See* NATIONAL CENTER FOR JUSTICE PLANNING, CORNERSTONE FOR JUSTICE: BYRNE JAG AND ITS IMPACT ON THE CRIMINAL JUSTICE SYSTEM 1 (2011), available at <http://www.ncja.org/sites/default/files/documents/cornerstone-for-justice-report.pdf> [hereinafter NCJP, CORNERSTONE FOR JUSTICE]. In some years, the DOJ Asset Forfeiture Fund's Equitable Sharing Program received cash infusions that make it comparable to JAG's budget. However, the Equitable Sharing Program is not expressly a federal grant program. *See generally* *Equitable Sharing Program*, DEP'T OF JUSTICE, <http://www.justice.gov/criminal/afmls/equitable-sharing/>.
- 90 “In 2013, BJA processed 56 state/territory awards and 1,078 local awards to direct recipients.” BUREAU OF JUSTICE ASSISTANCE, EDWARD BYRNE JUSTICE ASSISTANCE GRANT (JAG) PROGRAM FACT SHEET 1 (2013) [hereinafter BJA JAG FACT SHEET], available at https://www.bja.gov/Publications/JAG_Fact_Sheet.pdf. There are far more indirect recipients. For example, in Georgia, there were twenty-seven state sub-recipients in 2013. *See* CRIMINAL JUSTICE COORDINATING COUNCIL, BYRNE JUSTICE ASSISTANCE GRANT SUB-RECIPIENTS: ACTIVE AWARDS AS OF JULY 10, 2013, available at <http://cjcc.georgia.gov/sites/cjcc.georgia.gov/files/Byrne%20JAG%20Subrecipients%20as%20of%207.10.13.pdf>. Congress has progressively decreased funding appropriations to JAG in recent years: for example, in FY 2011 JAG was appropriated \$424 million; in FY 2012, \$352 million; and in FY 2013, \$371 million, but this amount was later reduced to \$352 million due to sequestration. *See History of Byrne JAG Funding*, NATIONAL CRIMINAL JUSTICE ORGANIZATION, <http://www.ncja.org/history-of-byrne-jag-funding#sthash.vpjd9kqp.dpuf> (last visited Nov. 11, 2013). *See also* *Appropriations*, NATIONAL CRIMINAL JUSTICE ORGANIZATION, <http://www.ncja.org/issues-and-legislation/legislation/appropriations> (last visited Nov. 11, 2013). “Byrne JAG's predecessor programs received even more [funding] between FY 1998 and FY 2004, averaging \$944 million.” SENATOR TOM COBURN, BACK IN BLACK: A DEFICIT REDUCTION PLAN 11 (2011), available at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=6f6a10c3-ebae-4c07-916e-758185defeb8 (citing NATHAN JAMES, CONG. RESEARCH SERV., RS22416, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 5 (2011)).

- 91 See Justice Assistance Grant (JAG) Program, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=59 (lasted visited Nov. 14, 2013).
- 92 VAWA Reauthorization, 42 U.S.C. § 3755. This formulaic calculation requires that each state's allocation meet or exceed a minimum of 0.25 percent of total JAG funds available for the year. If the formula, based on a state's population and violent crime rates, equals less than this amount, BJA must increase the award to the minimum.
- 93 The amount of funds received by localities is allocated through a second formula based only on the localities' violent crime rate. *See id.* If a local jurisdiction's award is calculated to be less than \$10,000, BJA sends the funds to the state and "flags" it for the specific locality. If the calculated award is \$10,000 or more, BJA sends the award to the locality to directly distribute. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-87, RECOVERY ACT: DEPARTMENT OF JUSTICE COULD BETTER ASSESS JUSTICE ASSISTANCE GRANT PROGRAM IMPACT 9-10 (2010), available at <http://www.gao.gov/new.items/d1187.pdf> [hereinafter GAO, DOJ COULD BETTER ASSESS JAG PROGRAM].
- 94 See ALEXIA D. COOPER, U.S. BUREAU OF JUSTICE STATISTICS, NCJ 2242412, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2013 4-5 (July 2013), available at <http://www.bjs.gov/content/pub/pdf/jagp13.pdf>.
- 95 "In most states, grants are made using a peer reviewed, competitive application process based on a statewide strategic plan developed in conjunction with the state's system stakeholders." *See* Letter from Jack Cutrone, President, Nat'l Criminal Justice Ass'n et al. to Sen. Barbara Mikulski et al. 2 (June 5, 2013), available at <http://www.ncja.org/sites/default/files/documents/Criminal-Justice-Stakeholder-Letter-on-Byrne-JAG-in-FY14.pdf> (explaining that local recipients often compete for funds).
- 96 State and territory funds are administered by appointed permanent agencies called "state administering agencies," while local funds are administered by temporary designated officials. The 6 territories are the District of Columbia, Puerto Rico, Guam, Mariana Islands, Virgin Islands, and American Samoa. *See* BUREAU OF JUSTICE ASSISTANCE, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM; STATE SOLICITATION 4 (2013), available at <https://www.bja.gov/Funding/13JAGStateSol.pdf>. *See also* BUREAU OF JUSTICE ASSISTANCE, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM: LOCAL SOLICITATION 4 (2013), available at <https://www.bja.gov/Funding/13JAGLocalSol.pdf>.
- 97 *See* BJA JAG FACT SHEET, *supra* note 90 for sources reflecting data provided in the chart. *See also* U.S. BUREAU OF JUSTICE ASSISTANCE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, 2013 TECHNICAL REPORT 1 (2013), available at <https://www.bja.gov/Publications/JAGTechRpt.pdf> (providing funding data for chart on 2013 JAG Funding).
- 98 *See* NCJP, CORNERSTONE FOR JUSTICE, *supra* note 89, at 18.
- 99 DIVISION OF CRIMINAL JUSTICE SERVICES, 2011 ANNUAL PERFORMANCE REPORT FOR THE NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES 55 (2011), available at <http://www.criminaljustice.ny.gov/pio/annualreport/2011-annual-dcjs-performance-report.pdf>.
- 100 "JAG funding is often the sole source of funding for task forces. Collectively, spending on task forces is 23 percent of total JAG formula spending." NATIONAL CRIMINAL JUSTICE ASSOCIATION, THE BYRNE JAG PROGRAM (2011), available at <http://ncja.org/sites/default/files/documents/ByrneJAGLaw%20EnforcementOnePager.pdf>.
- 101 BUREAU OF JUSTICE ASSISTANCE, PROGRAM PERFORMANCE REPORT: JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 3 (2012), available at <https://www.bja.gov/Publications/JAGTFApr2011-Mar2012.pdf>.
- 102 JAG funds accounted for approximately 0.271% of the FY 2012 Boston Police Department ("BDP") Budget, and 1.59% of the FY 2012 Chicago Police Department Budget. *See* THOMAS M. MENINO, OPERATING BUDGET FISCAL YEAR 2012 270 (2012), available at http://www.cityofboston.gov/images_documents/05%20Public%20Safety%20Cabinet_2_tcm3-37468.pdf (BPD received \$767,699 in JAG, accounting for 0.271 percent of the BPD total operating budget of \$283,038,027); RAHM EMANUEL, CITY OF CHICAGO BUDGET 2012 OVERVIEW 89, 95 (2012), available at http://www.cityofchicago.org/dam/city/depts/obm/supp_info/2012%20Budget/2012BudgetOverview.pdf ("\$21.2 million in Justice Assistance Grants," account for 1.59 percent of the CPD total operating budget of \$1,336,164,608).
- 103 Letter from Jack Cutrone, President, Nat'l Criminal Justice Ass'n et al. to Sen. Barbara Mikulski & Sen. Richard Shelby in support of Byrne JAG (Mar. 8, 2013), available at <http://www.ncja.org/sites/default/files/documents/Criminal-Justice-Stakeholders-Letter-on-Final-FY13-CR-to-Senate-CJS%20-03-8-13.pdf>.

- 104 NATIONAL CRIMINAL JUSTICE ASSOCIATION, BYRNE JAG STAKEHOLDER SURVEY: A SURVEY OF CALIFORNIA BOARD OF STATE AND COMMUNITY CORRECTIONS 3 (2013), available at http://www.bscc.ca.gov/download.php?f=/Agenda_Item_A_Attachment_B_JAG_Survey_Results.pdf. The NCJA collaborates with state, tribal and local criminal and juvenile justice practitioners to promote a balanced approach to public safety and communicate criminal justice needs and accomplishments to Congress. See About Us, National Criminal Justice Association, <http://www.ncja.org/about-ncja> (last visited Nov. 16, 2013).
- 105 42 U.S.C. § 3751(a) (1).
- 106 *Id.*
- 107 *Id.* at 42 U.S.C. § 3751(d) (2) (A-E).
- 108 BUREAU OF JUSTICE ASSISTANCE, JUSTICE ASSISTANCE GRANT (JAG) PROGRAM CLOSEOUT REPORT: JANUARY 2010-MARCH 2012 4 (2012), available at <https://www.bja.gov/Publications/JAG0312CloseoutReport.pdf> (providing average state and local JAG funding amounts from 2010-2012)[hereinafter BJA, CLOSEOUT REPORT].
- 109 NATIONAL CRIMINAL JUSTICE ASSOCIATION, THE IMPACT OF THE BYRNE JUSTICE ASSISTANCE GRANT PROGRAM: HOW BYRNE JAG IS CHANGING THE CRIMINAL JUSTICE SYSTEM 4 (2013), available at <http://www.ncja.org/sites/default/files/documents/System-Change-Through-the-Byrne-JAG-Program-NCJA-10-13.pdf> (providing 2012 state JAG funding amounts) [hereinafter NCJA, THE IMPACT OF BYRNE JAG].
- 110 BJA, CLOSEOUT REPORT, *supra* note 108, at 4.
- 111 See NCJA, THE IMPACT OF BYRNE JAG, *supra* note 109, at 9.
- 112 BJA, CLOSEOUT REPORT, *supra* note 108, at 4.
- 113 *Id.*
- 114 See NCJA, THE IMPACT OF BYRNE JAG, *supra* note 109, at 6.
- 115 BJA, CLOSEOUT REPORT, *supra* note 108, at 4.
- 116 *Id.*
- 117 *Id.*
- 118 NCJP, CORNERSTONE FOR JUSTICE, *supra* note 89, at 18. There is potential for an up to four year project period extension, meaning that states could be using a blend of FY2007, FY2008, FY2009, and FY2010 funding, as well as JAG Recovery Act funding for certain projects. See *id.* at 3.
- 119 The data in the pie chart is from the following source: BJA, CLOSEOUT REPORT, *supra* note 108, at 4 (providing average state and local JAG funding amounts from 2010-2012).
- 120 “Byrne JAG supports the federal government’s crucial role in spurring innovation, as well as testing and replicating evidence-based practices nationwide.” See NCJP, CORNERSTONE FOR JUSTICE, *supra* note 89, at 2.
- 121 See PEW CENTER ON THE STATES, NATIONAL INSTITUTE OF JUSTICE, ISSUE BRIEF: THE IMPACT OF HAWAII’S HOPE PROGRAM ON DRUG USE, CRIME AND RECIDIVISM I (2010), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/The%20Impact%20of%20Hawaii%E2%80%99s%20HOPE%20Program%20on%20Drug%20Use,%20Crime%20and%20Recidivism.pdf (providing statistics on success rates of HOPE Initiative); Steven S. Alm, *A New Continuum for Court Supervision*, 91 OR. L. REV. 1181, 1187, n.21 (2013), available at <http://law.uoregon.edu/org/olr/volumes/91/2/documents/Alm.pdf> (noting that HOPE saved taxpayers millions of dollars by avoiding the annual \$46,000 per prisoner for averted offenders).
- 122 ADULT REDEPLOY ILLINOIS OVERSIGHT BOARD, 2012 ANNUAL REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY ON THE IMPLEMENTATION AND PROJECTED IMPACT OF ADULT REDEPLOY 1 (2013), available at http://www.icjia.state.il.us/public/REDEPLOY/pdf/annualreports/2012_Adult_Redeploy_Illinois_Annual_Report.pdf.

- 123 Elizabeth Hague, Emma Freeman & Victoria Burt, “The Warning Signs Were There”: *The Jeanne Geiger Crisis Center Model, High Risk Teams, and Community Adaptation*, 17 DOMESTIC VIOLENCE REPORT 35, 35 (2012), available at http://jeannegeigercrisiscenter.org/jimg/resources/reportpdf/jgcc_DomesticViolenceReportw_JGCCArticles.pdf. See also JEANNE GEIGER CRISIS CENTER, INC., GREATER NEWBURYPORT DOMESTIC VIOLENCE HIGH RISK TEAM: SAFETY AND ACCOUNTABILITY REPORT (2005-2011) 4, available at http://jeannegeigercrisiscenter.org/jimg/resources/reportpdf/jgcc_safety-and-accountability-report.pdf.
- 124 See NCJA, THE IMPACT OF BYRNE JAG, *supra* note 109, at 2.
- 125 The statute requires all grant applicants to assure DOJ that they will “maintain and report such data, records, and information (programmatic and financial) as [DOJ] may reasonably require.” See 42 U.S.C. § 3752 (emphasis added). See *infra* note 154 (discussing the calls for reform to JAG performance measures by both the Heritage Foundation and the ACLU).
- 126 This form is called the “Justice Assistance Grant Performance Measures.” Recipients send this data back through the Performance Measurement Tool (“PMT”), BJA’s database for recipients’ reports. Sometimes, recipients colloquially refer to the performance measures as “the PMT.” See generally BJA, (JAG) PROGRAM PERFORMANCE MEASURES, *supra* note 12.
- 127 See *id.*
- 128 *Id.* at 4.
- 129 See *id.* at 3-12.
- 130 See *id.* at 13-16.
- 131 See generally *id.*
- 132 See GEORGE L. KELLING, CRIME AND METAPHOR: TOWARD A NEW CONCEPT OF POLICING, 1 CITY JOURNAL (1991), available at <http://www.city-journal.org/article01.php?aid=1577>. See also GEORGE L. KELLING, DEFINING THE BOTTOM LINE IN POLICING: ORGANIZATIONAL PHILOSOPHY AND ACCOUNTABILITY 23-36 (1996).
- 133 As part of our interview process explained in the Methodology, from June 2013 to October 2013, the authors interviewed more than 30 former and current state and local recipients across the country, each experienced in administering, distributing, or using JAG funds. These included recipients from: California, Georgia, Illinois, Massachusetts, Nevada, New York, Oregon, Pennsylvania, Texas, Tennessee, Washington State and Wisconsin. Notes are on file with the authors, some confidential. Please see the Methodology section of this report for more information.
- 134 Notably, task forces have been criticized by some as driving the War on Drugs. See ERIC BLUMENSON & EVA NILSEN, POLICING FOR PROFIT: THE DRUG WAR’S HIDDEN ECONOMIC AGENDA, 65 U. CHI. L. REV. 35, 42-55 (1998) (discussing the proliferation of task forces and the War on Drugs).”
- 135 In FY 2010 indigent defense received \$2.9 million in JAG funding, so the 53 percent increase between 2011 and 2012 may simply reflect lower than normal funding for this category in 2011, rather than an actual shift. See NATIONAL CRIMINAL JUSTICE ASSOCIATION, STRENGTHENING INDIGENT DEFENSE: UNDERSTANDING STATE AND FEDERAL RESOURCES, (webinar presented January 22, 2013), available at <http://www.ncja.org/sites/default/files/documents/Strengthening-Indigent-Defense.pdf>.
- 136 These statements were compiled based on the before mentioned interviews conducted by the authors in *supra* note 133.
- 137 AUDIT DIVISION, OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, AUDIT REPORT 10-43, OFFICE OF JUSTICE PROGRAMS’ RECOVERY ACT AND NON-RECOVERY ACT PROGRAMS FOR EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANTS AND BYRNE COMPETITIVE GRANTS 21 (Aug. 2010), available at <http://www.justice.gov/oig/reports/OJP/a1043.pdf> [hereinafter DOJ, AUDIT REPORT 2010].
- 138 This statement is based on several interviews conducted by the authors, as mentioned in *supra* note 133, and then confirmed by government officials in informal discussions.
- 139 DOJ, AUDIT REPORT 2010, *supra* note 137, at iii, 18, 21, 22, 24.

- 140 Telephone Interview with Elizabeth Zwicker, Performance Measures Coordinator, U.S. Dep't of Justice (Mar. 2010).
- 141 For the underlying numbers and details about data collection, see BJA, CLOSEOUT REPORT, *supra* note 108, at 4. For example, DOJ maintains profile pages for each state describing the amount of federal funding they receive, their crime rates, and highlighting any interesting programs. However, these profile pages do not demonstrate how those federal dollars were spent and generally lacks criminal justice information outside the fields of law enforcement and corrections. *See, e.g.* BUREAU OF JUSTICE ASSISTANCE, STATE AND TERRITORY FACT SHEET: NEW YORK 1, available at http://www.iir.com/bja-state-fact-sheets/PDF/New_York_State_Profile_Sheet.pdf (last visited Nov. 15, 2013) (providing information about JAG funding allocated to New York State, but lacking information about which purpose areas JAG funds supported and failing to identify JAG award sub-recipients); BUREAU OF JUSTICE ASSISTANCE, STATE AND TERRITORY FACT SHEET: TEXAS 1-2, available at http://www.iir.com/bja-state-fact-sheets/PDF/Texas_State_Profile_Sheet.pdf (last visited Nov. 15, 2013) (providing arrest data, crime trends, and JAG funding in Texas, but lacking information about the kinds of programs that JAG dollars were spent to support and how they benefit public safety or improve the criminal justice system).
- 142 OFFICE OF MANAGEMENT AND BUDGET, DETAILED INFORMATION ON THE MULTIPURPOSE LAW ENFORCEMENT GRANTS ASSESSMENT (2007), available at <http://georgewbush-whitehouse.archives.gov/omb/expectmore/detail/10003806.2005.html>.
- 143 DEP'T OF JUSTICE, BUDGET FOR FISCAL YEAR 2007 177 (2006), available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2007-BUD/pdf/BUDGET-2007-BUD-18.pdf>.
- 144 Telephone Interview with Elizabeth Zwicker, Performance Measures Coordinator, U.S. Dep't of Justice (Mar. 2010); *see also* BUREAU OF JUSTICE ASSISTANCE, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM; STATE SOLICITATION 4 (2007), available at <https://www.bja.gov/Funding/07JAGstate.pdf> (including only four questions, all relating to gangs or drugs).
- 145 GAO, DOJ COULD BETTER ASSESS JAG PROGRAM, *supra* note 93, at 2.
- 146 BUREAU OF JUSTICE ASSISTANCE, PROGRAM PERFORMANCE MEASURES FOR AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA) AND JUSTICE ASSISTANCE GRANT (JAG) PROGRAMS (2010) (on file with authors).
- 147 GAO, DOJ COULD BETTER ASSESS JAG PROGRAM, *supra* note 93, at 8, 30, 39.
- 148 *Id.* at 30.
- 149 *Compare id.* at 47, with BUREAU OF JUSTICE ASSISTANCE, PROGRAM PERFORMANCE MEASURES FOR AMERICAN RECOVERY AND REINVESTMENT ACT (ARRA) AND JUSTICE ASSISTANCE GRANT (JAG) PROGRAMS (2010) (on file with authors).
- 150 GAO, DOJ COULD BETTER ASSESS JAG PROGRAM, *supra* note 93, at 73-74; *see also* BJA, (JAG) PROGRAM PERFORMANCE MEASURES, *supra* note 12. In 2012, DOJ surveyed more than 800 recipients and committed to providing better definitions, giving recipients checklists, and publishing more data. BUREAU OF JUSTICE ASSISTANCE, JUSTICE ASSISTANCE GRANT PROGRAM SURVEY RESULTS 8 (2012), available at <https://www.bja.gov/Programs/JAG/JAGSurveyResultsSummary.pdf>.
- 151 BUREAU OF JUSTICE ASSISTANCE, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM; STATE SOLICITATION 2 (2010), available at <https://www.bja.gov/Funding/10JAGStateSol.pdf>.
- 152 EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM, FY 2010 STATE SOLICITATION 2-3 (2010), available at <https://www.bja.gov/Funding/10JAGStateSol.pdf>.
- 153 *Id.* at 3. *See also* *Crime Solutions.gov*, NAT'L INST. OF JUSTICE, <http://www.crimesolutions.gov/> (last visited Nov. 13, 2013) (defining evidence-based practices (EBPs)).
- 154 The Heritage Foundation has urged improved performance measures or alternatively the elimination of JAG specifically. *See* Muhlhausen, *supra* note 76, at 2. It has also criticized federal grants to local law enforcement more generally on federalist grounds. *See* David B. Muhlhausen & Erica Little, *Federal Law Enforcement Grants and Crime Rates: No Connection Except for Waste and Abuse*, 2015 BACKGROUNDER 1, 2-3 (2007), available at <http://www.heritage.org/research/reports/2007/03/federal-law-enforcement-grants-and-crime-rates-no-connection-except-for-waste-and-abuse> (criticizing the Office of Community Oriented Policing Services (COPS) grants because the “[i]ncreased federal influence in the operations of local police departments could . . . effectively create a nationalized police force.”). The ACLU has also criticized JAG, linking it to fueling

- racial disparities in arrest rates. See AM. CIVIL LIB. UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 102-04 (2013), available at <https://www.aclu.org/files/assets/100413-mj-report-rfs-rel1.pdf>.
- 155 See Byrne/JAG Program Accountability Act, H.R. 5304, 111th Cong. § 2 (2010) and Byrne/JAG Program Accountability Act, H.R. 1913, 112th Cong. § 2 (2011).
- 156 Justice for All Reauthorization Act of 2013, 113th Cong. 1st Session, S. 822 (2013). “The bill also asks states to produce comprehensive plans for their criminal justice systems, which will help to ensure that criminal justice systems operate effectively as a whole and that all parts of the system work together and receive the resources they need.” Press Release, Sen. Patrick Leahy, Leahy & Cornyn Introduce Legislation to Reauthorize Landmark Justice For All Act (Apr. 25, 2013), available at <http://www.leahy.senate.gov/press/leahy-and-cornyn-introduce-legislation-to-reauthorize-landmark-justice-for-all-act>.
- 157 OFFICE OF MANAGEMENT AND BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2014: BUDGET 53 (2013) available at <http://www.gpo.gov/fdsys/pkg/BUDGET-2014-BUD/pdf/BUDGET-2014-BUD.pdf>.
- 158 See NAT’L CONFERENCE OF STATE LEGISLATORS, DEP’T OF JUSTICE BUDGET OVERVIEW 1 (2013), available at http://www.ncsl.org/documents/statefed/DOJ_FY2014.pdf (recognizing that the Byrne Incentive Grant Program is dedicated in part to encouraging “justice realignment efforts”). See also See U.S. DEP’T OF JUSTICE, FY 2014 PERFORMANCE BUDGET 180 (2013), available at <http://www.justice.gov/jmd/2014justification/pdf/ojp-justification.pdf> (providing examples of potential “realignments”).
- 159 C. Peter Rydell & Susan S. Everingham, RAND Corp., *Controlling Cocaine: Supply Versus Demand Programs* xiv (1994), available at http://www.rand.org/content/dam/rand/pubs/monograph_reports/2006/RAND_MR331.pdf. Increases in drug treatment admissions are associated with reductions in crime rates and incarceration rates. The Washington State Institute for Public Policy estimated in 2009 that every dollar spent on drug treatment in the community will return an estimated \$21.16 in benefits to society. See Elizabeth K. Drake, Steve Aos, & Marna G. Miller, *Evidence-Based Public Policy Options to Reduce Crime and Criminal Justice Costs: Implications in Washington State*, 4 VICTIMS AND OFFENDERS 170, 185 (2009), available at <http://www.wsipp.wa.gov/rptfiles/09-00-1201.pdf>.
- 160 See *supra* notes 22-23 and accompanying text.
- 161 DOJ has the authority to enforce legislative reporting requirements against grant recipients who fail to submit complete and timely reports. The statute requires all grant applicants to assure DOJ that they will “maintain and report such data, records, and information (programmatic and financial) as the Attorney General may reasonably require.” See 42 U.S.C. § 3752. DOJ identifies those reporting requirements in annual solicitations, providing information on the next grant cycle. For example, in 2013 DOJ required recipients to submit quarterly and annual reports, including performance metrics reports, every year. See BJA, FYI 2013 STATE SOLICITATION, *supra* note 96, at 11.
- 162 See U.S. DEP’T OF JUSTICE, FY 2014 PERFORMANCE BUDGET 180-183 (2013), available at <http://www.justice.gov/jmd/2014justification/pdf/ojp-justification.pdf>.
- 163 BJA (JAG) PROGRAM PERFORMANCE MEASURES, *supra* note 12, at 1.
- 164 This definition is from the National Institute of Justice (“NIJ”). See *Crimesolutions.gov FAQs*, U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, <http://www.crimesolutions.gov/faqs.aspx> (last visited Nov. 11, 2013).
- 165 This definition is also from NIJ. *Id.* SHERMAN, ET AL., *supra* note 81.
- 166 The FBI’s Uniform Crime Reporting (“UCR”) program categorizes violent crime as composed of four offenses: murder and non-negligent manslaughter, forcible rape, robbery, and aggravated assault. Violent crimes are defined in the UCR Program as those offenses which involve force or threat of force. See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 2010 1 (2011), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime/violent-crime>.
- 167 For more on risk assessment instruments, see PEW CENTER ON THE STATES, PUBLIC SAFETY PERFORMANCE PROJECT: RISK/NEEDS ASSESSMENT 101: SCIENCE REVEALS NEW TOOLS TO MANAGE OFFENDERS (2011), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_Risk_Assessment_brief.pdf.
- 168 “Community wellness” is a concept increasingly used by police departments using community policing strategies. It includes

such things as improvements to public health, economic development, employment, and educational attainment. See ROBERT C. WADMAN, *POLICE THEORY IN AMERICA: OLD TRADITIONS AND NEW OPPORTUNITIES* (2009); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *SUMMARY OF THE FIRST MEETING OF THE CRIME INDICATORS WORKING GROUP* (2012); JEREMY TRAVIS & JOSEPH E. BRANN, U.S. DEP'T OF JUSTICE, NAT'L INST. OF JUSTICE, *MEASURING WHAT MATTERS PART TWO: DEVELOPING MEASURES OF WHAT THE POLICE DO* (1997), available at <https://www.ncjrs.gov/pdffiles/167255.pdf>.

- 169 Strategic planning is a process that includes establishing a team, involving stakeholders, collecting data, setting goals, developing strategies, and implementing and assessing programs. See *Overview of Strategic Planning*, NATIONAL CENTER FOR JUSTICE PLANNING, NATIONAL CRIMINAL JUSTICE ASSOCIATION, <http://www.ncjip.org/strategic-planning/overview> (last visited Nov. 15, 2013).
- 170 Crime prevention is defined not by its intentions, but by its consequences. These consequences can be defined in at least two ways. One is by the number of criminal events; the other is by the number of criminal offenders. Michael Gottfredson & Travis Hirschi. *Positive Criminology* (SAGE Publications 1987). Some also define it by the amount of harm prevented or by the number of victims. See Albert J. Reiss Jr. & Jeffrey A. Roth, eds., *Understanding and Preventing Violence* 59-61 (National Academies Press 1993); Graham Farrell, *Preventing Repeat Victimization*, CRIME AND JUSTICE 469-534 (1995) [hereinafter Reiss & Roth]. In asking the Attorney General to report on the effectiveness of crime prevention efforts supported by the Justice Department's Office of Justice Programs, Congress has embraced an even broader definition of crime prevention: reduction of risk factors for crime (such as gang membership) and increases in protective factors (such as completing high school) — concepts that a National Academy of Sciences report has labeled as “primary” prevention. Reiss & Roth at 150. What all these definitions have in common is their focus on observed effects, and not the “hard” or “soft” content, of a program. For more information on what approaches work to reduce crime, see SHERMAN, ET AL., *supra* note 81, at 20-45.
- 171 Defined as “violent crimes reported per 100,000 inhabitants.” See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012 (2013), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/violent-crime/violentcrimemain.pdf>.
- 172 A “violence-related” injury is one caused by an external cause. These causes are defined in the codes used by Medicaid, Medicare, private insurance companies, and healthcare organizations. See, e.g., ILL. DEP'T OF PUBLIC HEALTH, DIV. OF EMERGENCY MED. SYS. AND HIGHWAY SAFETY, ILLINOIS VIOLENT INJURY REPORTING (2005); ICD-9CM E-Codes, INT'L CLASSIFICATION OF DISEASES, CLINICAL MODIFICATION, EXTERNAL CAUSE OF INJURIES (10th Rev., 2010).
- 173 These types of activities are proven effective at crime prevention. See SHERMAN ET AL., *supra* note 81. Since it is difficult to measure and pinpoint causation for crime prevention, reporting on amount of funds spent can help ascertain whether law enforcement is engaging in effective activities.
- 174 These types of activities are proven effective at crime prevention. See *generally id.*
- 175 The Bureau of Justice Statistics has used the following race/ethnicity categories: White (i.e. white, non-Hispanic; black/African American, non-Hispanic; Hispanic/Latino, etc; or two or more races).
- 176 Although the statute terms this category “prosecution and courts,” DOJ has expanded it to include these other criminal court actors as well. It is within DOJ's discretion to define the categories. See BJA, (JAG) PROGRAM PERFORMANCE MEASURES, *supra* note 12.
- 177 Because prosecutors' recommendations concerning pretrial detention influence court actors, these questions are asked of prosecutors here and of courts later.
- 178 This measure and similar ones are designed to help reduce incarceration levels.
- 179 “Resolved” is defined as dismissed, resulted in a conviction, received a conviction, or received a final adjudication.
- 180 For jurisdictions with one jail, calculate the number of days the jail stayed under 120 percent capacity and divide by 365. For jurisdictions with multiple jails, calculate the sum of the number of days each jail stayed under 120 percent capacity and divide by the number of jails times 365.

181 *See supra* 180 for calculation methodology.

182 Research indicates that people participating in treatment for at least 90 days have substantially better outcomes than those participating for lesser periods (with the exception of people participating in methadone treatment programs). *See* NAT'L INST. ON DRUG ABUSE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE (2012); U.S. DEP'T OF HEALTH AND HUMAN SERVS., PRINCIPLES OF DRUG ADDICTION TREATMENT FOR CRIMINAL JUSTICE POPULATIONS: A RESEARCH-BASED GUIDE (2012).

183 Recipients should use the definition used in their state.

STAY CONNECTED TO THE BRENNAN CENTER

Visit our website at www.brennancenter.org.
Sign up for our electronic newsletters at www.brennancenter.org/signup.

Latest News | Up-to-the-minute info on our work, publications, events, and more.

Voting Newsletter | Latest developments, state updates, new research, and media roundup.

Justice Update | Snapshot of our justice work and latest developments in the field.

Fair Courts | Comprehensive news roundup spotlighting judges and the courts.

Twitter | www.twitter.com/BrennanCenter
Facebook | www.facebook.com/BrennanCenter

NEW AND FORTHCOMING BRENNAN CENTER PUBLICATIONS

Gideon at 50: Three Reforms to Revive the Right to Counsel
Thomas Giovanni, Roopal Patel

Early Voting: What Works
Diana Kasdan

Federal Judicial Vacancies: The Trial Courts
Alicia Bannon

What the Government Does with Americans' Data
Rachel Levinson-Waldman

A Proposal for an NYPD Inspector General
Faiza Patel and Andrew Sullivan

National Security and Local Police
Michael Price

The Case for Voter Registration Modernization
Brennan Center for Justice

Democracy & Justice: Collected Writings, Vol. VI
Brennan Center for Justice

For more information, please visit www.brennancenter.org.

BRENNAN
CENTER
FOR JUSTICE

at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, NY 10013
646-292-8310
www.brennancenter.org