Prosecutor-Led Diversion for Nonviolent Charges

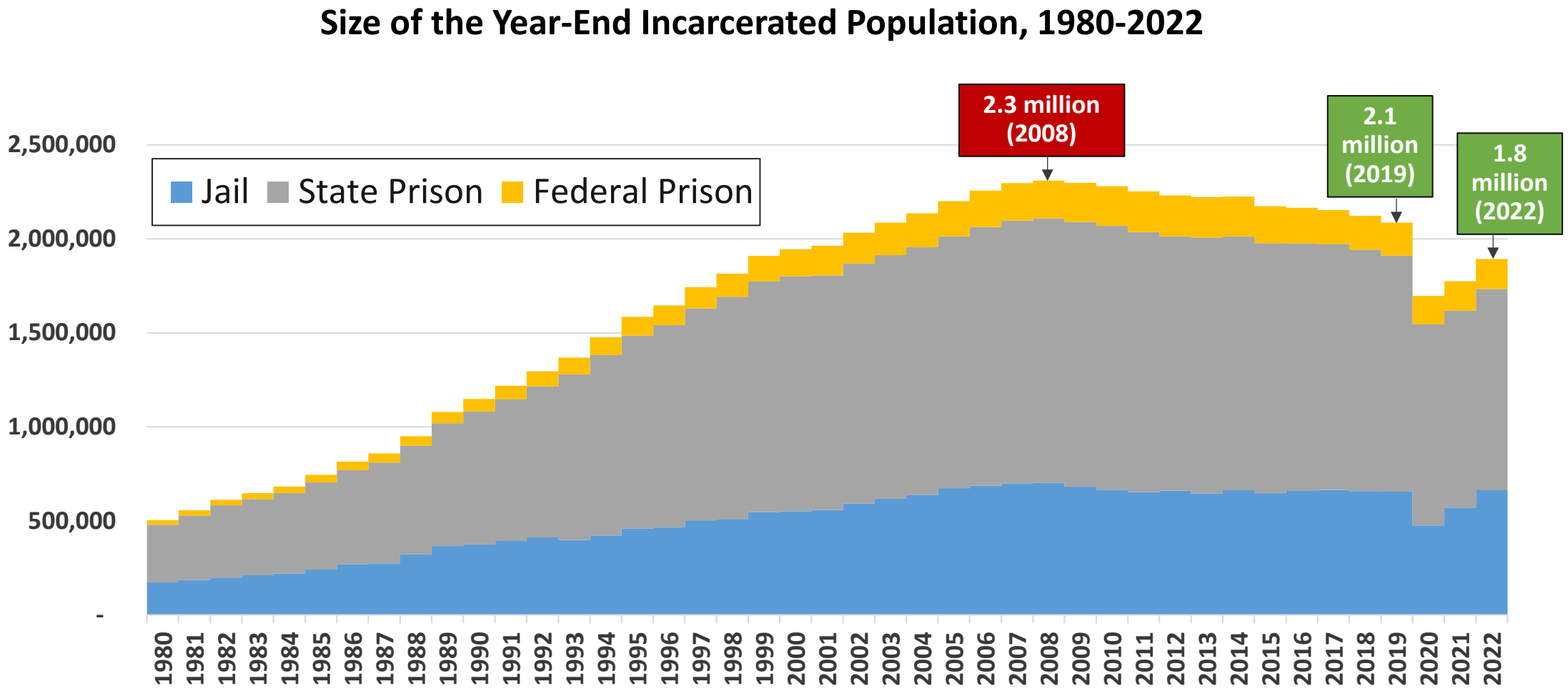
Michael Rempel
Data Collaborative for Justice (DCJ)
John Jay College of Criminal Justice
(mrempel@jjay.cuny.edu)

Examining Prosecution: A Workshop, National Academy of Sciences, Engineering, and Medicine, Washington, D.C., September 23, 2024

DATA COLLABORATIVE FOR JUSTICE AT JOHN JAY COLLEGE
STRENGTH IN NUMBERS

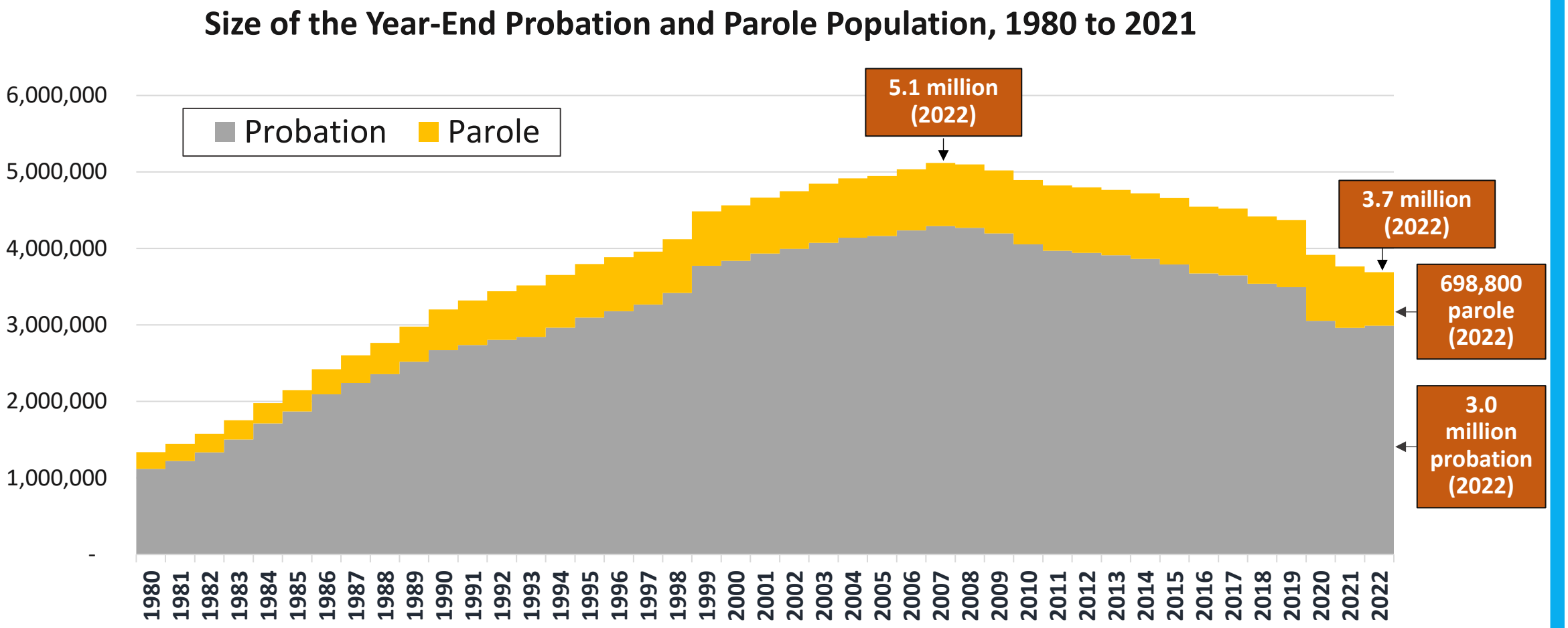
CUNY The City University of New York

Context: Mass Incarceration Since 1980



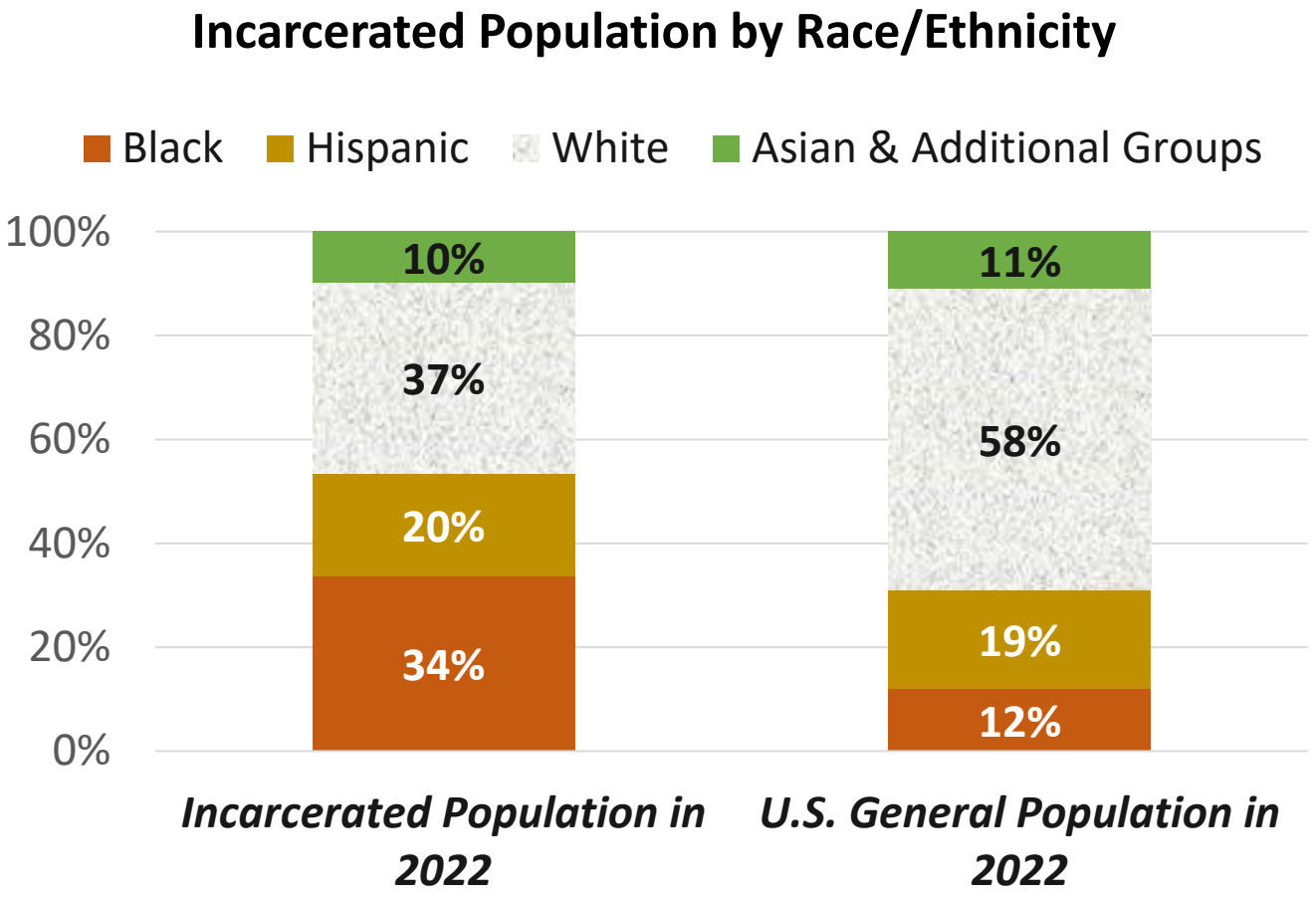
Source: Bureau of Justice Statistics. (Recent years in BJS (2024) for total & jail populations & BJS (2023) for state and federal prison populations.)

Context: Community Supervision



Source: Bureau of Justice Statistics (2023).

Racial/Ethnic Composition in 2022



Source: Bureau of Justice Statistics (2023).

Racial Disparities

- **Black-White Disparities:** Black people are incarcerated at a rate **4.5** times higher than white people (per 100,000 residents).
- **Hispanic-White Disparities:** Hispanic people are incarcerated at a rate 1.9 times higher than white people.

Defining Prosecutorial Diversion

- **Prosecutors Qua Gatekeeper** *(via policy or mandatory minimums)*:
  - **Drug courts:** *First in Miami, 1989; 1,696 programs by 2019.*
    - **Funding Restriction:** No violent felony charges.
    - **Recidivism:** Ave. 9-12 percentage-point reductions.
    - **Variable outcomes based on EBP uptake / middling research designs.**
  - **Spinoff "problem-solving courts"** *(mental health, veterans, reentry, etc.).*
- **Prosecutor-Led Diversion:** 55% of prosecutors (2019 survey).
- Police-led diversion

NIJ's Multisite Evaluation of Prosecutor-Led Diversion

- **Case Studies:** 16 programs in 11 sites (i.e., 11 prosecutors' offices):
- **Impact Evaluation:** 5 programs in 3 sites (conviction, jail, re-arrest).
- **Cost Evaluation:** 4 programs in 3 sites.

(*Caveat:* Research conducted 2015-2017. Current programs may differ.)

This project was supported by Award No. 2012-IJ-CX-0036, awarded by the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this publication are those of the author(s) and do not necessarily reflect those of the Department of Justice.

Prosecutor-Led Diversion Programs in the Study

Prosecutor's Jurisdiction	Program Name	Timing of Diversion	Charge Severity	Priors Allowed
	Northeast			
Chittenden County (VT)	• Rapid Intervention Community Court Project	Mixed	Misd/fel/citation	Yes
Philadelphia (PA)	• Small Amount of Marijuana Program (SAM)	Post-filing	Misd. **marij.**	Yes
	• Accelerated Misdemeanor Program (AMP)	Post-filing	Misd.	Yes
	• Accelerated Rehabilitative Disposition (ARD)	Post-filing	Misd/fel	Yes
	Midwest			
Cook County State's Attorney's Office (IL)	• Cook County Drug School	Post-filing	Misd/fel **drug/mar.**	Yes
	• Cook County Misdemeanor Diversion Program	Post-filing	Misd.	Yes
	• Cook County Felony Diversion Program	Post-filing	Fel.	Yes
Hennepin County (MN)	• Operation De Novo (Property and Drug Diversion)	Mixed model	Fel **drug/propty**	Yes
Milwaukee County (WI)	• Diversion Program	Pre-filing	Misd & fel	Yes
	• Deferred Prosecution Program	Post-plea	Misd & fel	Yes
	South			
Dallas County Attorney's Office (TX)	• Memo Agreement Program	Post-filing	Misd. **Retail theft/mar.**	No
	West			
Maricopa County (AZ)	• Maricopa TASC Adult Prosecution Program	Mixed model	Fel **drug/mar.**	Yes
Phoenix City (AZ)	• Project Rose	Pre-filing	Misd **prostitution**	Yes
San Diego City (CA)	• Beach Area Community Court	Pre-filing	Misd & Citations	Yes
San Francisco (CA)	• Neighborhood Courts	Mixed model	Misd/fel	Yes
Los Angeles (CA)	• Neighborhood Justice Initiative			

Key Policy Features

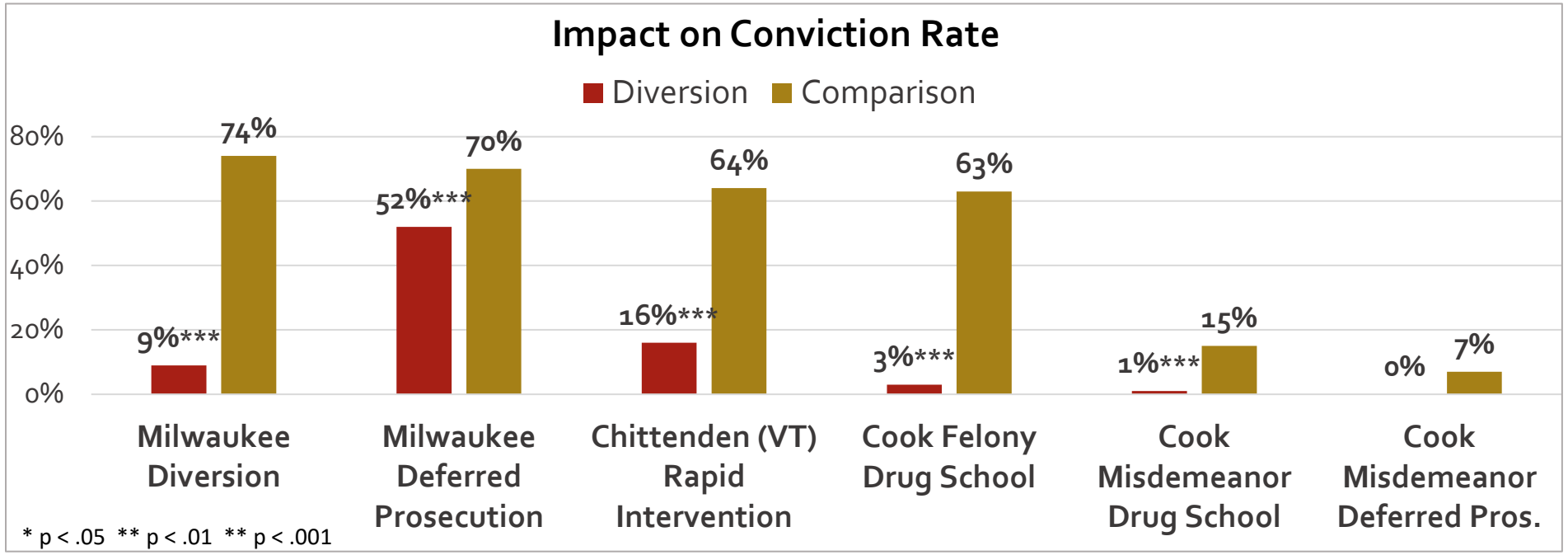
- **Diversion Timing:**
  - **Pre-Filing: 3** programs *(no court case)*.
  - **Post-Filing: 8** programs *(at least 1 court date). (Plea required in just 1.)*
  - **Mixed Pre- & Post-Filing *(with prosecutor discretion)*: 4** programs.
- **Prior Convictions Eligible: 14** of **15** programs (vs. 1970s-1980s).
- **Felonies Eligible: 9** of **15** admit felonies (vs. 1970s-1980s).
- **Legal Outcome:** Case dismissed or declined upon completion.

Program Mandates (*Upshot: Lack of EBP*)

- **Duration:** From 2 appts. to weekly sessions over 6 months.
- **Lack of Individualized Treatment:**
  - Education about the Individual's Problems: 13 of 15 programs
  - Community Service: 10 of 15 programs.
  - Cognitive-Behavioral Therapy: 2 of 15 use CBT (Maricopa & Milwaukee)
- **Restorative Justice:** San Francisco's Neighborhood Courts and L.A.'s Neighborhood Justice Initiative.
- **Risk Assessment:** 4 programs; only 1 consistently uses the results. (Milwaukee: LSI-R determines pre- or post-filing & mandate length.)

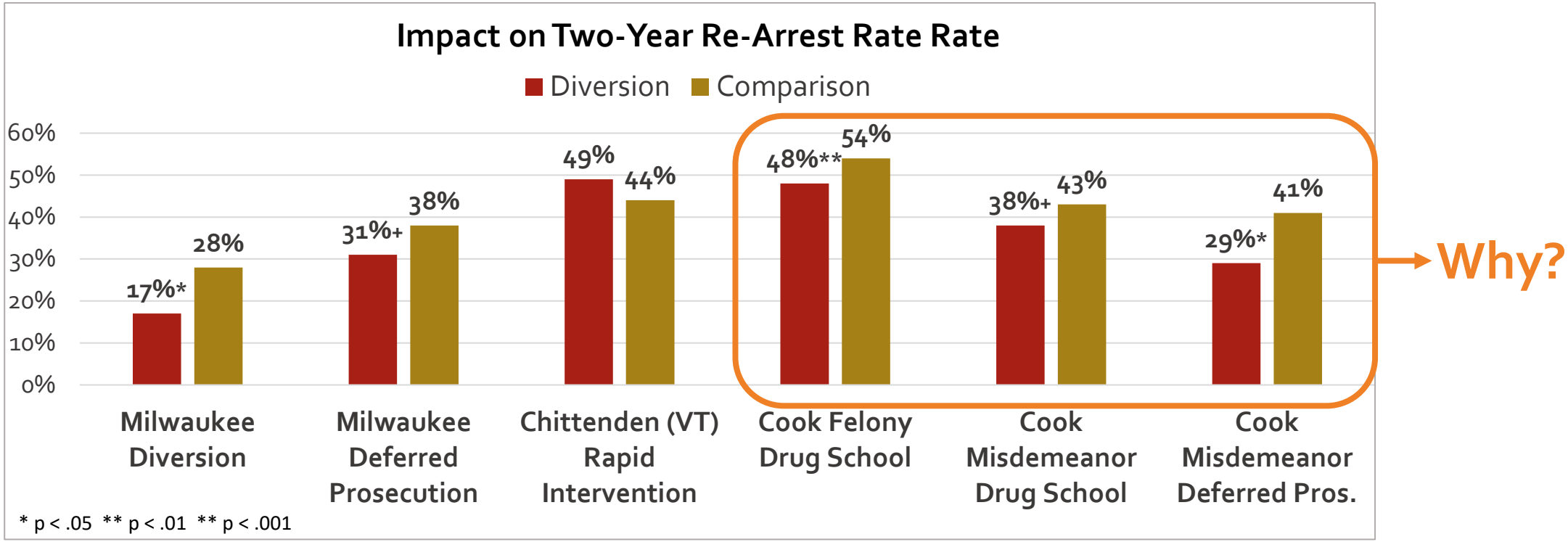
Impact Findings: Collateral Consequences

- **Convictions:** Fewer in **6** of **6** programs; *significant in **5** of **6***.
- **Jail Sentences:** Fewer in **5** of **5** programs; *significant in **4** of **5***.



Impact Findings: Recidivism

- **Re-Arrest Over 2 Years:** Reduction in 5 of 6 programs *(significant in 3)*.



Recidivism Reduction Absent EBP

- **Perceived Procedural Justice:** Fair treatment & compassion.
- **Perceived Substantive Justice:** Case dismissal & less court process.
- **Less Tangible Harm:** Less stigma, socioeconomic, & psychological harm from longer court/system contact.

Was Diversion Necessary at All?

Suffolk County (Boston) Study: *Not* prosecuting nonviolent misdemeanors reduced re-arrest by almost 60% (i.e., doing nothing works).

Some Research & Policy Challenges

- **Inconsistent use of evidence-based approaches.**
- **Historic violence exclusion** *(less research on models for violent cases).*
- **Few "nothing" counterfactuals** *(most involve "traditional prosecution").*
- **Risk of studying "boutique" programs** *(most drug court caseloads < 50).*
- **Little mass incarceration impact:**
  - Targeting non-jail-bound and/or over-incarcerating prison-bound.
  - Incarceration ↑ amid surge of "problem-solving courts" & diversion.
- **Why prosecutors** *(given "progressive" prosecutors come & go)?*