

# JUSTICE DRIVEN DATA



From the San Francisco District Attorney's Office

## An Epidemic Inside a Pandemic

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Edited By Rachel Marshall and Robyn Burke

November 30, 2020



# JUSTICE DRIVEN DATA

## An Introduction by District Attorney Chesa Boudin

The criminal legal system is failing to uphold the values it claims to promote. Instead of justice, our system is plagued by mass incarceration and staggering systemwide racial disparities. A focus on punishment has caused our jails and prisons to churn out people who are traumatized, disconnected from community support, less employable, and who often end up back in custody. This system fails to address the complex truth that people who engage in harm and those who are harmed often come from the same communities where structural racism and violence are pervasive. As a result, the system does not serve victim/survivors and increases the harm to our broader community. The system doesn't just need reform – it needs re-building. At the center of the system sits one of its most powerful decision-makers: the prosecutor's office.

The San Francisco District Attorney's Office (SFDA) believes it is time to radically change prosecutorial practices, rejecting the notion that to be free and safe we must cage others; rejecting the notion that redemption and accountability require practices that push defendants and victims/survivors further into poverty. We must work with local leaders and community members to ensure we are building an effective, humane criminal legal system that acknowledges the dignity in all people and values public health and accountability over punishment and retribution. As powerful decision makers sitting at the nexus of enforcement, accountability, and healing, prosecutors have a unique opportunity to drive solutions. We have a responsibility to share our own experience as we work to transform the system.

Justice Driven Data is a series of issue briefs created by SFDA to disseminate firsthand, practitioner experience focused on enhancing the field of prosecutorial reform. There are few publications that provide prosecutors' perspectives and experiences implementing reform. This publication aims to share practitioner perspective on the use of data to drive decision-making, to implement reform, and measure results. Justice Driven Data publications are focused on real time actions led by prosecutors in the pursuit of justice. This is a practitioner journal focused on modeling the use of data to inform change-making, promote transparency, and hold ourselves and the system accountable.

### Justice Driven Data and COVID-19

Less than three months into my first term in office, we were faced with a global crisis. Public health officials warned us that our city's jails were too crowded to allow for social distancing— an imminent threat to public safety. Faced with uncertainty amidst an unprecedented emergency, we focused on our principles: we turned to data, empirical evidence, experts, and our commitment to public safety for *all* to guide us. We aggressively implemented a broad array of policies to rapidly reduce our jail population and close a jail without jeopardizing public safety.

The purpose of this paper is to share the strategies we used to safely and rapidly decarcerate and to contextualize our work within our broader goals of public safety, reducing racial inequities, and data-driven justice.

As COVID-19 cases continue to surge across the country, we believe it is our duty to share this work to promote transparency and support other jurisdictions in taking the critical measures needed to reduce their jail populations and prevent avoidable deaths.

-Chesa Boudin

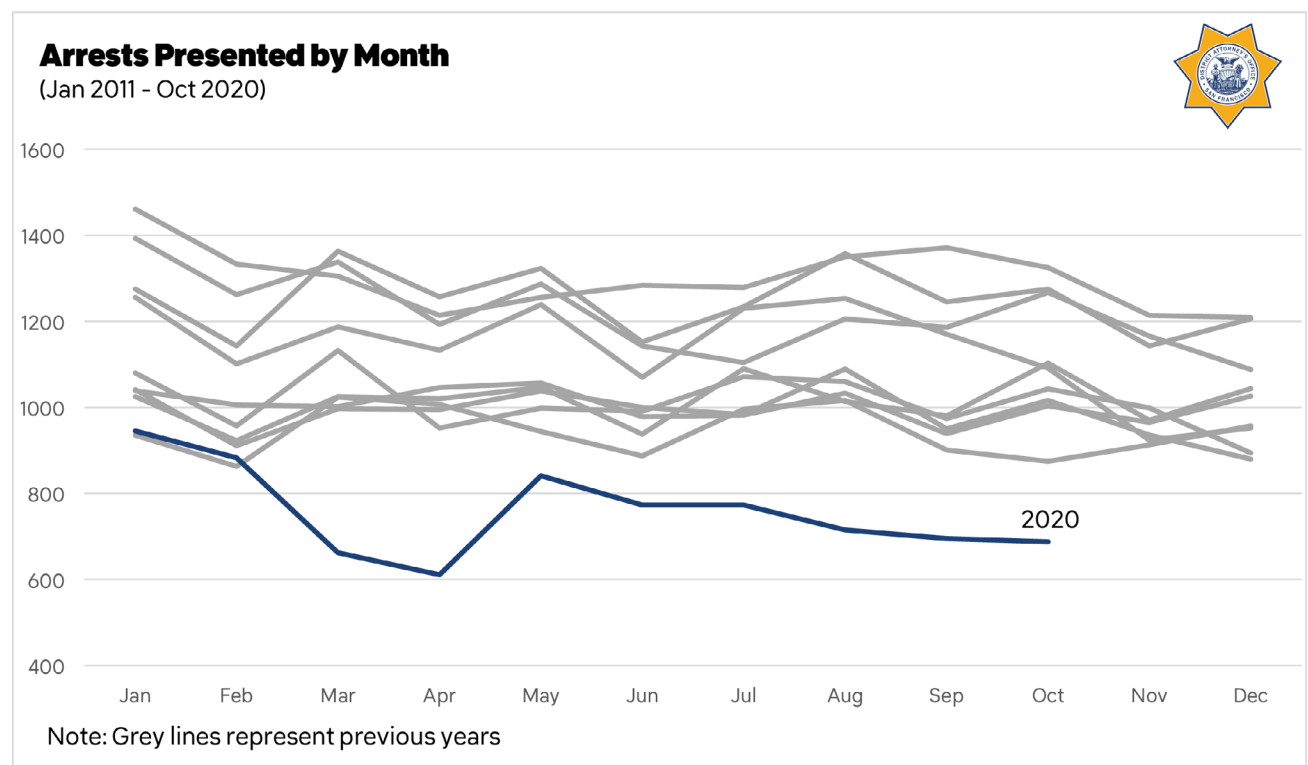


## The Impact of COVID-19 on San Francisco and Its Jail Population

*This section is based on a presentation given to the managing attorneys of our office on July 24, 2020. We created it to provide up to date, accurate information about the prevalence of COVID-19 in the City and County of San Francisco with an emphasis on the most impacted and vulnerable populations. The presentation's purpose was to guide office strategy, prosecutorial decision making, and the provision of services to victims and survivors.*

### Unprecedented

On March 17, 2020, Mayor Breed issued a Shelter-In-Place (SIP) order in response to the community spread of COVID-19. Shortly after the SIP was instituted, the number of San Francisco Police Department (SFPD) incident reports for thefts, robberies, and assaults sharply dropped to levels not seen since SFPD began systemically collecting data in 2003. March through October would mark the fewest monthly arrests presented to our office since we began systematically collecting data in 2011.



Source: San Francisco District Attorney's Office

On the day SIP was announced, the jail population was nearly 1,100. On March 24th, Dr. Lisa Pratt, the Director of Jail Health Services, called for a reduction of the jail population to 700-800 to allow for the social distancing needed to protect those who were incarcerated, San Francisco jail staff members, and the broader community.

Over the next few weeks, our office engaged in a comprehensive analysis of the entire jail population, prioritizing the release of the most vulnerable people, and enacting policies to safely reduce the use of



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incarceration. This included:

- Reviewing every single case involving someone in custody and identifying opportunities for alternatives to incarceration. For example, we identified a woman with a high-risk pregnancy, no criminal record, and who was in jail on a misdemeanor. With our reentry partners, we were able to get her community based prenatal care and housing.
- Leveraging the multi-disciplinary collaborative work established as a part of the MacArthur Foundation funded [Safety and Justice Challenge initiative to safely reduce the jail population](#).
- Adhering to our [office policy](#) to consider pretrial detention only in felony cases when the facts are evident and clear and convincing evidence shows a substantial likelihood that the defendant's release would result in flight or great bodily harm to others.
- Affirmatively seeking to reduce remaining time on sentences and/or immediately releasing individuals in custody with less than 60 days remaining on their sentence.
- Identifying cases where probation or mandatory supervision sentences were suitable and offering plea bargain terms that included immediate release when appropriate.
- Coordinating with defense attorneys to identify individuals in custody who were eligible for Department of Public Health temporary housing or other reentry supports.
- Releasing, pending trial, those in jail charged with misdemeanors and non-violent felonies.
- Identifying individuals suffering from mental illness and expediting their connection to community-based treatment.
- Working with the court and probation department to expedite scheduled release for incarcerated people with solid reentry plans.
- Avoiding detaining people for technical violations such as missed appointments with probation officers.
- Ensuring compliance with the [emergency relief measures](#) and [rules](#) issued by the California Judicial Council.

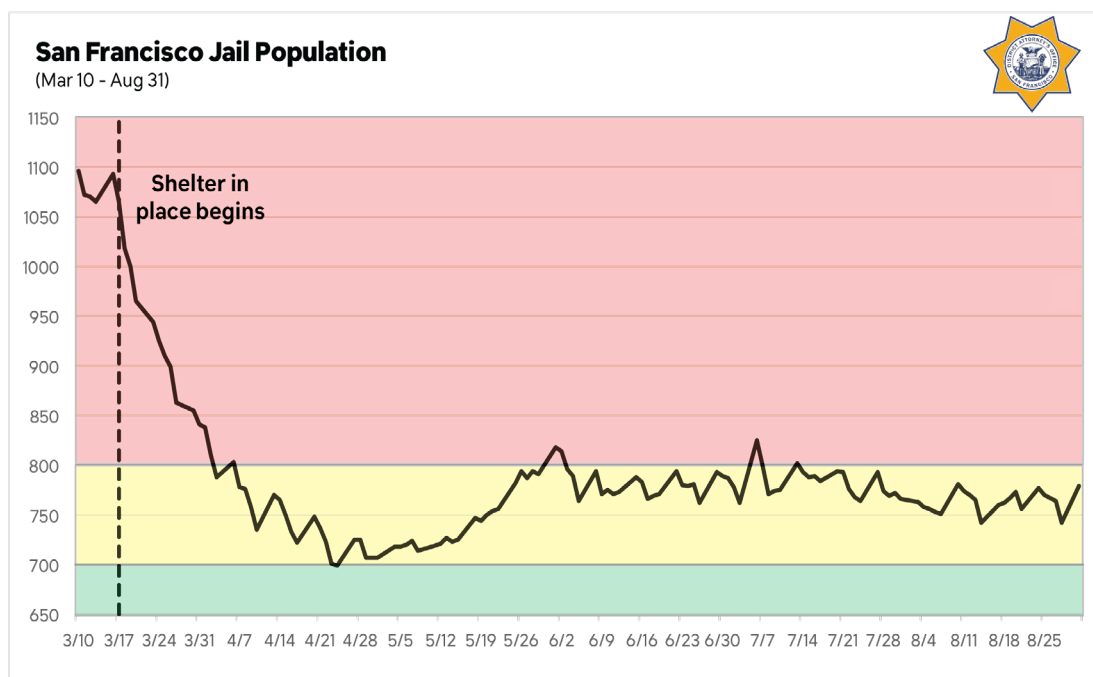
Additionally, we reviewed our charging strategies – ensuring that our lawyers follow office policies like [declining to file contraband crimes stemming from pretextual searches](#) or not filing charges that criminalize poverty or mental illness. We also worked to delay filing charges when we could safely do so without compromising public safety. As a result of these delayed filings, April marked our lowest filing rate on record at 36%.

Deliberate policy choices and collaboration with other criminal justice agencies enabled us to help reduce the jail population to the numbers Dr. Pratt recommended. On April 24, the jail population dropped to 699, its lowest point in recent history.





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Source: San Francisco Sheriff's Department

As the jail population declined, both property and violent crime rates remained well below their historical average, contradicting critics who warned of a spike in crime if our city were to rapidly decarcerate in response to COVID-19.

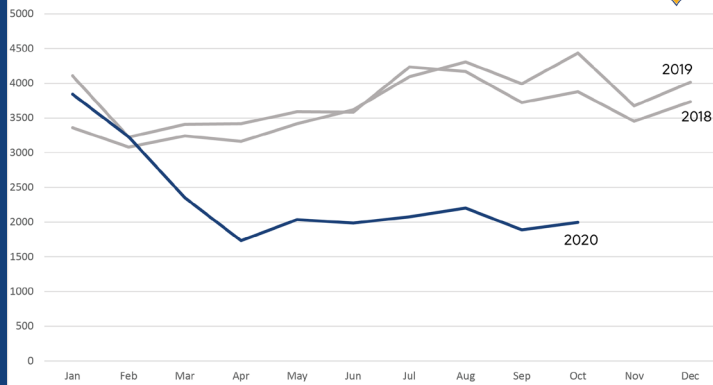
The exception here was residential and commercial burglaries. There was a spike in May that was largely driven by two nights of unrest and aggressive enforcement during the protests over the murder of George Floyd. Since then, burglary<sup>1</sup> rates have fallen, but they remain about 50% higher than in 2018 and 2019. This is likely a reflection of the circumstantial nature of crime and crime rates. Crimes of opportunity dependent on people being on the streets or businesses being open—like robbery and larceny theft—have declined by historic margins. Some of that crime, however, has been displaced into incidents like residential and commercial burglaries. Overall, since SIP began, reported crime in San Francisco is down over 33 percent.

<sup>1</sup> The SFPD definition of burglary only includes residential and commercial burglaries, which is a more narrow definition of burglary than what is found in the penal code. For example, SFPD categorizes an auto burglary (Penal Code § 459) as "Larceny Theft."

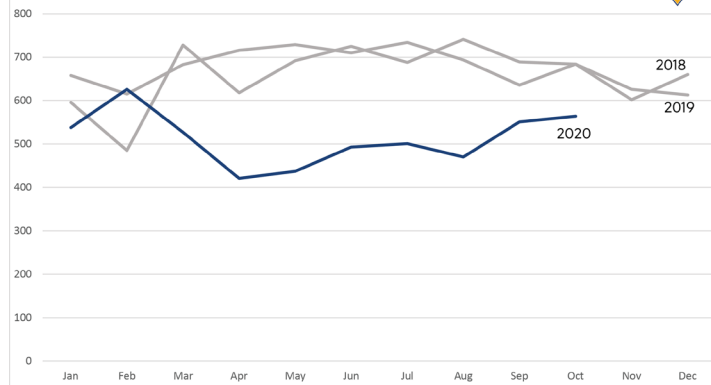


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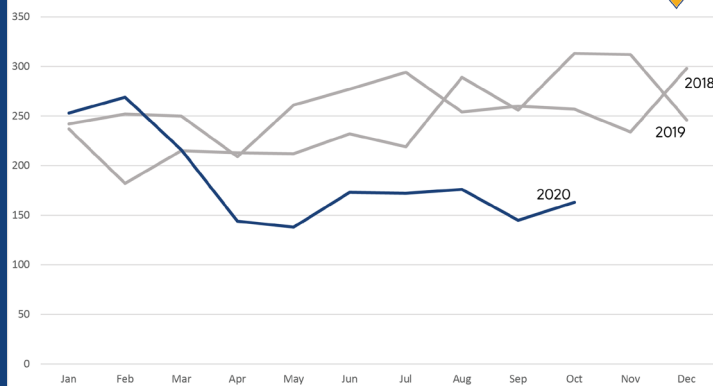
**Larceny Theft Incident Reports**  
(Jan 2018 - Oct 2020)



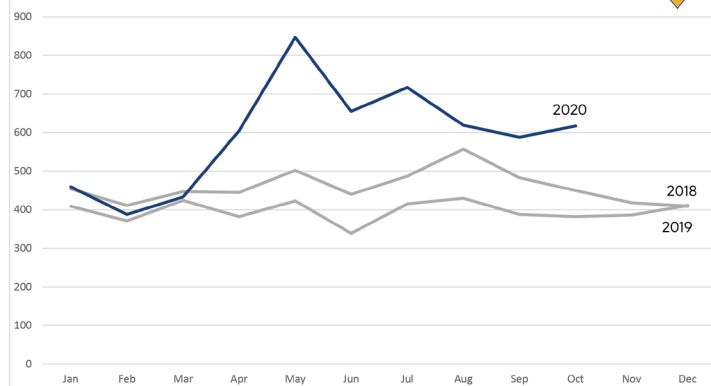
**Assault Incident Reports**  
(Jan 2018 - Oct 2020)



**Robbery Incident Reports**  
(Jan 2018 - Oct 2020)



**Burglary Incident Reports**  
(Jan 2018 - Oct 2020)



Source: <https://data.sfgov.org/Public-Safety/Police-Department-Incident-Reports-2018-to-Present/wg3w-h783>

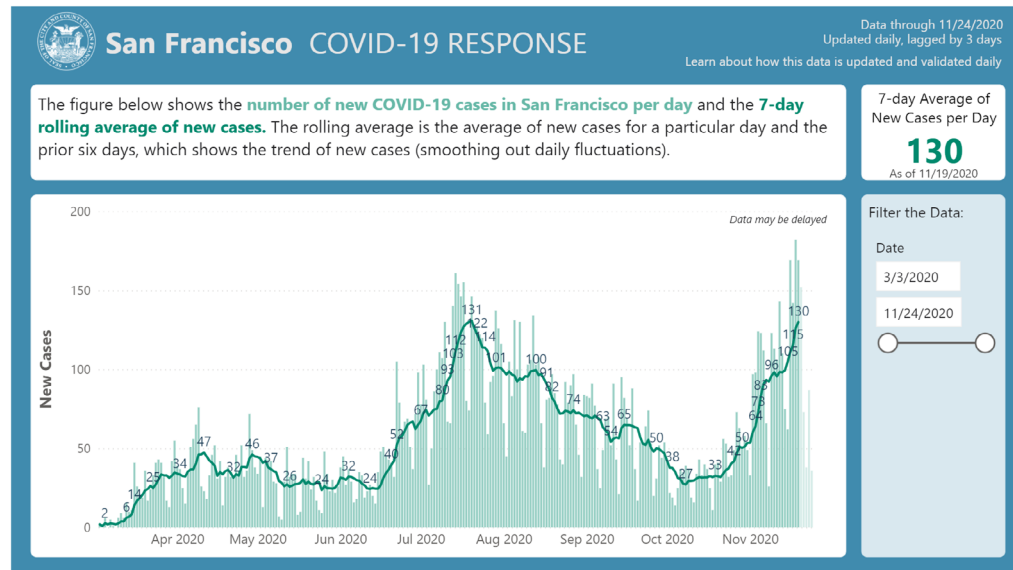
By taking intentional and aggressive measures to decarcerate, San Francisco safely and efficiently lowered the jail population, avoiding the catastrophic outbreaks of COVID-19 that were occurring in other jails, prisons, and communities nationwide. These measures were so effective that, in September, San Francisco was able to expedite the closure of County Jail 4, a facility known to be unsanitary and seismically unsafe.



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## But the story's not over.

Our city is attempting to reopen. The number of new daily COVID-19 cases is spiking.



Source: <https://data.sfgov.org/stories/s/dak2-gvuj>

As criminal legal system stakeholders in San Francisco have adjusted to life during COVID-19, we have collectively deprioritized reducing the jail population. This is reflected in a rising jail population that, through October, fluctuated in the high 700s, occasionally breaching 800 – a benchmark that, according to Dr. Pratt, “does not provide an opportunity to create distance between people in cells and mitigate the spread of infection.”

On July 22, after the jail population had risen to 776, the Sheriff noted that approximately 90 people in the jail had been exposed to COVID-19 by a single transport deputy who tested positive. This resulted in at least one incarcerated person and one jail medical staff member contracting COVID-19. A positive COVID-19 test for a person in the custody of the Sheriff’s Department or members of in-custody staff has cascading effects, impacting district attorneys, defense counsel, judges, clerks, deputies, jurors, and more.

As a result of the increase in average daily jail population combined with the increase in positive cases, there will likely be continuances and delays in criminal case processing as more individuals fall ill and new restrictions are implemented. Reports from hardship questionnaires for jurors in the few post-SIP trials indicate that 70% of potential jurors declared that they felt unsafe engaging in jury duty during the pandemic despite the [significant health and safety precautions implemented by the San Francisco Superior Court](#).

## A New Target

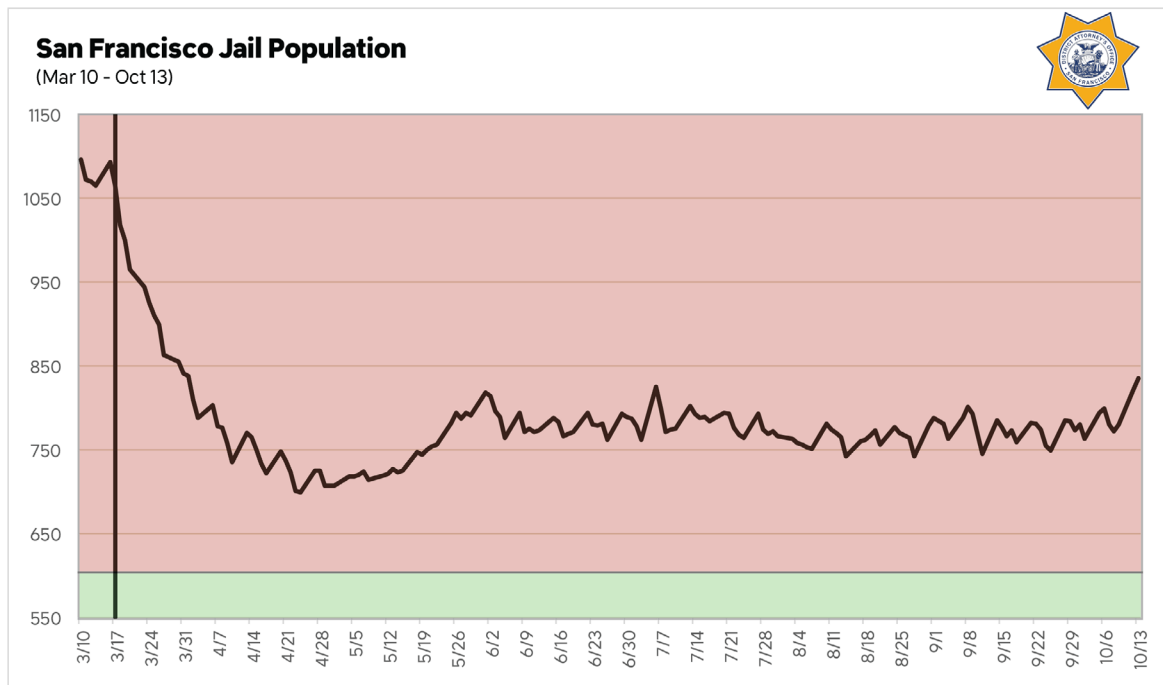
On the morning of October 14th, San Francisco criminal justice partners received an email from Dr. Pratt. Due to the closure of County Jail 4, the end of the emergency bail schedule issued by the California judicial council, and transfers from other county jails and state prisons, which had previously been halted, [Dr. Pratt set a new target jail population of 600](#) to ensure the safety of incarcerated people, jail staff, and the community at large. She again made the explicit ask for



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aggressive strategies to reduce the jail population.

On the date of this announcement, the jail population was 835.



Source: San Francisco Sheriff's Department

## Jails are not closed systems

We are in the middle of a public health crisis not just in our jail system, but in our entire city. A study by ACLU Analytics in collaboration with the University of Pennsylvania, University of Tennessee, and Washington State University demonstrates the impact of COVID-19 prevention efforts in jail on the broader community. The study looked at the projected increase in deaths in the broader community when mitigation efforts in jails are not conducted. This graphic shows the range of these projections, which span from a 13% increase in community deaths in New York City to a 232% increase in San Bernardino:





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## COVID-19 in Jails Threatens Surrounding Communities

Projections from data collected in mid-April show how failure to stem COVID-19 in the nation's 10 largest jail systems would increase the number of cases in the surrounding communities within six months.

Jail system	Projected deaths in community, not accounting for jails	Projected deaths, accounting for jails	Projected increase in deaths in community without mitigation efforts in jails
Los Angeles County	2,591	731 in jail; 3,322 in community	1,462 (56% increase)
Harris County, TX	1,696	427 in jail; 2,074 in community	805 (47% increase)
Maricopa County, AZ	1,384	358 in jail; 1,984 in community	958 (69% increase)
New York City	4,193	364 in jail; 4,362 in community	533 (13% increase)
San Bernardino, CA	410	278 in jail; 1,080 in community	949 (232% increase)
Dallas County	1,115	308 in jail; 1,545 in community	738 (66% increase)
San Diego County	673	306 in jail; 1,684 in community	1,317 (196% increase)
Cook County, IL	1,857	256 in jail; 2,056 in community	455 (24% increase)
Orange County, CA	524	274 in jail; 1,330 in community	1,080 (206% increase)
Philadelphia County	570	174 in jail; 591 in community	195 (34% increase)

Source: ACLU Analytics and researchers from University of Pennsylvania, University of Tennessee and Washington State University

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Source: <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/07/01/how-covid-19-in-jails-and-prisons-threatens-nearby-communities>

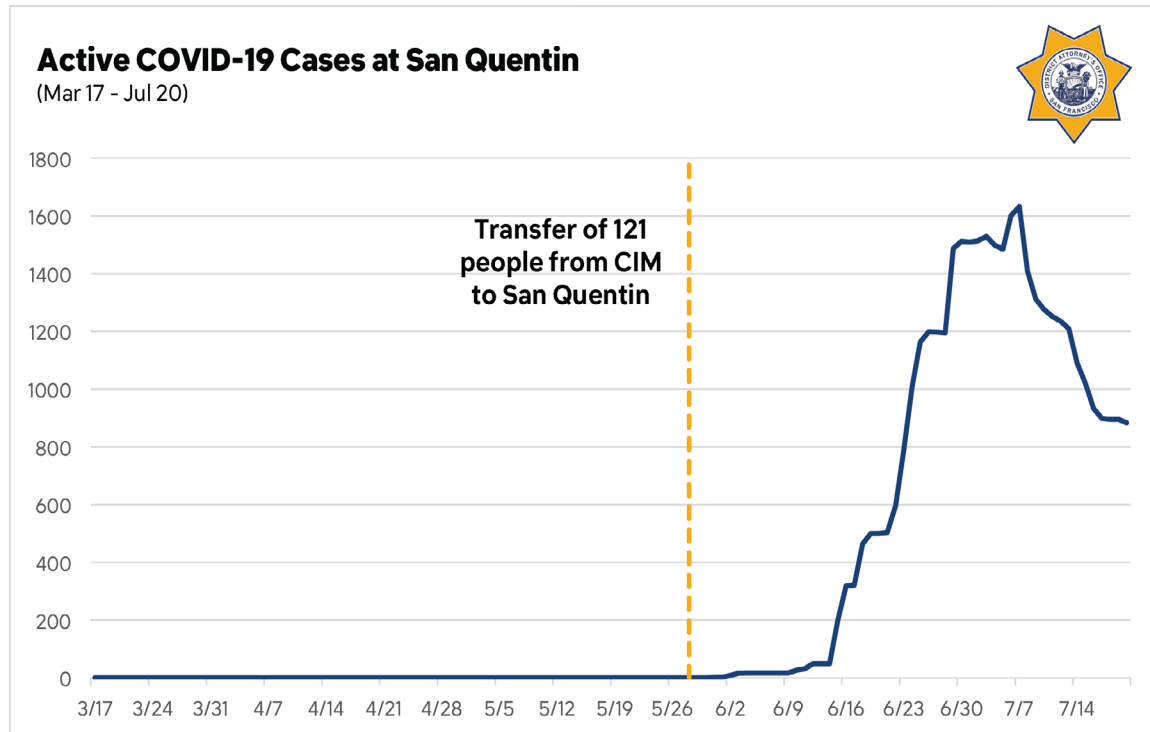
The message is clear: Inaction will cause the deaths of people both inside and outside our jails. To see how quickly an outbreak can occur and how dangerous it can be for incarcerated people, staff, and the surrounding community, we can look to the catastrophe that occurred in and around San Quentin State Prison, just miles north of our office.

## Timeline of the San Quentin Outbreak

Over the course of weeks, San Quentin went from a COVID-19-free environment to the [second largest hotspot in the country](#). Due to insufficient contact tracing, we will likely never know the true impact this outbreak has on the surrounding community. Examining the timeline of the outbreak illustrates the potential for explosive growth in infections amongst incarcerated communities when preventative mitigation efforts are not taken.



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Source: <https://www.cdcr.ca.gov/covid19/population-status-tracking/>

**March 16:** The California Department of Corrections and Rehabilitation (CDCR) postpones all family visits to prevent the spread of COVID-19.

**May 27:** San Quentin still has no known cases of COVID-19.

**May 28-29:** California Institution for Men (CIM) – a COVID-19 hotspot – transfers 121 medically vulnerable incarcerated people from CIM to San Quentin. None are tested for COVID-19 before being transferred and they are not quarantined. At least twenty of those people would later test positive.

**May 31:** San Quentin reports its first case of COVID-19.

**June 14:** The number of active COVID-19 infections at San Quentin has risen to 49.

**June 29:** The number of active COVID-19 infections at San Quentin is 1,491. The infection rate is 42% -- approximately 111x higher than the state infection rate.

**July 13:** The COVID-19 infection rate at San Quentin is 54%. Approximately 1,923 San Quentin residents and 205 staff members have been infected. Ten residents of San Quentin have died.

**July 20:** The infection rate stands at 59%. Three additional residents of San Quentin are now dead.

**November 18:** the outbreak has largely passed. There are 3 remaining cases in custody.

Approximately 2,214 incarcerated people and 289 staff members have been infected. Twenty-eight residents of San Quentin have died and [we are only beginning to understand the psychological impacts of COVID-19 outbreaks on incarcerated people and prison staff.](#)



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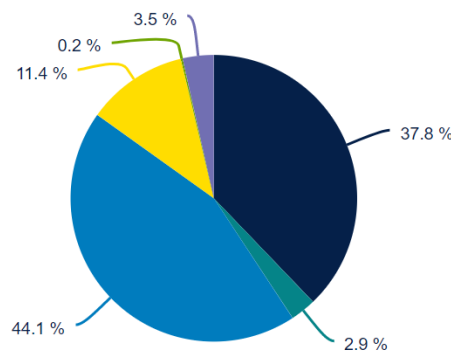
## Infections and Deaths: Latinx and Black Communities Disproportionally Affected

As we've witnessed at San Quentin, a COVID-19 outbreak in a congregate setting will disproportionately infect and kill the people living and working in that setting. Although our city's population is 5% Black and 40% white, the jail population is approximately 48% Black and 40% white. Thus, we know that an outbreak will disproportionately infect and kill Black people, particularly Black men, a category which represents 44% of the jail population.

Once this outbreak spreads to the broader community, it will again disproportionately infect and kill people of color. As we've seen across the country, COVID-19 outcomes are [strongly correlated with wealth](#) including factors like access to affordable healthcare and the privilege to work from home.

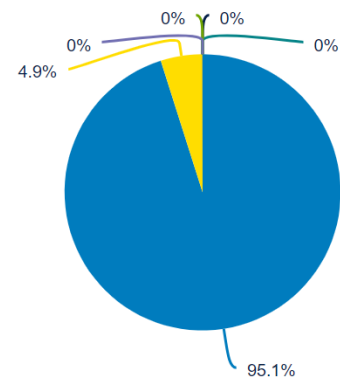
These disparities were exemplified by a study in late April in which [nearly 3,000 people living in a several square block area in the Mission District were tested for COVID-19](#). People were encouraged to get tested regardless of whether they were exhibiting symptoms. 44% of people tested identified as Hispanic or Latinx and 38% of people identified as white. Of the people who tested positive, 95% were Hispanic or Latinx and zero were white. Of those who tested positive, 90% could not work from home and 89% made less than \$50,000 a year. Of those who tested positive, 90% could not work from home and 89% made less than \$50,000 a year.

**Total Tested Population by Ethnicity**



● White or Caucasian ● Black or African American  
● Hispanic or Latino/Latinx ● Asian or Pacific Islander  
● Native American ● Other

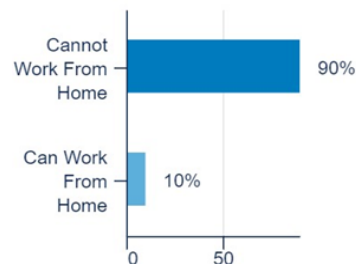
**Percentage of Positive Results (N=61) by Ethnicity**



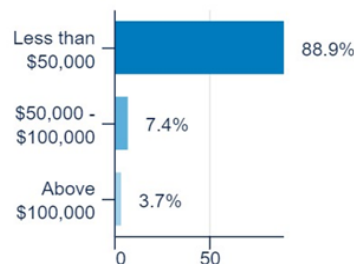
● White or Caucasian ● Black or African American  
● Hispanic or Latino/Latinx ● Asian or Pacific Islander  
● Native American ● Other

## Positive PCR Results by Socioeconomic Factors

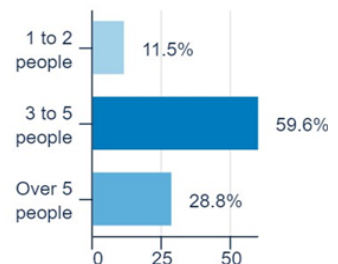
**Working from Home**



**Annual Income Level**



**Total Household Size**



Source: <https://www.ucsf.edu/news/2020/05/417356/initial-results-mission-district-covid-19-testing-announced>



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## Conclusion

The San Francisco District Attorney's Office seeks to reduce the racial disparities not just related to COVID-19, but also in the broader criminal legal system. On June 26, amidst protests over George Floyd's murder, an overwhelming majority of our staff chose to join District Attorney Boudin in taking an equity pledge to promote racial justice. The statement explicitly acknowledged, "systemic discrimination manifested in inequitable social, environmental, economic and criminal justice policies, practices, and investments." The pledge recognizes the role of government in creating and exacerbating the deep disparities throughout San Francisco's criminal legal system. This same legacy has set the stage for the disparities in COVID-19 community spread and deaths reflected in the analysis above.

Our office makes extremely difficult decisions every day in fulfilling our duty to uphold the Constitution. In the name of public safety, those decisions destabilize some of our most marginalized residents, separate parents from their children, and deprive people of their civil liberties.

We are facing unprecedented circumstances that force us to grapple with a new set of difficult decisions. If the "public" in "public safety" includes our most marginalized communities, then we must think deeply and creatively to identify ways to safely reduce the jail population and recommit ourselves to the policies that allowed us to rapidly decarcerate. Otherwise, we are resigned to reinforce the very racial inequities we just pledged to eradicate.

The data from March through October show that it is possible to safely reduce the jail population without causing a spike in crime. The crisis at San Quentin and the words of the Director of Jail Health Services, Dr. Pratt, have made it clear that we must take aggressive measures to mitigate the spread of COVID-19. We must act with urgency to ensure that detention is used only when the risk of great bodily harm to another person outweighs the community public health consequences. Public health and public safety depend on it.

## Policy Appendix

Two policies referenced in this report can be found on the following pages. The first is SFDA's "Pretrial Detention and Release Conditions" policy and the second is SFDA's "Declination of Contraband Charges Based on Pretextual Stops" policy. For a more complete list of office policies, visit [www.sfdistrictattorney.org/policy/policy-bank](http://www.sfdistrictattorney.org/policy/policy-bank).



**CHESA BOUDIN**  
DISTRICT ATTORNEY

*Policy Directive*  
*San Francisco District Attorney's Office*  
*Pretrial Detention and Release Conditions*

*January 22, 2020*

**I. INTRODUCTION**

Money bail is discriminatory and undermines public safety. It is the policy of the District Attorney's Office to never seek money bail at arraignment. It is the District Attorney's policy to seek pretrial detention, consistent with the California Constitution, to protect public safety and to reasonably ensure the defendant's return to court. Pretrial detention shall be the last option, only after all release conditions have been considered and determined to be inadequate to protect public safety or to reasonably ensure the defendant's return to court. Public safety and the safety of the victim shall be the primary considerations. To the extent any defendant is currently incarcerated solely because of an inability to pay money bail, this Office will not object to a new custody status hearing where this policy shall apply. To the extent that the Court continues to detain people using money bail, this Office will object in court and decline to defend against any writ filed by the defense.

**II. PRETRIAL RELEASE CONDITIONS**

- A. The Assistant District Attorney (ADA) charging the case shall determine whether pretrial release conditions will adequately protect public safety and reasonably ensure the defendant's return to court.
- B. The charging ADA shall seek and consider all available information including but not limited to incident reports and investigation chronologies, the PSA risk assessment, and all available information about a defendant.
  - 1. The ADA shall seek and consider the wishes of the victim consistent with the Victim's Bill of Rights under Marsy's Law as outlined by the California Constitution.
  - 2. All sources of information shall be considered to make the most informed decision possible within the timeframe allotted by law.
- C. Pretrial release conditions, if any, shall be considered in order from least restrictive (No Conditions) to most restrictive (Electronic Monitoring / Home Detention). Release with no



condition shall be the initial position. The least restrictive condition or combination of conditions for release must be determined to be inadequate to protect public safety and to reasonably ensure the defendant's return to court before considering the next least restrictive condition. Examples of pretrial release conditions in tiers of ascending order from least to most restrictive is appended to this policy. (See Table 1.)

- D. All pretrial release conditions requested shall be reasonably related to the charges, and necessary to protect the public and to reasonably ensure the defendant's return to court.
- E. Only after all pretrial release conditions have been thoroughly evaluated and determined to be inadequate to protect public safety and to reasonably ensure the defendant's return to court shall pretrial detention be considered.

### **III. PRETRIAL DETENTION PROCEDURES**

- A. The Assistant District Attorney (ADA) charging the case shall determine whether to seek pretrial detention. The charging ADA shall obtain the approval of a Division Chief or the District Attorney and document in the file whether the request for pretrial detention was approved or denied with the reasons.
- B. Absent other open cases, warrants, en routes, Parole, Probation, Post Release Community Supervision (PRCS) or Mandatory Supervision (MS), or other legal encumbrances, pretrial detention shall only be considered at arraignment in:
  - 1. Felony offenses involving acts of violence on another person; or
  - 2. Felony offenses where the defendant has threatened another with great bodily harm; or
  - 3. Felony sexual assault offenses on another person.
- C. Pretrial detention shall only be considered when the facts are evident and clear and convincing evidence shows a substantial likelihood that the defendant's release would result in great bodily harm to others or the defendant's flight.
  - 1. The substantial likelihood of defendant's flight may include felony holds from other jurisdictions. Release conditions or detention may be considered for the limited purpose of ensuring the defendant is not removed to another jurisdiction. Considerations shall include but are not limited to a comparison of the seriousness of the charges locally and for the hold, the uncertainty of when the defendant will be returned, and maintaining joinder of co-defendants.
- D. If approved to seek detention, the charging ADA shall prepare and file a Motion to Detain the defendant supplying supporting evidence and legal authority to the court.

#### **IV. COURT**

- A. The ADA at arraignment shall recommend release conditions as appropriate based on the policy and all available information, including any recommendations from the charging ADA.
- B. The initial pretrial detention determination shall only be reconsidered upon new information or changed circumstances not known at the time the initial determination was made.
  - 1. If the new information or changed circumstances supports seeking detention not previously sought, the ADA shall consult with a Managing Attorney and seek approval from either a Division Chief or the District Attorney.
  - 2. New information or changed circumstances may also support releasing the defendant or changing the level of recommended pretrial condition(s).
    - i. After an initial determination to seek detention, the decision to agree to release shall be made with the approval of a Managing Attorney.
    - ii. The decision to change the level of pretrial condition(s) shall be made at the discretion of the ADA.
- C. If requested by the victim, the ADA in court shall provide the victim with the opportunity to be heard on the post-arrest release decision.
- D. The ADA in court shall state the District Attorney's position documented in the casefile along with a summary of the reasons on the record at the time the court is considering detention or release.

#### **V. DATA COLLECTION**

All ADAs shall assist with the District Attorney's Office's procedures to collect data related to pretrial detention and release conditions. The data will be analyzed to evaluate the effectiveness of this policy for protecting public safety including a defendant's ability to maintain employment, remain in school or treatment, and contribute to their family's needs, and to ensure that the policy is applied consistently.

#### **VI. EXCEPTIONS**

In the event extraordinary circumstances present unusual risks of harm to public safety or victims, an ADA at any stage of the proceedings may deviate from the policies enumerated here with the approval of a Division Chief or the District Attorney.

**Table 1.**  
**PRETRIAL RELEASE CONDITIONS**

<b>LEAST Restrictive Conditions</b>	<ul style="list-style-type: none"> <li>• Own Recognizance Release – No Active Supervision (OR-NAS) <ul style="list-style-type: none"> <li>○ Court date reminders</li> </ul> </li> <li>• Travel restrictions – order to not leave the state, surrender passport</li> <li>• Driving prohibitions or restrictions</li> <li>• Order to abstain from alcohol or other substances</li> <li>• Stay away order</li> <li>• Other</li> </ul>
<b>MEDIUM Restrictive Conditions</b>	<ul style="list-style-type: none"> <li>• Own Recognizance Release – Minimum Supervision (OR-MIN/S) <ul style="list-style-type: none"> <li>○ Court date reminders</li> <li>○ Phone reporting</li> </ul> </li> <li>• Maintain employment, maintain or commence educational program</li> <li>• No weapons condition</li> <li>• Order to surrender weapon(s) to law enforcement</li> <li>• Search condition</li> <li>• Other</li> </ul>
<b>MOST Restrictive Conditions</b>	<ul style="list-style-type: none"> <li>• Own Recognizance Release – Assertive Case Management (OR-ACM) <ul style="list-style-type: none"> <li>○ Court date reminders</li> <li>○ Phone and in person reporting</li> <li>○ Out of custody assessments</li> </ul> </li> <li>• Electronic monitoring (EM-GPS)</li> <li>• Secure Continuous Remote Alcohol Monitoring (SCRAM)</li> <li>• Home detention (HD)</li> <li>• Home relocation</li> <li>• Mental health treatment</li> <li>• Alcohol abuse treatment</li> <li>• Substance abuse treatment</li> <li>• Drug and alcohol testing</li> <li>• Residential treatment program</li> <li>• Other</li> </ul>



CHESA BOUDIN  
DISTRICT ATTORNEY

*Policy Directive*  
*San Francisco District Attorney's Office*  
*Declination of Contraband Charges Based on Pretextual Stops*

## I. INTRODUCTION

Racial profiling undermines law enforcement legitimacy. It creates animus and distrust in communities of color and decreases public safety. It is the duty and obligation of the District Attorney's Office to protect the constitutional rights of every San Franciscan and to increase the fairness of our system of justice. To ensure the protection of all our communities, we will discourage "stop and frisk" style policing strategies.

The 2016 Report from the Department of Justice's Office of Community Oriented Policing Services (COPS) validated previous studies that have shown racially disparate treatment in traffic stops and post-stop searches. The report recommended several policy changes in this area that have yet to be implemented.

According to the 2020 Racial Identity and Profiling Advisory Board Report, in San Francisco, Black people were **stopped at rates over five times their representation** in the city's overall population -- a greater disparity than Los Angeles or San Diego.

This policy rebuilds trust and cooperation with affected communities in order to facilitate crime prevention and addresses the ongoing problem of racial disparities in the criminal justice system.

## II. POLICY

The San Francisco District Attorney's Office has a presumption against filing possession of contraband crimes when the search stemmed from an infraction-related stop, and no other independent probable cause (such as observed contraband in plain view) or other legal justification exists to justify the search and seizure of the contraband.

This policy encompasses "consent-only" searches because of the long-standing and documented racial and ethnic disparities in law enforcement requests for consent to search.

This policy also encompasses any search that is initiated after a detention is prolonged based on an otherwise unrelated inquiry from an officer regarding whether the person stopped for the infraction is "on probation or parole."

This policy only applies to infraction-related stops and post-stop searches for contraband where there is no other articulable suspicion of criminal activity, and to any potential criminal possessory charges that result from this investigative action.

This policy does not prevent any prosecution wherein a law enforcement agency has conducted a valid and legal stop to facilitate investigation of a non-possessory crime, such as, for example, homicide, sexual assault, aggravated assault, assault with a firearm, or driving under the influence.

This policy is an exercise of discretion by the San Francisco District Attorney's Office and does not purport to affect the legality or propriety of any other law enforcement officer's actions.

This policy does not, in any way, discourage the continued enforcement of traffic offenses that affect the safety of San Francisco residents. Rather, this policy is only intended to discourage the use of traffic laws as a pretext to stop and search people of color based on implicit or express bias.

The San Francisco District Attorney will continue to support forensic processing or confiscation and destruction of any contraband seized as a result of any law enforcement action.

This policy will be periodically reevaluated after data collection and review of SFPD's compliance with the DOJ COPS recommendations or any other effective change to traffic stop or consent-search procedures that addresses racial disparity.

### **III. DATA COLLECTION**

All ADAs shall assist with the District Attorney's Office procedures to collect data related to this policy. Any case that is discharged or dismissed because of this policy shall be recorded. The data will be analyzed to evaluate the effectiveness of this policy, and to ensure that the policy is applied consistently. Additionally, the data will be shared with the arresting agencies as a feedback to them for training purposes.

### **IV. EXCEPTIONS**

Deviation from this policy should be made in writing in the limited circumstances where necessary and requires the approval of a Chief of the Criminal Division or the District Attorney.

## **Appendix**

### **PRETEXT STOP AND SEARCH**

A "pretext" or "pretextual" stop and search occurs when a law enforcement officer detains a person for a minor offense (i.e. traffic or other infraction) because the officer seeks to investigate the person for potential involvement in another, unrelated crime (i.e. drug possession),[1]



## CRITICISM

Pretext stops have been criticized because they give “carte blanche” for police to stop motorists due to “innumerable traffic laws, many of which are vague and subjective.”[2] Pretext stops are prohibited under the state constitutions of Washington and New Mexico.[3]

The California Vehicle Code contains hundreds of equipment and moving violations that can result in a stop and citation or arrest for an infraction.[4] Similarly, there are also hundreds of local San Francisco ordinances that can form the basis of a citation for an infraction.[5] For these reasons, in San Francisco law enforcement has almost unfettered discretion to stop an individual for an infraction when the actual goal is to conduct a subsequent search for contraband.

Pretext stops are similar to other discretionary police tactics, such as the disavowed and discriminatory “stop and frisk” practices that ensnared millions of Black and Latinx persons in major cities across the United States. The use of pretext stops creates a situation wherein law enforcement officers can exercise their unfettered discretion based on conscious or unconscious bias, and they can profile individuals based on perceived race, ethnicity or other social category.[6] This practice has become so commonplace that the term “DWB” or “Driving While Black or Brown” has become part of the everyday vernacular.

Though too often *unreported*, the media continues to report cases where an innocent person of color was targeted because of the color of his or her skin.[7]

Scholar/writer Michelle Alexander has decried the use of pretext stops and resulting “consent-searches” in her groundbreaking work “The New Jim Crow.”

## PERSISTENT AND ONGOING RACIAL DISPARITY IN SAN FRANCISCO

For almost twenty years, there have been numerous reports that have highlighted the gravity of the problem of racial profiling caused by pretext infraction stops and searches in San Francisco:

### **2002 ACLU Traffic Stop Analysis and Report[8]:**

A 2002 analysis of traffic stop data collected by SFPD, and obtained through Public Records Act requests for a complete year (covering over 50,000 traffic stops in all regions of the city) found that Black motorists were significantly more likely to be stopped by San Francisco police officers in every police district in the city, Black motorists were 3.3 times more likely to be searched following a traffic stop than whites, and Latinos were 2.6 times more likely. Black motorists were more than twice as likely as whites to be asked their “consent” to be searched without any probable cause of a crime, and though Black and Latinx individuals were disproportionately subjected to intrusive stops and searches, San Francisco police officers were significantly less likely to find any evidence of criminality as a result of searching Black and Latinx individuals.

**2016 Report of the Blue Ribbon Panel on Transparency, Accountability, and Fairness in Law Enforcement.[9]**

Analysis of 2015 SFPD traffic stop data showed that Black and Latinx individuals were more likely to be searched than any other group following a traffic stop. Of those stopped in 2015, searches were conducted on 1.1 percent of Asian people, 13.3 percent of Black people, 5.3 percent of Hispanic people, 1.7 percent of White people, and 1.3 percent of “Other” races/ethnicities. The report also highlighted the community perception that police officers disproportionately asked Black or Latinx individuals if they were on probation or parole as a part of their traffic stop encounter.

**2016 U.S. Department of Justice Office of Community Oriented Policing Services Report and Recommendations.**

Black people were 24% more likely to be stopped for a traffic violation than their estimated population in the driving community and 9% more likely than their estimated population among potential traffic violators. Black and Latinx drivers were disproportionately arrested and searched following traffic stops and **less** likely to be found with contraband than White drivers. The report noted: “The racial disparity in traffic stops and post-stop outcomes appears to be large and statistically significant.”

The DOJ report highlighted several policy recommendations that have not, as of the date of this policy’s effect, been fully implemented. [10]

Since the DOJ study, there has been no update to the SFPD Department General Order regarding consent searches. The Department Bulletin 19-136 (issued 6/25/19) 1) only applies the existing written consent search policy to a search of a person’s residence, 2) does not require that the consent be read in the appropriate language, 3) does not require documented approval by a superior officer and 4) does not require additional safeguards to ensure consent is knowing and voluntary.

**2020 Racial Identity and Profiling Advisory Board Report[11]**

The report analyzed 1.8 million traffic stops statewide, from July through December 2018 from the state’s eight largest law enforcement agencies — including California Highway Patrol and officers in jurisdictions in Los Angeles, San Francisco, San Diego, Riverside and San Bernardino. In San Francisco, SFPD analyzed over 50,000 stops from 2018 and found that Black people were **stopped at rates over five times their representation** in the city’s overall population -- a greater disparity than Los Angeles or San Diego. White individuals were **stopped at a lower rate** than their representation in the population. Statewide, Officers searched Black people whom they stopped at a rate that was **2.9 times** the rate they searched White individuals. When law enforcement officers were granted greater discretion to conduct a search (such as asking for “consent”), yield rates for racial/ethnic groups of color were lower than for White individuals.

Of note, the RIPA report found that, state-wide, narcotics were seized in approximately 1.3% of all traffic stops, and weapons or ammunition seized in 0.6% of all traffic stops.

**The effect on community relations and engagement.**

The use of pretext stops contributes to the racial disparity in our jail and prison populations. Numerous studies show that Blacks and Whites consume and sell drugs at similar rates, but our jails and prisons are disproportionately filled with Black and Latinx individuals charged with these and other possessory offenses. [12] While the reasons for this disparity are numerous, relative to their portion of the population, racial and ethnic minorities are overrepresented among the individuals involved in the criminal justice system. In the City and County of San Francisco, Black people accounted for 41 percent of those arrested between 2008 and 2014, 43 percent of those booked into jail, 38 percent of cases filed by the San Francisco District Attorney's Office, and 39 percent of new convictions despite only accounting for 6 percent of the population of the county.

The use of pretext stops as an investigative tactic breeds distrust of law enforcement and the prosecution when individuals feel targeted. [13] As a result, while the overall efficacy of this law enforcement tactic is questionable, the cost to profiled individuals and communities is great. Justice Sonia Sotomayor recently stated in a dissent: "Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more." [14]

Based on the numerous studies cited above, the use of this enforcement tactic causes great harm to individuals and communities in relation to the minimal yield rate associated with this invasive law enforcement tactic, has a negative effect on building necessary trust with affected communities and has hindered the effective prosecution of criminal cases.

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[1] The use of pretext stops was sanctioned by the Rehnquist Supreme Court in the 1996 *Whren* decision. *Whren v. United States* (1996) 517 U.S. 806. Justice Ginsburg has recently suggested that it may be appropriate to reevaluate *Whren* in light of the criticism that the decision promotes improper police arbitrariness. See *District of Columbia v. Wesby* (2018) 583 U.S. \_\_\_, dissenting opinion of J. Ginsburg.

[2] <https://www.cato.org/blog/pretextual-traffic-stop-should-require-sufficient-pretext>

[3] *State v. Ochoa*, 206 P.3d 143 (N.M. Ct. App. 2008); *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999). There has been no data to suggest that these jurisdictions have suffered from greater criminal activity as a result of their added constitutional protections

[4] The extensive list of statutory moving violations and equipment violations can be found at: <https://leginfo.legislature.ca.gov/faces/codesTOCSelected.xhtml?tocCode=VEH>

[5] San Francisco has numerous and voluminous Municipal Codes that can result in citations for infractions. The San Francisco Municipal Police Code contains many of these potential violations, and can be found at [https://codelibrary.amlegal.com/codes/san\\_francisco/latest/sf\\_police/0-0-0-2](https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-2)

[6] See e.g., “LET’S GET REAL: BEHAVIORAL REALISM, IMPLICIT BIAS, AND THE REASONABLE POLICE OFFICER” Megan Quattlebaum, Stanford Journal of Civil Rights and Civil Liberties 2018, <https://law.stanford.edu/wp-content/uploads/2018/05/Quattlebaum-FINAL.pdf>

[7] For example, former Attorney General of the United States Eric Holder: <https://thehill.com/homenews/news/215627-holder-tells-ferguson-students-he-was-a-victim-of-racial-profiling>; Florida’s first and only State’s Attorney Aramis Ayala: <https://www.washingtonpost.com/news/post-nation/wp/2017/07/13/police-stop-a-woman-for-her-tinted-windows-then-learn-shes-a-florida-state-attorney/>;

[8] See <https://www.aclunc.org/sites/default/files/A%20Department%20in%20Denial%20-%20The%20San%20Francisco%20Police%20Department%27s%20Failure%20to%20Address%20Racial%20Profiling.pdf>

[9] [https://sfdistrictattorney.org/sites/default/files/Document/BRP\\_report.pdf](https://sfdistrictattorney.org/sites/default/files/Document/BRP_report.pdf)

[10] [https://cops.usdoj.gov/html/dispatch/11-2016/assessment\\_of\\_san\\_francisco\\_pd.asp](https://cops.usdoj.gov/html/dispatch/11-2016/assessment_of_san_francisco_pd.asp)

[11] <https://oag.ca.gov/sites/all/files/agweb/pdfs/ripa/ripa-board-report-2020.pdf>

[12] See e.g. Brookings Institute: [https://www.hamiltonproject.org/charts/rates\\_of\\_drug\\_use\\_and\\_sales\\_by\\_race\\_rates\\_of\\_drug\\_related\\_criminal\\_justice](https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice)

[13] Baumgartner, Epp, and Shoub, *Suspect Citizens* 2018.

[14] *Utah v. Strieff*, 579 U.S. \_\_\_\_ (2016); dissenting opinion of J. Sotomayor.