Overcriminalization of Low-Level Offenses: Perpetuating Poverty and Racial Disparities in the Misdemeanor Criminal Justice System

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Introduction

Misdemeanors cover a broad range of conduct. Some misdemeanors cover serious conduct, like drunk driving or domestic assault. But more frequently, misdemeanors cover minor offenses like speeding and low-level drug possession, or “quality-of-life” offenses such as sleeping in public, loitering, disorderly conduct, and panhandling. Because misdemeanors are considered “minor” or low-level, they receive much less attention than felonies. But responses to misdemeanors are proportionately much harsher than their felony counterparts.

Overcriminalization has been defined as “the overuse or misuse of criminal law to address societal problems that could be remedied more effectively through the civil legal system or other institutions.” In the context of low-level offenses and the misdemeanor criminal justice system, the increasing criminalization of a broad range of conduct facilitates and perpetuates racial and class disparities for low-level offenses. It does this in two ways.

First, the misdemeanor system targets poor and minority individuals and communities. Virtually all actors in the criminal justice system exercise substantial discretion. Police decide where to patrol, who to stop, who to search, and who to arrest. Prosecutors decide which cases to bring, what charges to indict, what plea deals to offer, and what sentences to recommend. And judges make the pivotal decision of what sentence the defendant ultimately receives. Bias influences all of these decisions—both implicit and explicit. And the system is self-reinforcing, relying on inherently biased data based on past discriminatory practices to justify the continued use of those same practices.

This targeted enforcement is illustrated by the significant racial and class disparities that exist in the misdemeanor system. Poor and minority individuals are significantly overrepresented in the misdemeanor system, and this disparity is completely unwarranted. Black individuals are not any more likely to commit crimes that their white counterparts. Many of the differences between black and white defendants—such as criminal history—are due to past discrimination. But even holding these other variables constant, black individuals are still more likely to experience negative outcomes than white individuals. These disparities pervade all stages of the misdemeanor system—black individuals are more likely to be stopped, searched, arrested, charged, and incarcerated. But this discrimination extends beyond the criminal justice system. Studies have shown that white applicants with a criminal record were still more likely to get a job than black applicants without a criminal record. These disparities, both within the criminal justice system and without, are unjustified and unwarranted, and illustrate the consequences of a system that targets these groups specifically.

Second, the consequences of these low-level offenses are relatively extreme, and far outweigh the severity of the conduct. Fines and fees are the most common punishment for misdemeanor violations, but these fines do not take ability to pay into account. Poor defendants who are unable to pay, through no real fault of their own, suffer increased fines and additional penalties, including the possibility of incarceration, while similarly situated wealthier defendants are not negatively impacted. And the consequences extend well beyond those imposed by law.

Those with a criminal record may face addition indirect consequences, including difficulties finding and keeping housing and employment.

Overcriminalization facilitates this targeted and discriminatory enforcement and perpetuates these disparities. The sheer volume of misdemeanor offenses, covering conduct as serious as domestic violence, to minor conduct such as jaywalking, spitting, or even using Silly String, means that most of us commit many of these crimes. But we are not all equally as likely to be charged for a violation. With so many offenses, it is easy for law enforcement to stop someone for whatever reason, and then identify some offense they may have committed after the fact. But this has it backwards. No one should be subjected to the consequences of the criminal justice system for any reason other than committing a morally reprehensible offense. If the system impacted all demographics equally, the problems posed would be very different, but it is low-income and minority individuals and communities that bear the brunt of the enforcement, and consequently, the brunt of the negative impact.

And ultimately, no one solution in any one area will solve the problem. There are many potential reforms that address the issue directly—such as decriminalizing conduct—and these reforms are necessary, but by themselves, criminal justice reforms are insufficient. The causes of racial discrimination go well beyond the criminal justice system—i.e., structural and economic inequality, implicit and explicit bias, history of slavery, racism, etc. “The ultimate aim of criminal legal system reform cannot be to lessen racial disparities; the endpoint must be to eliminate these disparities altogether.”

I. Background

Many misdemeanors cover conduct most agree should be criminalized, like domestic assault and drunk driving. But the law criminalizes some conduct that does not need to be criminalized. In Mount Airy, North Carolina, it is “unlawful for any person to sell or use ‘Snap-N-Pops,’ ‘Silly Strings’ and similar items within the corporate limits of the city.” The law criminalizes conduct that is unavoidable, like homeless individuals loitering and sleeping in public. And the law is applied disproportionally, subjecting poor and minority individuals to consequences that far exceed the seriousness of their crimes. And even if someone were exceedingly diligent, and sought to abide by every law, no matter how benign the conduct, they would likely be unable to do so. Criminal codes span hundreds, if not thousands, of pages. North Carolina’s criminal code spans 765 sections at the state level, in addition to countless local ordinances. This is 55 percent larger than Virginia and 38 percent larger than South Carolina. And misdemeanors stipulated in the criminal code do not account for the many additional offenses that exist in the common-law or as local ordinances.

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6 Id.
Our criminal justice system is based on the principle that people are given fair notice of what conduct is criminalized, and so they can adjust their conduct accordingly. However, if people do not know what acts are criminalized—either because the laws are located in too many places to search them all, or in the case of common-law crimes, aren’t located anywhere—they are unable to ensure they are acting legally. Despite this, North Carolina has been adding new crimes at an increasing rate. Prior to 2014, the state averaged 34 new crimes a year, but by 2016, this grew to 83.

Federally, a misdemeanor is defined as a crime with a maximum sentence of imprisonment for one year, and although this definition can vary by state, it is generally an accurate definition. North Carolina has four classes of misdemeanors: Class A1, 1, 2, and 3. Class A1 offenses—the most serious misdemeanor offenses—include, among other offenses, assault inflicting serious injury or with a deadly weapon. Class 1 offenses include breaking and entering and willful damage to real property. Class 2 offenses include simple assault, first-degree trespass, and disorderly conduct. And Class 3 offenses—the lowest possible class of misdemeanor—include fishing or hunting without a license, possession of less than ½ ounce of marijuana, and being intoxicated and disruptive in public. Appendix A includes a list of the five most common offense for each class. In 2019, 11 percent of misdemeanor convictions were for Class A1 offenses, 50 percent were for Class 1 violations, 14 percent were Class 2, and 25 percent were Class 3.

Data typically does not differentiate between classes of misdemeanor, but there is a significant difference between offense classes. Many Class 3 misdemeanors constitute “quality-of-life” offenses—such as loitering or sleeping in public—that are unavoidable for many people, or cover offenses that most do not view as immoral—such as spitting or fishing without a license. There is little dispute today that someone who assaults their domestic partner or abuses a child—both Class A1 offenses—should be punished, no matter their class, race, or any other variable. But this is not the case with low-level offenses—offenses that most do not view as morally repugnant or requiring punishment. And if a community has determined that some low-level offense covers conduct that should in fact be regulated, the criminal justice system, with all its many consequences, is typically not the best place to address that conduct. It is these low-level offenses—like driving with a suspended license, low-level marijuana possession, and quality-of-life offenses—that have an outsized impact on the misdemeanor system, and where the racial and class disparities are the greatest.

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8 *Id.*
12 *Id.*
13 *Id.* at p. 34.
The type of conduct that constitutes a misdemeanor varies based on the state and locality. Some conduct that is a misdemeanor in one state may be a felony in another. Also, some offenses that are a misdemeanor in one state or locality may be classified as infractions or violations in another. Infractions and violations are technically not misdemeanors and may not technically be crimes. In North Carolina, infractions are defined as “a noncriminal violation of law not punishable by imprisonment,” subject to a maximum fine of $100 unless otherwise provided for by law.\(^\text{14}\) Traffic violations are generally infractions, and not included in the misdemeanor data, but they are misdemeanors in some jurisdictions. In North Carolina, most traffic offenses are infractions, not misdemeanors.\(^\text{15}\) The main exceptions are DUIs and reckless driving, which are misdemeanors.\(^\text{16}\) But infractions can have the same consequences as misdemeanors. For example, failing to pay a fine for an infraction can be a misdemeanor and can result in arrest.\(^\text{17}\)

Police have the power to arrest individuals for even the most minor misdemeanors.\(^\text{18}\) Even those where the maximum punishment is only a fine, without the possibility of incarceration.\(^\text{19}\) And prosecutors can charge people for anything that is technically a crime—which is a lot. If misdemeanors were enforced equally and equitably, race and class would not be a factor, and this would be a different issue. But the system is regressive, and effectively makes the poor poorer. And the data shows a significant racial disparity, compounding and directing the severe negative consequences to low-income communities of color. Overcriminalization exacerbates these problems. “Most people never commit serious crimes, but misdemeanor prohibition against common conduct expose nearly everyone to the authority of the petty-offense process.”\(^\text{20}\) And the likelihood that someone will be ultimately charged with an offense, and the likelihood that they will be able to pay bail, fines and fees, depends on that individual’s race and wealth. This is the problem.

The problem is not a new one. Racial disparities have always existed in the American criminal justice system. In 2005, one commentator noted before Congress that “policy focusing on small-time dealers and users was ineffective in reducing crime, while breaking generation after generation of poor minority young men.”\(^\text{21}\) Despite knowing that there is a problem and knowing that it has a debilitating effect on poor, minority communities, we have been unable to devise an adequate solution. This is because finding a solution to this problem is hard. Issues regarding race and discrimination exist throughout society, and not just in the criminal justice


\(^{15}\) Id. § 20.

\(^{16}\) Id. § 20–138.1.


\(^{19}\) Id. at p. 1.

\(^{20}\) Id. at p. 186.

system. And any solution targeted only at reducing these disparities on the back end, without addressing their larger causes, are destined to be woefully insufficient.

a. Racial disparities

Approximately thirteen million people are charged with misdemeanors annually. This accounts for 80 percent of cases in the entire criminal justice system nationally. However, minority individuals and communities of color are disparately impacted by the criminal justice system.

Racial disparity in the criminal justice system exists when the proportion of a racial or ethnic group within the control of the system is greater than the proportion of such groups in the general population. Illegitimate or unwarranted racial disparity in the criminal justice system results from the dissimilar treatment of similarly situated people based on race.

In 2019, approximately 26 percent of all those arrested in the U.S. were black, while blacks made up only 13.4 percent of the total population. Similar disparities exist for virtually all minority groups.

North Carolina is not immune from this trend. In 2019, 88,048 people were ultimately convicted and sentenced for misdemeanor offenses in North Carolina—approximately 75 percent of all convictions in the state. Blacks constituted 22.2 percent of the total population but accounted for over 40 percent of all misdemeanor convictions. In response to this disparity, Governor Cooper created the North Carolina Task Force for Racial Equity in Criminal Justice in 2020, noting that

communities of color are disproportionately affected throughout the criminal justice system, with national data showing that from the point of arrest through potential conviction and sentencing, members of communities of color are significantly more likely than the white population to not have their murders solved; to be pulled over for a traffic violation; to be jailed and imprisoned at a higher rate; and to be sentenced to longer terms of imprisonment.

Individuals caught up in the misdemeanor system are subjected to consequences that are disproportionately harsh when compared to the seriousness of their crime. And those

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23 Id.
consequences are numerous. The system can directly impose punishments like jailtime, fines and fees, probation, and results in a criminal record. In addition to these direct consequences, many laws and regulations impose collateral consequences to criminal convictions. Collateral consequences are those that, by law, attach to criminal convictions. Collateral consequences span from the inability to possess a firearm to the inability to seek government funded assisted housing. One of the more consequential collateral consequences is the suspension of one’s driver’s license. In North Carolina, there are 221 such collateral consequences that may apply when someone is convicted of a misdemeanor, depending on the offense committed. And finally, many indirect consequences attach, such as depleting badly needed resources paying fines and fees, and loosing employment and housing opportunities due to time spent in jail and having a criminal record.

Race impacts the entire process, from the initial stop to arrest to conviction to sentence to reentry. Racial bias is present after an individual has been charged—such as in pretrial release determinations, the composition of the grand and trial juries, using of peremptory challenges, references to race and racial prejudice during trial, and in sentencing. In North Carolina, 44 percent of men convicted of misdemeanors are black, 48 percent are white, 4 percent are Hispanic, 2 percent are Native American, and 2 are percent other.

But the trouble starts much earlier, with policing and prosecuting decisions. The more than 88 thousand people convicted of misdemeanors in North Carolina are only a part of the picture. Many more are impacted by the system, even if not ultimately convicted and sentenced. “While mass incarceration is now widely recognized as one of the driving forces behind this country’s racial inequities, the racialization of crime begins much earlier in the criminal process, with low-level arrests and in misdemeanor courts, long before anyone goes to prison.” Prior to even charging an individual with a crime, racial prejudices, whether intentional or unintentional, play a role in stops, searches, arrests, eyewitness identifications, and who the prosecutor decides to prosecute in the first place. The discretion given to law enforcement in how and who to police makes these low-level offenses gateway offenses that disproportionately introduce minority and poor individuals to the criminal justice system. And this contact comes with consequences and perpetuates racial disparities, even when the individual is not charged or is even innocent.

Much of the data and sources focus on the impact on black communities and individuals, but the issue is not unique to black communities. Many minority communities suffer from discriminatory law enforcement practices. Different reports look at the disparate effects on black, Latinex, Native American, etc., communities. And demographics change based on location, so overcriminalization impacts varying locations and communities differently. This is

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true within North Carolina as well. However, many reports looking at North Carolina focus on the impact in black communities specifically, and for good reason. The population in North Carolina is 70.6 percent white, 22.2 percent black, with the remainder being American Indian, Asian, Pacific Islander, or two or more races. Much of this report will also focus on the impact on black communities, but it is important to note that this is not the entire universe, and although most minorities are negatively affected, the impact is not the same across all demographics and localities.

b. Class disparity

Race is not the only relevant factor. Class is also important. Poor people are less able to pay fines—which can result in arrest—are less able to hire an attorney, are forced to use overworked public defenders, and are less able to rally political support to draw attention to issues they face, to name just a few of the obstacles poor defendants face. Minority communities are also much more likely to be poor. In North Carolina, 26.1 percent of black individuals are below the poverty line, while only 11.8 percent of white individuals are.

Overcriminalization disproportionately punishes minority communities, and since minorities are more likely to be poor, the consequences are compounded. “[F]ines and fees … disproportionately impact Black and Latinx families, not just because they are targets of infraction enforcement, but because Black and Latinx families have much less wealth on average than white families.” A black family just above the federal poverty line has zero dollars in wealth or is in debt and has negative dollars in wealth, while a similarly situated white family has around $18,000 in wealth. A black person is more likely to be denied pretrial release on their own recognizance, and also be unable to pay bail, which results in them staying in jail for potentially months or years before going to trial, where they may ultimately be acquitted. But “[w]hile poor people of color often fare the worst in the misdemeanor system, it is wealthy offenders—not white offenders—why typically fare the best.”

Police, prosecutors, defense attorneys, and judges are the main official players in the misdemeanor criminal process. And all of these players are negatively impacted by the problem of overcriminalization. The massive amount of misdemeanor arrests and charges result in prosecutors being unable to adequately screen cases and so they simply adopt the police officer’s recommended charges and story of events, making police quasi-prosecutors. Alternatively, prosecutors are incentivized to enter into plea agreements to close the case as soon as possible. Defense attorneys have massive dockets where they cannot adequately investigate each case and defend each defendant. This results in “meet ‘em and plead ‘em” mentality, where defense attorneys meet their clients only briefly, and mainly encourage them to take a plea

36 Id. at pp. A-1–A-2.
40 Id. at p. 85.
Finally, judges are also negatively impacted by the overlarge caseloads and are incentivized to streamline the process and clear large dockets as fast as possible.

Different states are different. They have different laws, fines, and law enforcement policies. And they have different demographics, both in regard to race and class. But despite this variation, the numbers all point in the same direction. Statistics from a broad variety of states and jurisdictions show a trend. No matter what the laws are, how they are purported to be enforced, and the punishments they entail, poor and minority individuals are disproportionately impacted and bear the brunt of the consequences in every state and locality. These consequences build on each other and have a snowballing effect, perpetuating poverty in minority communities. All because the individual is a person of color and cannot afford to pay the increasing costs the system imposes.

II. Punishments and Consequences
   a. Direct Consequences

   Direct consequences are those imposed directly by the court because of a conviction. These include fines and fees defendants are forced to pay, cash bail required for pretrial release, time defendants spend in jail (both before and after trial), and probation. Lots of attention is spent on the problem of mass incarceration, and this is a problem with significant consequences. But when it comes to low-level misdemeanors, the most common punishment is in the form of fines and fees, and the fines and fees system is regressive. When people are unable to pay, the punishment and fine amount is increased. This has the perverse outcome of forcing poor defendants to pay more for the exact same conduct relative to wealthier defendants, simply because they are poor.

   i. Fines and fees

   Fines and fees make the poor poorer. Those able to pay the initial amount generally do not face many problems, but for those unable to pay that initial amount, more fees are subsequently piled on, forcing that individual deeper into debt. This is a regressive system. Fines are the same for both poor and rich alike, so poor individuals are forced to spend a much higher portion of their income for minor offenses, while the cost of a fine or fee may be inconsequential to someone of more means.

   Fines are fees are technically different, but their impact on poor defendants is the same. While fines are punishments for offenses, fees are not meant to be punitive. Fees are imposed by courts, jails, cities, etc., to pay for the operation of the criminal system itself. Fees are for things like court costs, drug testing fees, jail fees, and late fees, to name a few. But fees can be considerable. For example, in California, an initial statutory fine of $100 includes an additional $100 state penalty assessment, $20 state criminal surcharge, $40 court operations fee, $50 court construction fee, $70 for the county fund, $50 for the DNA fund, $4 for the Emergency Medical

41 Id. at p. 74.
42 Id. at p. 26.
43 Id.
44 Id.
Air Transportation fee, $20 for the EMS fund, a $36 conviction assessment, and a $1 night court assessment, for a total of $490.\textsuperscript{45} If the individual misses the deadline to pay, an additional $10 warrant fee, a $15 failing to appear fee, and a $300 civil assessment for failing to appear and pay, are added for a new total of $815.\textsuperscript{46} All for an offense that is statutorily punishable by a $100 fine. Failing to pay a fine can also result in arrest and incarceration.\textsuperscript{47} Effectively, there is no difference between fines and fees for poor defendants.

The cost of fines and fees has been increasing nationwide.\textsuperscript{48} “In North Carolina, fees increased an average of 400 percent from 1997 to 2017.”\textsuperscript{49} This makes it increasingly harder for low-income defendants to pay fines, fees, or bail. Forty percent of Americans cannot afford to pay even a $400 emergency or unexpected expense.\textsuperscript{50} People without the means of paying an initial fine or fee are punished with additional fines and fees, forcing them further into debt. This forces people to decide between paying a fine or buying food and other necessities, in addition to other indirect and collateral consequences, including incarceration.

Subjecting individuals to fines and fees for minor, and frequently unavoidable, conduct, effectively criminalizes poverty and homelessness. The Human Rights Clinic at Yale Law School published a report in 2016 on how the system criminalizes homelessness and poverty in Connecticut. Jurisdictions throughout the state criminalize conduct that homelessness people cannot stop doing, such as sleeping in public, panhandling, and creating shelters.\textsuperscript{51} The inability to stop this conduct means that these homeless individuals are perpetually subject to citations and/or arrest. Homeless people generally cannot pay any fines, and so they must attempt to fight the citation, but they lack money, transportation, or even an address where they can receive notice of a hearing, making this option almost impossible. “Even if the charges are ultimately dismissed, an arrest carries devastating consequences.”\textsuperscript{52} These consequences “further entrench homelessness and poverty, leading people back to the park bench or the city plaza, where they likely will be fined or arrested again.”\textsuperscript{53} Half of the counties in California still issue arrest warrants for failure to pay a fine, but even where a citation does not ultimately lead to an arrest, the consequences of “even brief encounters with the police can be traumatic.”\textsuperscript{54}

\textsuperscript{46} Id.
\textsuperscript{48} Stopped, Fined, Arrested. (2016). p. 22
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Deela-Piana et al. (2020). p. 6.
ii. Bail.

The subject of bail has received a lot of attention, even leading to several states enacting significant bail reform measures, and I will not attempt an exhaustive overview of the subject. But bail, like fines and fees, punish poor individuals for being poor and contribute significantly to the racial disparities in jail populations.

For violent felonies, the defendant is incarcerated pretrial without the option of paying bail. But for low-level offenses, defendants are offered bail at an amount set by the judge.\(^{55}\) Bail is meant to ensure that someone will appear in court when ordered to do so, and the amount is meant to reflect this assurance. If the defendant does not appear, they forfeit the bail, but if they appear at their court date, they are refunded the total amount paid.\(^{56}\) But if they cannot pay bail in the first place, they are incarcerated until their court date.\(^{57}\) Alternatively, judges are empowered to release defendants on their “own recognizance,” which means that person promises to show up when they are supposed to.\(^{58}\) A substantial number of people in jail are there simply because they cannot afford to pay bail, not because they were convicted of a crime. For example, in New Jersey prior to 2017, nearly 75 percent of those in jail were there because they could not afford to pay bail, and they were incarcerated for an average of 10 months pretrial.\(^{59}\)

Our criminal justice system is, theoretically, built upon the premise that accused are presumed innocent until proven guilty. The bail system turns this presumption on its head. For one, defendants, if ultimately convicted, are frequently given credit for time spent incarcerated pretrial.\(^{60}\) Other defendants ultimately receive sentences that do not include jail time, such as probation or fines. Both outcomes incentivize defendants to plead guilty.\(^{61}\) Plea deals are frequently the fastest way to get out of jail, and this could mean the difference between keeping a job or getting fired; maintaining personal relationships or missing social events; attending school or failing; paying rent or getting evicted; and all of the other life necessities that people in jail are unable to maintain. Ultimately, many defendants are punished pre-trial, while they are supposed to be presumed innocent, then released when they are convicted or plead guilty.

Other defendants turn to bail bondsman to secure their release pretrial. Bail bondsmen charge a nonrefundable fee, usually 10–15 percent of the total bail amount, and in exchange, they assume responsibility for the defendant’s bail obligation.\(^{62}\) The remainder of the bond is secured through collateral, such as a car or house.\(^{63}\) If the defendant fails to show up for their court date,
the bondsman will recoup the full amount of bail through the collateral. If the defendant does show up, they still forfeit the nonrefundable fee. People wealthy enough to pay the full amount of bail on their own are not forced to forfeit 10–15 percent of the total bail amount. They can pay bail directly, then they receive the full amount back from the court after they show up for their court date. Because of this, “[o]nly about 30% of defendants from the wealthiest zip codes are detained pretrial, versus around 60-70% of defendants from the poorest zip codes.”

Thus, defendants who cannot afford to pay bail are punished for being poor. If they cannot afford to pay a bail bondsman, they are forced to wait in jail. Even if they can afford to pay a bondsman, they are still forced to forfeit 10–15 percent of that bail amount. In both cases, poor defendants are punished simply for being poor, and are forced to pay more than similarly situated wealthy defendants. This also has the perverse effect of allowing wealthy individuals who have committed more serious offenses to be released simply because they can afford to pay bail, while poor defendants convicted of minor non-violent offenses may be incarcerated.

Additionally, studies have shown that being detained pretrial increases recidivism rates. A 2013 study found that, “[w]hen held 2-3 days, low-risk defendants are almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.” “When held 8-14 days, low-risk defendants are 51 percent more likely to commit another crime within two years after completion of their cases than equivalent defendants held no more than 24 hours.” In Harris County, Texas (the third largest county in the country), “although detention reduced criminal activity in the short-term through incapacitation, by 18 months post-hearing, detention is associated with a 30% increase in new felony charges and a 20% increase in new misdemeanor charges.”

Those being held pretrial also receive harsher punishments and are more likely to be convicted. “[D]etained defendants are 25% more likely than similarly situated releasees to plead guilty, are 43% more likely to be sentenced to jail, and receive jail sentences that are more than twice as long on average.”

Some states have already begun reforming the cash bail system. New Jersey replaced cash bail with a “risk-based” assessment. Bail was effectively eliminated, and defendants were detained only if the assessment showed a proven risk of failing to show up to court or a risk of committing another offense. Different states and localities have adopted many versions of the risk-assessment tool, but New Jersey’s “uses nine factors from an individual’s criminal history to

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66 Id.
70 Id.
predict their likelihood of returning to court for future hearings and remaining crime-free while on pretrial release.”71 And the New Jersey regulation achieved what it intended to; decrease jail populations without increasing criminal activity or failures to appear in court. The jail population decreased 43.9 percent from the end of 2015 to the end of 2018.72 And of those defendants who were released pretrial, “a large majority were not accused of committing a new crime and appeared in court when required.”73 “[T]here [are] no statistically significant differences in outcomes (i.e., court appearance and public safety rates) between defendants released without having to post financial bonds and those released after posting such a bond.”74

Despite the growing popularity of risk-assessment tools, they are not without their problems. For one, assessment tools vary, and it is not always clear what factors are being considered. Even judges generally do not receive the information that went into the assessment when they set bail.75 The assessments are frequently conducted by privately owned algorithms and AI systems whose contents are protected under trade-secret laws.76 And these systems can still perpetuate racial disparities. “[T]he AI systems themselves have biases baked in because they rely on data where low-income defendants and people of color may be overrepresented because of past arrests.”77 Relying on biased data to justify differential treatment perpetuates and compounds the initial discrimination and the consequences that flow from it.

### iii. Probation

Instead of being incarcerated, some convicted of misdemeanors may instead be placed on probation. Other than fines, probation is the most common punishment for misdemeanor offenses.78 There are many terms and conditions of probation. Probation may require; regular check-ins with a probation officer, paying restitution, community service, drug testing, regular employment or school attendance, avoiding crime-prone activities and associates, random searches, counseling, etc.79 Complying with these conditions costs money. Individuals on probation must pay supervision fees, court fees, and even fees for some of the conditions—i.e., those required to attend alcohol education classes must pay for them as well.80 Probation is

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71 Id.
72 Id.
77 *American Bar Association.* (2020).
“burdensome, expensive, and intrusive.” Failure to comply with any condition can result in suspending probation, other sanctions, arrest, and incarceration.

Not only are black individuals overrepresented in probation data, they are also more likely to have their probation revoked, resulting in incarceration. “The racial gap resembles that in incarceration: Black adults are about 3.5 times as likely as whites to be supervised, and although African-Americans make up 13 percent of the U.S. adult population, they account for 30 percent of those on probation or parole.” A multistate study looking at revocation rates found that black defendants were between 55 percent and 100 percent more likely to have their probation revoked. The study noted that black individuals were classified as higher risk, and had more extensive and serious criminal histories. This is likely to be due, at least partly, to discrimination in other aspects of the criminal justice system. But even after controlling for these differences, white individuals were still between 18 and 39 percent less likely to have their probation revoked.

iv. Jail

Jail is the harshest possible sentence for those convicted of low-level misdemeanors and those who are unable to pay bail, fines and fees. The misdemeanor system effectively steers minority and low-income individuals towards jail, even if the original offense is punishable only with a fine. “Jail is one of the most damaging aspects of the misdemeanor experience, and it looms large throughout.”

Prisons are where people serve felony sentences—i.e., sentences of more than one year incarceration. But jails are where you go after you are arrested, where you go if you cannot afford to pay bail or a fine, or where you may serve your misdemeanor sentence if convicted. There are eleven million admissions to 3,000 jails every year, and on average, one third of those are for misdemeanors. Sixty percent of the jail population is being incarcerated pretrial, even though they are presumptively innocent, and may ultimately be proven so. Time spent in jail can be as little as one day, but the average duration is one month, and 18 percent of the jail population remains there for over six months.

81 Id. at p. 24.
84 Janetta et al. (2014).
85 Id.
86 Id.
88 Id.
89 Id.
90 Id. at p. 22.
91 Id.
92 Id.
“In Rhode Island from 2005 through 2007, failure to pay court debt was the most common reason that individuals were incarcerated.”\textsuperscript{93} Forty-nine states charge inmates for time spent in jail, leaving people more in debt when they come out than when they went in.\textsuperscript{94} Added to the potential to losing employment, housing, or other benefits during incarceration, the negative consequences could be enormous. However, some states offer a $50 or $100 credit for each day spent in jail for failure to pay fines and fees, which is then subtracted from the outstanding fine amount.\textsuperscript{95} Since only those unable to pay the debt in the first place take advantage of this ability, this has been referred to as the new debtors’ prison.\textsuperscript{96}

b. Collateral Consequences

Like direct consequences, collateral consequences are imposed by the government—i.e., by law, regulation, policy, or other government action. But where direct punishments are meant to punish a defendant for committing a crime, collateral consequences are imposed for various public policy reasons, and they cover a broad range of outcomes.

Some collateral consequences serve a legitimate public safety or regulatory function, such as keeping firearms out of the hands of people convicted of violent offenses, prohibiting people convicted of assault or physical abuse from working with children or the elderly, or barring people convicted of fraud from positions of public trust. Others are directly related to a particular crime, such as registration requirements for sex offenders or driver’s license restrictions for people convicted of serious traffic offenses. But some collateral consequences apply without regard to the relationship between the crime and opportunity being restricted, such as the revocation of a business license after conviction of any felony. Frequently consequences also apply without consideration of the time passed between the conviction and the opportunity being sought or the person’s rehabilitation efforts since the conviction.\textsuperscript{97}

For example, under federal law, “individuals criminally convicted under either state or federal drug statutes could become ineligible for over 460 federal benefits.”\textsuperscript{98} These benefits include “Temporary Assistance to Needy Families, food stamps, low-income housing, and Supplemental Security Income for the elderly and disabled.”\textsuperscript{99} Legal residents can also lose their immigration status if convicted for a misdemeanor offense, and undocumented residents face deportation.\textsuperscript{100}

\textsuperscript{94} Id.
\textsuperscript{96} Id.
\textsuperscript{97} National Inventory of Collateral Consequences of Conviction. (2020). National Reentry Resource Center.
\textsuperscript{100} Id. at p. 32.
A significant collateral consequence that has been gaining attention is driver’s license suspension and revocation. In every state, a driver’s license can be suspended or revoked for driving related offenses, such as speeding, reckless driving, or driving under the influence.\footnote{Cozier, W. E., & Garrett, B. L. (2020) Driven to Failure: An Empirical Analysis of Driver’s License Suspension in North Carolina. \textit{Duke Law Journal}, \textbf{69}, 1585–1641. p. 1594.} However, North Carolina is one of forty-four states that “require indefinite suspension of driver’s licenses for non-driving related reasons, such as failure to appear in court or pay fines for traffic infractions.”\footnote{\textit{Id.} at p. 1585.} Again, this costs money. Failing to appear or failing to pay a fine can result in $200 in additional fees if not remedied in time, and after a license is suspended, it costs $120 to restore it.\footnote{\textit{Id.} at p. 1594–95.}

The case is much the same in California. There, traffic courts hear both traffic cases—such as not wearing a seatbelt—and non-traffic offense—such as loitering.\footnote{\textit{Id.}.} Within ten days of failing to appear or failing to pay a fine, traffic courts may issue a misdemeanor bench warrant, which automatically triggers a $300 additional fine, and driver’s license suspension.\footnote{\textit{Id.}.}

Offenses that may result in driver’s license suspension, and the subsequent arrests for driving with a suspended license, are not enforced equally across racial demographics. Professors Brandon Garret and William Cozier at Duke University conducted a study on driver’s license suspensions in North Carolina, and its relation to race and poverty.\footnote{Cozier & Garret. (2020).} They found that one in seven adult drivers in North Carolina—or about 1.2 million people—have active driver’s license suspensions for failing to appear in court or failing to pay a fine or fee after being charged with a driving-related offense.\footnote{\textit{Id.} at p. 1606.} 37.6 percent of them are black and 36.3 percent are white, while blacks account for only 21 percent of the driving population and whites account for 65 percent.\footnote{\textit{Id.} at pp. 1606, 1608.} Intuitively, increased poverty would increase the inability to pay and/or appear for court, and ultimately increase license suspension rates. And that was found to be true for white individuals. The study found that the number of white individuals in poverty was a predictor for the number of license suspensions.\footnote{\textit{Id.} at p. 1616.} But the same was not true for black individuals. For black individuals, more people above the poverty line resulted in more license suspensions.\footnote{\textit{Id.}.}

Despite being above the poverty line, the unimpoverished black population may still be disproportionately affected by the financial hardship of paying a fine, particularly compared to the white population above the poverty line. Black individuals below the poverty line, conversely, may have such a small effect because that population is less likely to have a driver’s license, less likely to
appear in traffic court cases because they may not own a car, or may have access to better legal services for indigent defendants.\textsuperscript{111}

Even with the same income, a white individual just above the poverty line may have $18,000 more in wealth than a similarly situated black family, resulting in black families’ being unable to pay unexpected expenses.\textsuperscript{112} And, as discussed later, police disproportionately patrol black and low-income neighborhoods, increasing the disparities.\textsuperscript{113}

North Carolina is not unique. In a California study, black drivers were significantly more likely to be pulled over by police. Blacks accounted for 70 percent of those pulled over in Oakland, but only accounted for 26.5 percent of the total population.\textsuperscript{114} Blacks were also 4.3 times more likely to be pulled over without a good reason, and three times more likely to be searched during a traffic stop.\textsuperscript{115} This is despite the fact that police were much less likely to find contraband on black individuals as compared to their white counterparts. When searching black individuals, police in Los Angeles were 37 percent less likely to find to find weapons, 24 percent less likely to find drugs, and 25 percent less likely to find other contraband, when compared to their white counterparts.\textsuperscript{116} The sheer number of black individuals being stopped and searched accounts for the racial disparities in citation rates—per 10,000 residents in Los Angeles, blacks received 1300 more citations that their white counterparts\textsuperscript{117}—and police continue to disproportionately stop and search black residents, despite being significantly less likely to find contraband. These discriminatory practices, and underlying biases, are firmly entrenched.

However, the monetary costs fail to account for the numerous indirect consequences people who are no longer able to drive are subjected to. People with a suspended license have difficulty finding employment as many jobs either require a driver’s license or screen applicants based on whether they have one or not, and because many necessarily have to drive to get to work and would lose their job if they could not.\textsuperscript{118} Individuals may also be forced to forgo paying necessities such as rent and food as all of their funds are focused on paying off fines and fees.\textsuperscript{119} The foreseeable result is that many are compelled to continue driving, even after their license has been suspended, and can then be arrested for driving with a suspended or revoked license, with the usual accompaniment of more fines, fees, and potential jail time.

Driving with a revoked or suspended license is a misdemeanor in both North Carolina and California, authorizing law enforcement to arrest offenders and subject them to all the

\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} See infra, IV.a.
\textsuperscript{114} Stopped, Fined, Arrested. (2016). p. 5.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at p. 3.
\textsuperscript{117} Id. at p. 21.
\textsuperscript{118} Id. at p. 26.
associated consequences.\textsuperscript{120} To add insult to injury, driving with a suspended license can also increase insurance premiums.\textsuperscript{121}

c. Indirect consequences

Collateral and direct consequences are those imposed by some government act. Conversely, indirect consequences are not required by law, and are frequently due to private or social acts or prejudices. There is some overlap between categories. For example, an individual could lose their housing due to a misdemeanor conviction if they are in public housing and a law requires it, or because their landlord refuses to extend their lease due to the criminal record. The label is not an indicator of the seriousness of the consequence, but many of the indirect consequences are significant. For one, convicted individuals have a criminal record which can preclude them from many opportunities.

Today, background checking—for employment purposes, for eligibility to serve as a volunteer, for tenant screening, and for so many other purposes—has become a necessary, even if not always a welcome, rite of passage for almost every adult American. Like a medical record, a bank record, or a credit record, a background check record is increasingly a part of every American’s information footprint.\textsuperscript{122}

The inability to get or maintain housing and/or employment is one of the most well-known consequences of having a criminal record.

i. Employment

Many, if not most, job applications include a box to indicate whether the applicant has a criminal record. And businesses frequently reject applicants just because they check that box. The convictions can range from domestic abuse to loitering, but applicants are frequently rejected out of hand, without ever getting a chance to explain what the conviction was for, or the circumstances surrounding it. There is a myriad of reasons why an employer may reject an applicant because of criminal record, including “internal policy, practice, habit, reflex, or otherwise.”\textsuperscript{123}

Over 65 million people have criminal records in America—including 1.7 million North Carolinians—and these criminal records increasingly are used to inhibit employment.\textsuperscript{124} Not only are many individuals unable to pay the bail, fines and fees associated with a misdemeanor conviction, they are then inhibited from finding employment—i.e., the means of paying the fines—perpetuating the financial instability that prevented them from paying in the first place. As with many of the aspects of the criminal justice system discussed in this paper, the effect is

\textsuperscript{121} Stopped, Fined, Arrested. (2016). p. 22.
The system creates the problem—poverty—then imposes additional penalties for that problem, compounding the consequences on disadvantaged individuals.

This outcome has led some states to “ban the box”—i.e., prohibit employers from asking about criminal history on initial employment applications. Governor Cooper signed an executive order in 2020 banning the box for all state government employees in North Carolina. However, the order does not apply to private employers, and it does not necessarily keep an applicant’s criminal history a secret. Hiring managers can still run background checks, but only for people who have already been invited in for an interview. The rationale being that people receiving an interview will be able to prove themselves and explain their criminal history before being automatically rejected for the position. At this point, applicants can still be refused the job due to the criminal record.

However, studies have shown that, in many instances, race plays a larger role than criminal records in why an applicant was denied employment. In a study where black and white applicants used the same resume to apply for positions, members of both races were less likely to get a callback if they had a criminal record. But this was not true between races. White applicants with a criminal record were still more likely to get a callback than black applicants without a criminal record. The findings of this study are not unique. “[S]tudies have found that while some racial and ethnic disparities exist in prosecution and sentencing are explained through legal factors or previous stages, they persist even after controlling for those factors.” Black individuals are discriminated against by being more likely to have a criminal record and be denied employment on that ground. But black applicants are also more likely to be denied employment regardless of any criminal record, simply because of race.

### i. Housing

Criminal records also pose problems for finding housing, creating and perpetuating homelessness. For public housing, this is usually stipulated. For example, for federally assisted housing, the guidelines say that housing authorities may reject applicants who have engaged in any of the following activities “during a reasonable time” prior to submitting their application: “(1) Drug-related criminal activity; (2) Violent criminal activity; (3) Other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing-agency employees.” When dealing with public housing, this is a collateral consequence. But private housing accounts for 97 percent of the housing in the U.S., and easy access to criminal records has resulted in private landlords

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125 Doran. (2020).
126 Id.
127 Id.
128 Id.
130 Id. at p. 958.
rejecting applicants with criminal records.\textsuperscript{133} This conduct persists because both landlords and tenants alike view this as a benefit of the system. “Discrimination against people with criminal records has not only been considered constitutional, it has been thought necessary to ensure community safety.”\textsuperscript{134} But this goal is not largely realized because black applicants are more likely to have a criminal record because they are black, not because they pose more safety risks.

The overrepresentation of black individuals in the criminal justice system results in more black individuals with criminal records, and ultimately more black individuals being denied housing. But, like the case with employment, the existence of a criminal record is not the only thing black applicants have to deal with in the housing/apartment market. “In paired-testing studies of equally qualified white and minority home seekers, HUD found that ‘white homesseekers are more likely to be favored than minorities. Most important, minority homesseekers are told about and shown fewer homes and apartments than whites.’”\textsuperscript{135} This is true for even the “unambiguously well-qualified” black applicants, but the discrimination gets even worse for black applicants who are “marginally qualified home seekers.”\textsuperscript{136}

The lack of a home and address also makes finding employment difficult, as there is nowhere to contact applicants, send information, and more fundamentally, a home provides a place to sleep, groom, and prepare for work and interviews.

In 2020, North Carolina passed the “Second Chance Act,” with not a single legislator voting against it, which permits individuals to “expunge many criminal records that give rise to severe barriers to employment, housing, and other essential opportunities.”\textsuperscript{137} However, the Act applies mainly to non-violent offenses and requires seven years of good behavior.\textsuperscript{138} The rest of the provisions apply to juvenile offenses, and offenses that are dismissed or disposed “not guilty.”\textsuperscript{139} But once an offense has been expunged, “an individual may truthfully deny the charge or conviction ever occurred in most circumstances.”\textsuperscript{140}

\textbf{i. Stigma and other consequences}

These are not the only indirect consequences. An exhaustive list is likely not possible, but, for example, “[i]ncarcerated parents can lose custody or visitation rights or face further incarceration for failing to pay child support that accrued while they were in jail.”\textsuperscript{141} And those with criminal records, and those incarcerated—whether pre- or post-trial—are also more likely to have future encounters with law enforcement, and be re-arrested, convicted, and sentenced to

\begin{enumerate}
\item \textsuperscript{133} Id. at p. 1108.
\item \textsuperscript{134} Id. at p. 1105.
\item \textsuperscript{135} Id. at p. 1111.
\item \textsuperscript{136} Id.
\item \textsuperscript{137} Hawes, J. (2020). Transformative Second Chance Act Passes Senate, Breaking Down Barriers to Employment, Housing, Essential Opportunities. \textit{North Carolina Justice Center}.
\item \textsuperscript{138} Id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Id.
\end{enumerate}
longer sentences. People with prior convictions are “recidivists,” and recidivism statutes increase penalties for people with prior convictions.142 Police are more likely to arrest people with prior convictions, instead of issuing a warning or citing them for an infraction.143 And prosecutors are more likely to seek bail, increased amounts, or charges for more serious crimes for recidivists.144 Criminal records also create fear, stigma, and civic disrespect.

“[S]tigma refers to a person’s reluctance to interact, either socially or economically, with an individual with a criminal record. This stigma might manifest as a belief that the individual has bad moral character or is undeserving of help and support. Even if a potential landlord believes that individuals can change, a preoccupation with risk might lead to denial of housing. While this stigma may fade with the passage of time and as individuals are able to demonstrate their rehabilitation, the prevalence of life-long bans in both public and private housing illustrates the persistent effects of this stigma.145

“A misdemeanor arrest or conviction can undermine a person’s relationships with friends and family, colleagues, and places of worship.”146 “When an individual cannot find stable employment or housing because of their conviction record, the family unit is impacted.”147 People with negative interactions with law enforcement are also more likely to avoid other institutions that keep official records, despite their benefits: avoiding places such as “banks, hospitals, and schools.”148

III. Misdemeanor Convictions in North Carolina

The North Carolina Sentencing Commission releases an annual report of all misdemeanor convictions in the state.149

“In 2019 there were 1,602,813 total misdemeanor charges statewide. Of those charges, only 6.5% (104,185 charges) were for violent misdemeanor offenses. The remaining charges were for DWI and related offenses (73,095 charges) and nonviolent misdemeanor charges (1,425,533). Within the latter group of charges—nonviolent misdemeanors—non-DWI related traffic misdemeanors constitute the lion’s share of that total (1,089,765). The remaining charges are for ordinance crimes (11,420) and other nonviolent misdemeanors (324,348). The

142 Id. at p. 34.
143 Id.
144 Id.
most common specifically designated ordinance charges were for open container of alcohol, failure to provide proof of fare, and begging.\textsuperscript{150}

Of those 1,602,812 misdemeanor charges filed, there were 88,048 convictions.\textsuperscript{151} 52.3 percent of all those convicted of misdemeanors were white and 40.7 percent were black.\textsuperscript{152} But only 22.2 percent of the total population is black, while 70.6 percent is white.\textsuperscript{153}

Table 1: North Carolina Racial Demographics: Population and Misdemeanor Convictions

<table>
<thead>
<tr>
<th>Race</th>
<th>Black</th>
<th>White</th>
<th>Hispanic</th>
<th>Other/Unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>% of Population</td>
<td>(22.2%)</td>
<td>(70.6%)</td>
<td>N/A\textsuperscript{154}</td>
<td>(7.2%)</td>
</tr>
<tr>
<td>% of Misdemeanor Convictions</td>
<td>(40.7%)</td>
<td>(52.3%)</td>
<td>(3.3%)</td>
<td>(3.7%)</td>
</tr>
</tbody>
</table>


Half of all convictions were for Class 1 offenses, and the most common Class 1 offenses include larceny of less than $1,000 worth of property and possession of between $\frac{1}{2}$ and $1 \frac{1}{2}$ ounces of marijuana.\textsuperscript{155} Figure 2 shows the breakdown by crime type.

\textsuperscript{151} NC Sentencing Report. (2019); Smith, et al. (2020).
\textsuperscript{153} Quick Facts: North Carolina. (2019). \textit{U.S. Census Bureau}.
\textsuperscript{154} The U.S. Census Bureau does not obtain racial data for Hispanic populations.
\textsuperscript{155} See Appendix A for top five offenses in all misdemeanor classes; NC Sentencing Report. (2019).
And the disparities persist throughout all offense classes. For Class 1 offenses, 35.8 percent of all convictions were of black individuals, while 57.4 percent of convictions were of white individuals. The disparity is starker for other offense classes. For Class 3 offenses, blacks account for 130 more convictions that whites—46.8 percent of those convicted were black, while 46.2 percent were white.

Table 2: Misdemeanor Convictions by Offense Class and Race

<table>
<thead>
<tr>
<th>Offense Class</th>
<th>Black</th>
<th>White</th>
<th>Hispanic</th>
<th>Other/Unknown</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>A1</td>
<td>3915</td>
<td>4483</td>
<td>336</td>
<td>347</td>
<td>9081</td>
</tr>
<tr>
<td></td>
<td>(43.1%)</td>
<td>(49.4%)</td>
<td>(3.7%)</td>
<td>(3.8%)</td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>15735</td>
<td>25262</td>
<td>1392</td>
<td>1613</td>
<td>44002</td>
</tr>
<tr>
<td></td>
<td>(35.8%)</td>
<td>(57.4%)</td>
<td>(3.2%)</td>
<td>(3.6%)</td>
<td></td>
</tr>
<tr>
<td>2</td>
<td>5884</td>
<td>6207</td>
<td>399</td>
<td>533</td>
<td>13023</td>
</tr>
<tr>
<td></td>
<td>(45.2%)</td>
<td>(47.7%)</td>
<td>(3.1%)</td>
<td>(4.0%)</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>10251</td>
<td>10121</td>
<td>789</td>
<td>765</td>
<td>21926</td>
</tr>
<tr>
<td></td>
<td>(46.8%)</td>
<td>(46.2%)</td>
<td>(3.6%)</td>
<td>(3.4%)</td>
<td></td>
</tr>
</tbody>
</table>

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2019 Statistical Report Data. Analysis performed by Ameya Rao, March 2021. The analysis of these data and any conclusions may not be attributed to, and are not endorsed by, the NCSPAC.
Prior conviction level is determined by the number of prior convictions and is used to calculate the sentence each defendant receives. The disparity again persists in the number of prior convictions, with the percentage of black individuals increasing with the total number of prior convictions. For example, 39.6 percent of misdemeanor defendants with no prior convictions were black, while 42.9 percent of misdemeanor defendants with five or more prior convictions were black.

Table 3: Prior Conviction Level by Race

<table>
<thead>
<tr>
<th># of Prior Convictions</th>
<th>Race</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Black</td>
<td>White</td>
<td>Hispanic</td>
<td>Other/Unknown</td>
<td>Total</td>
</tr>
<tr>
<td>0</td>
<td>9871</td>
<td>12600</td>
<td>1214</td>
<td>1238</td>
<td>24923</td>
</tr>
<tr>
<td></td>
<td>(39.6%)</td>
<td>(50.6%)</td>
<td>(4.9%)</td>
<td>(4.9%)</td>
<td></td>
</tr>
<tr>
<td>1–4</td>
<td>12825</td>
<td>17373</td>
<td>1208</td>
<td>1250</td>
<td>32656</td>
</tr>
<tr>
<td></td>
<td>(39.3%)</td>
<td>(53.2%)</td>
<td>(3.7%)</td>
<td>(3.8%)</td>
<td></td>
</tr>
<tr>
<td>5 +</td>
<td>13096</td>
<td>16109</td>
<td>494</td>
<td>770</td>
<td>30469</td>
</tr>
<tr>
<td></td>
<td>(42.9%)</td>
<td>(52.9%)</td>
<td>(1.6%)</td>
<td>(2.6%)</td>
<td></td>
</tr>
</tbody>
</table>

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2019 Statistical Report Data. Analysis performed by Ameya Rao, March 2021. The analysis of these data and any conclusions may not be attributed to, and are not endorsed by, the NCSPAC.

Finally, there are differences in how defendants plead. An Alford plea allows a defendant to “plead guilty while factually maintaining innocence, provided that the record contains ‘strong evidence of actual guilt’.”\textsuperscript{157} “An Alford plea carries all of the consequences of a guilty plea.”\textsuperscript{158} “Guilty to Lesser” means the defendant plead guilty to a lesser offense than what was initially charged. This can be particularly beneficial if the defendant is initially charged with a felony but is given the opportunity to plead to a lesser misdemeanor. “A valid guilty plea acts as a conviction of the offense charged and serves as an admission of all of the facts alleged in the indictment or other criminal process.”\textsuperscript{159} A “no contest” plea is similar to an Alford plea, in that the defendant does not admit guilt but agrees not to contest the charge.\textsuperscript{160} In North Carolina, a defendant can only enter a no contest plea with the prosecution’s and judge’s consent, and “[t]he main benefit of a no contest plea is that it does not constitute an admission of guilt in civil proceedings.”\textsuperscript{161} Lastly, pleading not guilty is the only way for a defendant to proceed to trial, and require a jury to determine guilt beyond a reasonable doubt.\textsuperscript{162}

\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at p. 5.
\textsuperscript{161} \textit{Id.} at p. 6.
\textsuperscript{162} \textit{Id.} at p. 3.
Most defendants plead guilty. As shown in Table 4 below, 81,042 of the total 88,048 misdemeanor convictions were due to guilty pleas—Guilty (Alford), Guilty to Lesser, or Guilty pleas. But the racial demographics look different depending on the type of plea. For example, a higher number of black defendants overall plead not guilty, or submitted an Alford plea, which both permit defendants to maintain innocence. Conversely, white defendants were more likely to plead guilty, plead guilty to a lesser offense, or plead no contest. Potential reasons for these differences are discussed below in Section IV.b, in the context of prosecutorial discretion.

### Table 4: Plea Type by Race

<table>
<thead>
<tr>
<th>Offense Class</th>
<th>Black</th>
<th>White</th>
<th>Hispanic</th>
<th>Other/Unknown</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guilty (Alford)</td>
<td>990</td>
<td>948</td>
<td>62</td>
<td>63</td>
<td>2063</td>
</tr>
<tr>
<td>Guilty to Lesser</td>
<td>4079</td>
<td>5310</td>
<td>319</td>
<td>354</td>
<td>10062</td>
</tr>
<tr>
<td>Guilty</td>
<td>27951</td>
<td>36024</td>
<td>2337</td>
<td>2605</td>
<td>68917</td>
</tr>
<tr>
<td>No Contest</td>
<td>578</td>
<td>1488</td>
<td>70</td>
<td>56</td>
<td>2192</td>
</tr>
<tr>
<td>Not Guilty</td>
<td>2194</td>
<td>1488</td>
<td>128</td>
<td>180</td>
<td>4814</td>
</tr>
</tbody>
</table>

SOURCE: NC Sentencing and Policy Advisory Commission, FY 2019 Statistical Report Data. Analysis performed by Ameya Rao, March 2021. The analysis of these data and any conclusions may not be attributed to, and are not endorsed by, the NCSPAC.

This disparity also exists across locality and county. In Durham, 40 percent of the population is black, but 80 percent of all resisting arrest charges are against black individuals.\(^{163}\) In Charlotte, black individuals are almost three times more likely to be arrested for marijuana possession.\(^ {164}\) This data shows that black individuals are overrepresented in the misdemeanor system in North Carolina, and as a rule, are more likely to experience negative outcomes.

Federally, the numbers look a little different as federal law generally covers difference conduct than state law, but the disparities remain. For example, 38.4 percent of all federal offenses were related to immigration offenses in 2019, which is usually a federal offense, as opposed to a state offense.\(^ {165}\) And because most defendants in immigration cases are Hispanic,

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\(^{164}\) Id. at p. 153.

Hispanics accounted for 56.3 percent of all federal convictions. But the racial disparity still exists for other offenses. “African Americans made up 42.6% of the [federal] prison population convicted for drug offenses in 2011, while they compromise 13.4% of the total population of the United States.”

IV. Overcriminalization Facilitates and Perpetuates Racial Disparities

Minority individuals are overrepresented in every aspect of the criminal justice system, despite that reports have found “actual rates of black offending are not as disproportionate as crime statistics would suggest and are, in some cases, equal to that of whites.” Police records show that police are more likely to turn up guns or drugs when searching white drivers, but black drivers are still three times more likely to be subjected to a search. Implicit bias plays a significant role in creating these disparate outcomes. Studies have shown that police are more likely than the average person to perceive guilt based on race, and police are more likely to perceive guilt due to the ambiguous actions of black individuals than white individuals. Although implicit bias may account for much of the discrimination, some discrimination is explicit. For example, a former San Diego police officer filed suit against his department, claiming that he was told citizens of predominantly white neighborhoods “deserve to be treated better,” and that he was to stop enforcing violations in those neighborhoods. And in Baltimore, police department trespass forms already had “BLACK MALE” filled in. “The discrepancy in treatment between minorities and whites in the criminal justice system is attributable to political decisions and directives, not an inherent likelihood for minorities to commit more crime.”

Discretion is not all bad, and in many instances, it is necessary for the system to operate. We do not want police stopping everyone driving five miles over the speed limit. That would unnecessarily clog the system with thousands of cases for conduct that is typically benign. But police need the discretion to stop someone who is driving erratically and posing a risk to others, while being able to let drivers go who pose no such risk. In many cases, police have the discretion to issue a fine or infraction violation instead of arresting someone. Prosecutors can use their discretion beneficially to mitigate the effect of police discrimination by refusing to prosecute cases they believe were influenced by racial animus, or they can decide to charge

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166 Id. at p. 6.
167 Id. at p. 6.
171 Id.
lesser crimes or offer plea agreements for less serious offenses. And judges can take mitigating factors into account if they believe that a defendant is deserving of a lower sentence (or vice versa). The problem arises when these actors make discretionary decisions based on race. And the data shows that this is what is happening.

Overcriminalization helps facilitate abuses of discretion by criminalizing an extremely broad range of conduct. Low-level offenses cover conduct that is not morally repugnant, and that many of us commit with some regularity, like jaywalking. Or they cover conduct—such as minor drug possession—that is predominantly enforced against minority individuals and communities, even though they are not more likely that white individuals to commit such offenses. The ability to easily identify some offense to stop and charge someone with means that police and prosecutors can make discretionary decisions based on factors other than culpability and moral responsibility. And they do. Whether or not it is a conscious decision, these actors frequently make decisions based on racial stereotypes, prejudices, and biases.

a. Law enforcement

The decisions police officers make on a daily basis are almost completely within their discretion. They decide where to patrol, who to stop, who to search, and ultimately, who to arrest. And this discretion has led to significant racial disparities throughout the criminal justice system. Police officers are more likely to patrol low-income minority communities, and are more likely to stop, search, and arrest minority individuals. And if “criminal investigations focus on African Americans, more African Americans necessarily will be arrested and convicted of crimes.”174 For example, in 2013, a federal judge found that “the NYPD carries out more stops where there are more black and Hispanic residents, even when other relevant variables are held constant.”175

Overcriminalization facilitates the discriminatory use and abuse of this discretion. Misdemeanors criminalize a vast range of conduct. In addition to more serious crimes such as domestic assault or driving under the influence, the misdemeanor system criminalizes acts such as feeding feral cats to quality-of-life offenses such as loitering and sleeping in public.176 If someone is aware that feeding a feral cat is even a crime, they “generally suspect that they will never be prosecuted.”177 The latter quality-of-life offenses frequently have vague definitions, permitting law enforcement to stop and arrest people for benign conduct. In North Carolina, it is a Class 3 misdemeanor to “[en]gage in disorderly conduct,” or “without having necessary business there, loiter and loaf upon the premises,” at a bus stop, train station, or airport.178 According to the Model Penal Code, one violates this statute if he “prowls in a place, at a time,

or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.” But what constitutes “a manner not usual for law-abiding individuals” is completely up to the individual police officer. For example, police in Baltimore were encouraged to “clear corners,” even when the people standing there were not committing any crimes. When an officer protested that he had no reason to stop them because they were doing nothing wrong, his supervisor told him to “make something up.” Vague offenses like loitering and disorderly conduct make it easy for officers to “make up” offenses whenever necessary.

Even without being explicitly directed to arrest innocent people, as was the case in Baltimore, overcriminalization facilitates discriminatory enforcement. The numerous crimes encompassing a broad range of conduct, frequently written in language that permits law enforcement to stop and arrest people for ultimately innocent or benign conduct, allows law enforcement to make decisions on who to stop and arrest, based not on the criminal nature of the conduct, but on who is committing the conduct. Ultimately, overcriminalization permits police to decide who to stop and/or arrest before identifying any crime they may have committed. The vast number of laws means that they can find something to charge the individual with, not matter what they were doing. This results in a significant racial disparity in stop and arrest rates.

The more power police have to use their discretion in enforcement, the more severe the racial disparities become. In North Carolina from 2000–2011, blacks accounted for 29.78 percent of all traffic stops, while only accounting for 21.5 percent of the population. Although there were racial disparities in stop, search, and arrests rates for all the traffic offenses analyzed, “the [racial] disparities appear greatest when the level of officer discretion is highest—seat belts, vehicle equipment, and vehicle regulatory issues.” Conversely, blacks were actually less likely to be stopped for Driving Impaired—accounting for only 21.35 percent of all stops. Police have broad discretion whether to enforce vehicle regulatory laws, and they can decide to issue warnings in lieu of arrests. But there is less discretion when enforcing more serious offenses like driving under the influence, where anyone caught doing so will likely be arrested. As a result, the racial disparities are greatest where the ability for law enforcement to exercise discretion is greatest.

Police also use discretion in deciding where to patrol in the first place. In their seminal article “Broken Windows,” published in 1982, George Kelling and James Wilson introduced the concept of broken-window-policing. The authors opined that police should focus enforcement in urban spaces to reduce disorderly conditions—such as broken windows—because general

\[\text{179} \text{ Model Penal Code § 250.6. (2021).} \]
\[\text{181} \text{ Id.} \]
\[\text{183} \text{ Id. at p. 2.} \]
\[\text{184} \text{ Id. at p. 5.} \]
disorder is conducive to more serious crimes. Police departments across the country adopted these broken-window strategies, “focus[ing] on low-level disorder or nuisance offenses such as graffiti, homelessness, public drinking, low-level drug dealing, and prostitution as a means for deterring more serious crime.” These types of strategies focus law enforcement in what is perceived as high-crime areas, generally home to low-income minority communities. This produced what one author referred to as “million dollar blocks,” or neighborhoods where states spend millions of dollars on law enforcement to monitor and incarcerate minority communities. In addition to the direct consequences of discriminatory law enforcement, broken-window policing also “reinforces racist stereotypes of black criminality because it is deployed predominantly in black neighborhoods and results in large-scale stops and arrests of black people for minor or harmless conduct.” One prominent example is the stop-and-frisk policy previously adopted and utilized by the New York Police Department (NYPD).

The ability to “stop and frisk” anyone that a law enforcement officer “reasonably” suspects of being engaged in criminal activity drastically increases the discretionary power for police to stop anyone on the street. “An in-depth investigation found that stop and frisk searches were carried out disproportionately on minority groups, such as African-Americans and those of Hispanic origin.” In 2013, a federal judge ruled that the NYPD policy of targeting young black and Hispanic men for stops and frisks was illegal. “Whether through the use of a facially neutral policy applied in a discriminatory manner, or through express racial profiling, [NYPD] target[ed] young black and Hispanic men for stops and searches based on the alleged criminal conduct of other young black of Hispanic men [which] violates bedrock principles of equality.” The NYPD Commissioner even made statements that “the NYPD focuses stop and frisks on young black and Hispanics in order to instill in them a fear of being stopped.” This was partly accomplished through the use of force, as “Black and Hispanics were also more likely to experience force from police officers during stop and frisk searches, thus increasing their victimization.” The primary factor leading a police officer to stop someone was their race, and this is a poor proxy for likelihood of committing a crime. But only six percent of all stops even resulted in an arrest for any crime.

California experienced similar outcomes. The Lawyers’ Committee for Civil Rights of the Bay Area recently published a report on the effect of “the most low-level violations in both

186 Id.
188 Id.
192 Id. at 664.
193 Id. at 662.
the state and municipal [criminal] codes” on minority communities in California. The Committee looked at the over 250,000 infractions issued among 5,792,245 individuals stopped by the 15 largest law enforcement agencies in California in 2019. The Committee noticed a deep racial disparity in enforcement. The report found that black adults were 9.7 times more likely to be issued a citation than white adults in the same jurisdiction, and Latinex adults were 5.8 times more likely. The most common offenses, sleeping, sitting, or loitering in public, accounted for 37 percent of all the citations given.

Although policies as extreme and explicitly discriminatory as the one previously used by the NYPD have been deemed unconstitutional, police officers still have the authority to conduct stop and frisk searches and adopt broken-window strategies. These policies and tactics—like most other aspects of the misdemeanor system—disproportionately target minority and poor communities. “Order-maintenance” policing has become an increasingly common strategy since the 1990s. In her 2018 book, Yale Law School Professor Issa Kohler-Hausmann found that, not only are black New York City residents three to four times more likely to be arrested for misdemeanors than white residents in the first place, they are also 25 percent more likely to be re-arrested and/or ultimately convicted. Much of this, she argues, is due to police focusing attention and resources on poor and minority neighborhoods.

There is substantial evidence that the underlying behaviors of some of the largest arrest categories, such as marijuana and narcotics possession or even domestic violence, are relatively evenly distributed across racial and class groups. But these groups face vastly unequal risk of arrest because of the social realities of where and how drugs are sold and used, the residential spaces where violent street crime is concentrated, and because of the density and form of policing in different spaces.

Despite studies largely debunking the theory that neighborhood disorder generates violent crime, stereotypes continue to drive policies that criminalize low-income minority communities, because “economically disadvantaged neighborhoods of color are perceived as more crime-prone and disorderly.” Not only are blacks more likely to be stopped in the first place, but once

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197 Id.
198 Id.
199 Id.
200 Id. at p. 6.
203 Id. at p. 266.
204 Peterson et al. (2018).
stopped, blacks were 1.77 times more likely to be searched, and 1.61 times more likely to be arrested.\footnote{Baumgartner, F. R., Epp, D. (2012). Final Report to the North Carolina Advocates for Justice Task Force on Racial Bias and Ethnic Bias. \textit{Department of Political Science: University of North Carolina at Chapel Hill}, pp. 6 & 9.}

To combat the subjective racial biases that dictate who police decide to stop and frisk, predictive policing algorithms have been proposed and used as an objective alternative not influenced by bias like individual officers. Predictive policing uses existing police and risk data to predict where crimes are likely to occur, who will commit them, and who will be targeted.\footnote{Browning & Arrigo. (2020). p. 6.} “Under the guidance of these algorithms, police officers engage in proactive patrols or surveillance, targeting areas or persons highlighted by the data through increased police presence or monitoring.”\footnote{\textit{Id}.} Studies on predictive policing have had mixed results. Studies have found that, when compared to traditional crime forecasts, predictive algorithms are up to two times more effective, lead to statistically significant decreases in crime, and did not exacerbate preexisting racial disparities.\footnote{\textit{Id}.} Other reports have found that predictive policing only displaced criminal activity from traditional hotspots to new areas, resulting in no overall decrease in crime.\footnote{\textit{Id}.}

UNC Charlotte Professors Matthew Browning and Bruce Arrigo analyzed the claim that, because predictive algorithms do not involve individual officer decisions which may be colored by biases, predictive policing algorithms are more objective than discretionary stop-and-frisk-type policies.\footnote{\textit{Id}.} They found that predictive policing algorithms are not significantly more accurate than stop and frisk policies—only resulting in a .4 percent increase in arrest rates—as the algorithms are based on existing data in which minorities are unfairly overrepresented.\footnote{\textit{Id}. at p. 8.} Because they are dependent on existing police data, which incorporates existing police biases and racial disparities, the algorithms typically highlight areas police already consider high-crime and which are predominantly minority neighborhoods.\footnote{\textit{Id}. at p. 9.} The authors conclude that, despite the “façade of objectivity,” “predictive policing algorithms are more likely to target low-income minority neighborhoods over affluent neighborhoods even when the objective amount of crime is similar in both locations.”\footnote{\textit{Id}.} Minorities are overrepresented in police and crime data, so any attempt to use that data to justify over-policing minority and poor communities is inherently flawed.

\footnote{Browning & Arrigo. (2020). p. 6.}
\footnote{\textit{Id}.}
\footnote{\textit{Id}.}
\footnote{\textit{Id}.}
\footnote{\textit{Id}. at p. 8.}
\footnote{\textit{Id}. at p. 9.}
\footnote{\textit{Id}.}
b. Prosecutors

After law enforcement has arrested someone, prosecutors are arguably the “most powerful player in the American criminal system.”[214] “[P]rosecutors have the power to decide whether an arrest will become a criminal charge, what the formal charges will be, whether to seek bail, whether to offer diversion, what plea deal to offer, if any, and what sentence to recommend to the judge.”[215] Different offenses have different potential punishments, so deciding to charge someone for the most serious offense possible can subject defendants to the highest possible fines, the longest time in prison, and thus the brunt of the consequences. Conversely, prosecutors can choose to charge someone for lesser crimes, with lesser punishments, or decline to bring charges altogether. In practice, “[w]hites charged with misdemeanors are 45 percent more likely than blacks to receive reduced charges or to have their cases dismissed entirely.”[216]

As is the case with law enforcement officers being able to find a law that, at least plausibly, criminalizes whatever conduct is being committed, overcriminalization means that, if a prosecutor decides to charge someone, they will likely be able to find something that they can charge them with. But this has the process backwards. Prosecutors should be determining what conduct should be prosecuted before identifying who committed the act. Technically, “who” should not matter in identifying whether something they did was a crime. Again, the exercise of this discretion results in racial disparities. For example, in Charlotte, North Carolina, prosecutors have never declined to prosecute a black woman for drug charges and decline to prosecute whites for drug charges much more often than blacks overall.[217]

A 2018 study focusing on Miami-Dade County, Florida, found that broken-window policing strategies were partly due to prosecutors’ reliance on neighborhood stereotypes when deciding who to prosecute and what charges to bring.[218] Specifically, the study found that “prosecutors’ race- and class-based conceptions of prime and marginalized spaces influence how institutional resources, [such as law enforcement,] are devoted to these areas.”[219] For example, in 2010 in a high-crime neighborhood in New York, Malik was arrested for smoking a marijuana cigarette (he claimed it was not marijuana, but normal tobacco).[220] During plea negotiations, the prosecutor “explained that they evaluate the arrest allegations against the backdrop of the crime conditions in the neighborhoods where arrests happen.”[221] Effectively, the prosecutor said that Malik was more likely to be convicted because of where he lived—i.e., his socioeconomic status. The result is a circular, self-reinforcing scenario where prosecutors decide to prosecute cases

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[215] Id. at p. 67.
[216] Id. at p. 156.
[217] Id.
[219] Id.
[221] Id. at pp. 228.
because the defendant is from a perceived high-crime area, and police decide to patrol these areas more heavily because this is where the prosecutions are coming from. This in turn results in more arrests and prosecutions of individuals from these marginalized communities, restarting the cycle.

In making these stereotype-based decisions, prosecutors exercise what the authors call “discretionary differentiation,” whereby defendants are informally classified according to signals of risk or persistent unlawfulness rather than individually considered. The study found that prosecutors focus charges for nuisance offenses, “typically associated with a less severe penalty,” in consumer or economically “prime” neighborhoods. The authors suggest that this is to prevent disorder and crime from surrounding neighborhoods from spilling over into the “prime” areas. These prosecutions are largely made up of homeless- or alcohol-related offenses directed towards “undesirable” populations. On the other hand, prosecutors “monitor and criminalize the behavior of poor people and communities of color, reinforcing the socially constructed boundaries associated with specific urban spaces.” These prosecutions take on a punitive role and focus on crimes like low-level drug offenses in “marginalized spaces.” This, the authors suggest, is because prosecutors aim to suppress the perceived criminality of such neighborhoods, which is based on racial and economic stereotypes. In each instance, it is poor and minority individuals being prosecuted, whether it is for being in a neighborhood where they are deemed “undesirable,” or because they are in poorer neighborhoods that are perceived as crime ridden. Effectively, poor and minority individuals are forced into a lose-lose situation.

Prosecutorial discretion also extends beyond who to prosecute. A Wisconsin study found that defendants of color are less likely to have their charges dismissed—supporting the findings of the Miami-Dade study—but also that “defendants of color are 12% less likely to receive a plea to a lesser charge and 19% less likely to receive a non-custodial sentence following a guilty plea.” Thus, minority individuals are more likely to be charged and prosecuted than similarly situated white individuals, and they are also more likely to receive harsher punishments in plea agreements.

Prosecutors have broad authority in determining whether to offer a plea deal, and if offered, what the terms of that deal are. Many factors pressure defendants into pleading guilty, whether it be pretrial incarceration due to an inability to pay bail, a lack of resources, ignorance of how the system operates, fear, etc. “Each of these standard features of the misdemeanor process enhances the prosecutor’s ability to get defendants to take a deal rather than content their

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222 Peterson et al. (2018).
223 Id.
224 Id.
225 Id.
226 Id.
227 Id.
Most defendants are convicted via a guilty plea. Trials are rare, and only 1–2 percent of cases are actually determined by a jury. Defendants with no prior criminal history are actually disproportionately affected by detention as they are more likely to receive plea offers that consist of low sanctions, thus increasing their incentives to accept the plea even when innocent. This places prosecutors in a significant place of power at one of the most important times for a criminal defendant.

A 2020 study looked at Maryland sentencing data to analyze the racial disparities regarding plea deals. In that study, two thirds of all defendants were black, and 94 percent of defendants who were convicted plead guilty. Perhaps counterintuitively, whites were significantly more likely to plead guilty than blacks—although most defendants in both groups did ultimately plead guilty. Despite that “the odds of imprisonment and the average length of imprisonment are both significantly lower for defendants convicted by guilty plea instead of trial,” “[n]inety-six percent of White defendants entered a plea of guilty compared with 93% of Blacks and 91% of Latinos.”

The authors identify two possible reasons for this outcome. First is that blacks “have lower levels of trust in various agents of the criminal justice system, including prosecutors and judges.” Black communities are overpoliced and have numerous negative experiences with the criminal justice system, making them less likely to trust that agents of the system will treat them fairly during plea negotiations.

The second related reason relates to the quality of the plea individuals are offered. A key factor determining whether a defendant accepted a plea deal is the quality of the offer. In Maryland, there are three types of plea agreements: (1) ABA plea offers, which are negotiated by the parties and are binding on the courts; (2) non-ABA plea offers, which are also negotiated between the prosecution and defense, but are not binding on the court so a judge can reject the terms; and (3) non-negotiated plea agreements are entered into by the defendant with no agreed upon terms by the prosecution or court, and the defendant relies on leniency from both the judge and prosecutor.

Black defendants were much less likely to enter into non-negotiated plea agreements, which would place their fate more firmly in the hands of judges and prosecutors, whom they distrust. Whites were more likely to enter into both non-ABA pleas and non-negotiated pleas, where judges and prosecutors, respectively, have discretion to deviate from the terms of the agreement. More than half of white defendants settled their cases through non-negotiated plea agreements.

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230 Id.
231 Id.
234 Id. at pp. 512, 520.
235 Id. at p. 506.
236 Id.
237 Id. at pp. 509–10.
agreements, compared to only 33 percent of black defendants.\textsuperscript{238} Conversely, 40 percent of blacks entered into ABA pela agreements, which are binding so neither the judge nor the prosecutor can deviate from the terms.\textsuperscript{239}

Not only are black defendants less likely to take advantage of the potential benefits of pela agreements—as a result of repeated discriminatory treatment and negative interactions with the criminal justice system—but they also receive worse terms compared to white defendants. In New York, “Black defendants are 19% more likely than similarly situated White defendants to be offered plea deals that include jail or prison time,” are “less likely to receive reduced charge offers in misdemeanor marijuana cases,” “receive less value than White defendants in terms of their charge reductions,” and defense attorneys are more likely to recommend sentences that include jail time to black defendants.\textsuperscript{240}

The incentives the system creates to plead guilty are successful, and over 90 percent of misdemeanor convictions are via plea deals. And plea deals do have the potential benefit of imposing lesser sentences than defendants who go to trial receive. But the system sows distrust among minority and poor communities, and so members of these communities are less likely to take advantage of these potential benefits. And even when they do—which, again, is still most of the time—they receive much less value and benefits from pleading guilty, as compared to similarly situated white defendants.

Policies guiding the exercise of prosecutorial discretion vary depending on who and where the prosecutor is, and there are some potential benefits to this broad discretion. The State’s Attorney in Baltimore recently said that the city will no longer prosecute low-level non-violent offenses, such as “drug and drug paraphernalia possession, prostitution, trespassing, minor traffic offenses, open container violations, and urinating and defecating in public.”\textsuperscript{241} The City had enacted the policies during the COVID pandemic to decrease incarceration rates and stem the spread of the virus, and after a year of being in effect, the policies had their intended outcome. “The policies enacted over the past year have resulted in a decrease in arrests, no adverse impact on the crime rate, and address the systemic inequity of mass incarceration.”\textsuperscript{242} “[T]he overall incarcerated population in Baltimore City is down 18% during COVID and the data reveals there has been a 39% decrease in people entering the criminal justice system compared to this time last year.”\textsuperscript{243} Specifically, violent crime is down 20 percent, and property crime is down 36 percent.\textsuperscript{244} Under the new policies, “[i]nstead of prosecuting people arrested for minor crimes like prostitution and public urination, the program dealt with those crimes as

\textsuperscript{238} Id. at pp. 512–14.
\textsuperscript{239} Id. at p. 512.
\textsuperscript{240} Id. at p. 507.
\textsuperscript{243} Id.
\textsuperscript{244} Id.
public health issues and work with community partners to help find solutions.”

But these types of policies are not without criticism. A Maryland state senator responded that, while he respects prosecutorial discretion, the State’s Attorney’s policies go beyond the mere exercise of such discretion: “That’s not prosecutorial discretion, that’s an exercise in legislating. That’s what the legislature is supposed to do.”

The varying nature of prosecutorial policies are easily seen on the federal side. According to the federal Department of Justice, “it is a core principle that prosecutors should charge and pursue the most serious, readily provable offenses.”

Under the Obama administration, this policy was qualified: “the charges should reflect an individualized assessment and fairly represent the defendant’s criminal conduct.” The Obama-era guidelines note that “[l]ong sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.” Specifically, federal prosecutors were told they should not charge drug quantities that trigger mandatory minimum sentences when (1) the conduct is non-violent, (2) the defendant is not an organizer or leader, (3) the defendant does not have ties to large-scale drug trafficking organizations, and (4) the defendant does not have a significant criminal history.

Under the Trump administration, this qualification was repealed. Prosecutors were directed to resume charging the most serious offense possible, and the new guidelines required that “any decision to vary from the policy must be approved by a United States Attorney or Assistant Attorney General, or a supervisor designated by the United States Attorney or Assistant Attorney General, and the reasons must be documented in the file,” limiting the ability of individual prosecutors to deviate from this policy.

Under the Biden administration, the previous Obama-era policies were reinstated. The recent January 2021 guidelines state that they are intended “to safeguard to public, maximize the impact of our federal resources, avoid unwarranted disparities, promote fair outcomes in sentencing, and seek justice in every case.”

c. Public Defenders

In misdemeanor cases where the defendant cannot afford to hire their own private counsel, defendants are forced to rely on public defenders. The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to an attorney, and this applies both at trial and at the plea agreement stage. But this right only applies for offenses where the defendant

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246 Id.
249 Id.
250 Id.
could be sentenced to jail time, and so many misdemeanor defendants, who still face the potentially severe consequences of a fine and a criminal record, are not afforded this right. And while many public defenders are capable, devoted attorneys—and this is particularly true at the federal level—“more often the right to counsel fizzes out in misdemeanor court.”

Public defenders also exercise discretion, but this discretion is different from the other actors discussed. Although public defenders can similarly suffer from bias and prejudice, they have a larger problem: money and the sheer volume of cases. Overcriminalization and overenforcement swamp public defenders with too many cases to adequately defend each defendant in each case. “Public defense is notoriously underfunded,” which creates “the widespread reality that many public defenders spend little or no time talking to their misdemeanor clients, investigating cases, or litigating legal issues. Instead, they meet their clients briefly in the courthouse or jail, explain the government’s plea offer, and get their clients to accept it that day, sometimes that very hour.” This is what is commonly referred to as “meet ‘em and plead ‘em” lawyering.

This is compounded by the fact that misdemeanor court is traditionally a place for new, inexperienced attorneys to get experience, as the conduct and consequences are considered minor. A 2009 report from the National Association of Criminal Defense Lawyers noted this problem:

Many public defenders start in misdemeanor courts after being hired right out of law school. They are handed a stack of case files and told their courtroom assignment. No supervisor accompanies them and there is no training before they begin. On their first day, they will talk to clients, negotiate plea deals, appear before a judge and, frequently, advise clients to plead guilty.

The system thus targets minority, low-income individuals for enforcement and prosecution on the front end, and then—if they are even entitled to assistance of counsel in the first place—woefully underfunds their primary line of defense on the back end. Consequently, public defenders are ill equipped to mitigate the effects of discriminatory enforcement, and their ability to successfully defend the defendant at trial or negotiate a favorable plea agreement and/or sentence is inhibited.

d. Judges and courts

Finally, judges determine the sentence that those convicted of, or plead guilty to, misdemeanors ultimately receive. Sentences can consist of any of the direct consequences discussed above, such as incarceration, probation, and fines/fees. Incarceration is the least likely

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254 Id. at 72.
255 Id. at 74.
256 Id. at 75.
257 Id. at 74–75.
258 Id. at 74.
of these three potential punishments that can be imposed for misdemeanor offenses, but it is also the harshest. Disparities in the length of sentences is also problematic. But, since misdemeanors typically involve a maximum of one-year in jail, disparities in sentence lengths are more problematic in the felony context. For misdemeanors, the more problematic disparities are in what punishments a defendant is sentenced to—i.e., jail, probation, or a fine. A study on misdemeanor sentencing in Nebraska found that “[w]hile the majority of defendants received just a fine, racial/ethnic minority individual were three times more likely to receive a fine and/or some other disposition, suggesting that racial/ethnic minority misdemeanants may be at more risk for harsher misdemeanor sentencing.”

In North Carolina, among all criminal defendants—both felonies and misdemeanors—black adults are 5.9 times more likely to be incarcerated that white adults.

Like public defenders, courts also suffer from a lack of funding and overcriminalization. Due to the high volume of misdemeanor cases, some attorneys have analogized misdemeanor courts to assembly lines. Another referred to the Manhattan criminal court as a “cattle auction.” And a Florida Supreme Court justice referred to misdemeanor courts as “mindless conviction mills.” These may be extreme characterizations, but “low-level courts are especially fast and informal and have been so for a long time.”

Not only are racial disparities particularly concerning in the sentencing context, but long incarcerations, or any incarceration, are costly, and adds further incentives for courts to impose fees to help pay for incarcerating individuals. Mass incarceration costs money, and this is largely ignored during sentencing. However, “[i]n 2010 Missouri took a novel approach to the problem; it began providing judges with cost and effectiveness estimates for prospective sentences.” For example, in a second-degree robbery case (a felony offense),

A Missouri judge has the following information when deciding on a sentence: the estimated cost of a five-year prison sentence ($54,724), the associated rate of recidivism (39.6%), the estimated cost of a five-year term of probation ($6,770), and associated rate of recidivism (29.7%). Absent specific offender or offense characteristics indicating a need for incarceration, it is easy to see why a judge may determine probation is the better sentence based on this data.

Incarcerating someone also does not actually decrease the chances that they become recidivists. In the Missouri example above, those sentenced to probation were less likely to be

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263 Id.
264 Id.
265 Id.
267 Id. at p. 1538.
recidivists than those sentenced to actual prison time. Incarcerating someone for a low-level offense is both inefficient and ineffective.

Traditional misdemeanor courts are also not the only option to adjudicate misdemeanors, and many states and localities have begun implementing “problem-solving courts” for some specific types of cases. These problem-solving courts “are specialized dockets within the criminal justice system that seek to address the underlying problem(s) contributing to certain criminal offenses. Generally, a problem-solving court involves a close collaboration between a judge(s) and a community service team to develop a case plan and closely monitor a defendant’s compliance, imposing proper sanctions when necessary.”268 These courts “serve populations with special needs such as drug addicts, people with mental health issues, veterans, or prostitutes,” and in addition to adjudicating guilt, these courts “provide social services, health care, jobs, training, and therapy.”269

“There are a multitude of other various problem-solving courts located in every state and territory,” including North Carolina.270 North Carolina has “Recovery Courts” located throughout the state, which “are designed to assist chemically dependent offenders with their court ordered treatment plans.”271 Similarly, Mental Health Courts in North Carolina “allow[] the state mental health system to provide repeat adult offenders who need mental health services with treatment and other mental health services aimed at improving their ability to function in the community, thereby reducing recidivism and easing the workload of the court.”272

V. The North Carolina Task Force for Racial Equity in Criminal Justice (TREC)

In recognition of the problem of overcriminalization and its impact on minority communities, North Carolina Governor Roy Cooper established the North Carolina Task Force for Racial Equity in Criminal Justice (Task Force).

Governor Cooper asked the Task Force to identify intentional and unintentional racial biases in the criminal justice and law enforcement systems and to highlight the unequal outcomes that result from these biases. In addition to identifying these issues, the Task Force was charged with recommending evidence-based solutions to help eliminate racial bias and create fairer outcomes for Black people and communities of color, while maintaining public safety.273

On December 14, 2020, the Task Force submitted its report to Governor Cooper, complete with 125 individual recommendations and solutions to address issues of race in the criminal justice system.274 The recommendations have two overarching goals; to promote racial equity in regard


p. 2.
274 Id.
to law enforcement, and to promote racial equity in regard to courts. In pursuit of these goals, the Task Force identified broad, big-picture recommendations—such as “[r]educe current sentencing and incarceration disparities,” “[s]hrink the criminal code,” and “[r]educe collateral consequences of criminal convictions”—in addition to more specific solutions for each recommendation—such as decriminalizing possession of less than 1.5 ounces of marijuana and requiring implicit bias and racial equity training.275 These recommendations and solutions are insightful and cover a broad range of issues—such as reforming the role of School Resource Officers and reforming the felony system—but some of the most relevant to misdemeanor overcriminalization are:

71. “Deprioritize marijuana-related arrests and prosecutions;
72. Decriminalize the possession of up to 1.5 ounces of marijuana;
74. Reclassify Class III misdemeanors that do no impact public safety or emergency management as noncriminal/civil infractions;
75. Enact legislation with a sunset provision for all local ordinance crimes that criminalize poverty or behavior in public places;
77. Review and recommend changes to the criminal code;
78. Eliminate cash bail for Class I, II, and III misdemeanors unless risk to public safety;
84. Require racial equity training for court personnel, including judges, DAs, and public defenders;
87. Educate prosecutors, their staff, and officers of justice on unconscious bias in the criminal justice process and prosecutorial decision-making;
89. Study and adopt evidence-based reforms for reducing and eventually eliminating racial disparities in charging decision and prosecutorial outcomes;
97. Establish a Second Look Act to reduce disparate sentences through review and action of those currently incarcerated;
101. Assess a defendant’s ability to pay prior to levying any fines and fees;
102. Reduce court fines and fees;
115. Analyze and report on racial disparities in sentencing laws and recommend possible changes;
124. Identify the places along the criminal justice system where data collection directly impacts the implementation, evaluation, and monitoring of the Task Force’s recommendation and broader questions of racial equity within the criminal justice system; [and ultimately,] 
125. Establish the Commission for Racial Equity in the Criminal Justice System as a permanent independent commission.”276

275 Id. at 16–29.
276 Id. at 16–29.
VI. What Next?

There is a “wide consensus” among scholars that the drastic expansion of criminal laws is problematic, and there are a few recommended solutions that appear often in the literature, but any solution, by itself, will be largely insufficient.\textsuperscript{277} That the Task Force identified 125 individual recommendations emphasizes that no single solution will solve the problem. And “[c]entral to [the Task Force’s] vision is the need for further data collection, continued monitoring, and additional recommendations that might flow from further study of racial disparities.”\textsuperscript{278} The 125 recommendations are just a starting point, with the hope that new data could further identify other areas for reform.

One potential reform measure that appears most in the literature—and appears in the Task Force’s recommendations—is decriminalizing conduct. An intuitive response to the problem of there being too many crimes is to get rid of many of them. But the sheer number of criminal offenses can make this difficult. For example, “[i]t is impossible to say, today, how many things were made criminal in North Carolina.”\textsuperscript{279} To address the issue, the North Carolina General Assembly passed Senate Law 198, tasked with “keeping the laws as clear and concise as possible by means of continuous statutory research and correction,” which includes reviewing and compiling data necessary to empirically look at the problem of overcriminalization, and to make recommendations based on that data.\textsuperscript{280}

Senate Law 198 required that the General Statutes Commission (GSC) study reports submitted by individual municipalities detailing the criminal ordinances in their jurisdiction and make recommendations to the 2021 General Assembly on “whether any conduct currently criminalized either (i) by an ordinance of a county, city, town, or metropolitan sewerage district or (ii) in the North Carolina Administrative Code by an agency, board, or commission, should have criminal penalties provided by a generally applicable State law.”\textsuperscript{281} Task Force recommendation 74—reclassifying Class III misdemeanor offenses that pose no threat to public safety as civil infractions—is along the lines of this reform measure.

However, the reports submitted by individual localities regarding their specific criminal local ordinances have been unclear, inconsistent, and incomplete.\textsuperscript{282} And in February 2021, the GSC recommended that a separate commission be established, specifically tasked with recodifying the criminal code, “consisting of persons with expertise in criminal law, [who] would be better suited than is the General Statutes Commission to study and make

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{277} Copeland, J. R., & Gorodetski, I. (2014). Overcriminalizing the Old North State: A Primer and Possible Reforms for North Carolina. \textit{Manhattan Institute for Policy Research}.
\item \textsuperscript{279} Smith, J. (2018). Overcriminalization: A North Carolina Issue, Presentation to John Locke Foundation, John Locke Foundation.
\item \textsuperscript{281} \textit{Id}.
\end{itemize}
\end{footnotesize}
recommendations regarding the State’s criminal laws.”\textsuperscript{283} The Task Force aims to resolve this problem of insufficient data as well; i.e., recommendation 124—aimed at improving data collection.

Other states have utilized different methods of decriminalizing conduct. For example, Minnesota in 2014 held a special legislative session, which they called an “unsession”, to identify and repeal unnecessary laws. As a result, the state repealed 1,175 “obsolete, silly laws,” at the state-level.\textsuperscript{284}

Another commonly discussed reform measure is abolishing the use of monetary tools in the misdemeanor system, including both bail and fines/fees. Abolishing bail is briefly discussed above and could have the benefit of not subjecting poor individuals to jail time just because they are poor, and will stop poor individuals having to pay more for bail—via a nonrefundable fee to a bail bondsman—than similarly situated wealthier defendants. Similar to this measure, Task Force recommendation 78 recommends eliminating bail for Class I, II, and III offenses. As discussed at length, fines and fees are regressive, are growing at an increasing rate, and are the most common punishment for misdemeanors, despite the fact that low-income and minority defendants frequently cannot afford to pay through no fault of their own. Task Force recommendations 101—requiring courts to assess a defendant’s ability to pay a fine before imposing one—and 102—reducing the cost of fines and fees—are directed at this potential reform measure.

Finally, eliminating incarceration as a potential punishment for low-level conduct is another potential reform measure. Although incarceration is the least common punishment for misdemeanor offenses, there are significant consequences with even brief stints in jail. But for many low-level offenses, and especially offenses that are statutorily only punishable with a fine, jail is not necessary, and only makes things worse for the defendant who is locked up and for the state who pays for it.

These reforms are necessary to addressing this issue, but they are ultimately insufficient. Solutions in the area of criminal justice must necessarily be multifaceted. Many factors combine to create the racial and class disparities that exist in all parts of the criminal justice system, and so solutions must address these may factors—such as structural and economic inequality, implicit and explicit bias, history of slavery, racism, etc. The misdemeanor system, combined with the state of race relations in the U.S., imposes these relatively severe consequences for the lowest level of criminal offenses, and disproportionately targets and affects poor and minority individuals and communities.

Michael Pinard, a law professor at the University of Maryland, wrote an article about the problem of overcriminalization and race, and how reforms targeted at various aspects of the criminal justice system are not enough.\textsuperscript{285}

By focusing squarely on the criminal legal system, these reforms do not reach the root of the problem. The reforms do not get why Black men, women, and children continue to be overrepresented in the criminal legal system. As a result, these reforms are incomplete. They do not address or even confront the ugly truth that being Black, in and of itself, has been and continues to be criminalized.  

Professor Pinard’s article attempts to explain many of the phenomena we have discussed throughout this paper. Why black men without a criminal record—using the exact same resume and appearing the same in every other regard—were less likely to get a job offer than white men with a criminal record. Why black individuals are more likely to have their probation revoked than white individuals with the exact same criminal history and risk classification. And why black individuals are more likely to be stopped searched and arrested in the first place. “Nearly half of Black male babies will be arrested by the time they reach twenty-three years of age.”

The real problem is what Pinard calls “racialized criminalization.” “Blacks are perceived, interpreted, responded to, devalued, stigmatized, and dehumanized from the moment they are born.” This discrimination starts at a young age. Black children are seen differently than other children. Pinard cites studies that found that, beginning at age 10, black male children “are perceived by police officers and others as older than they are and more criminally culpable for their behavior, as compared to White males and Latino males.”

Current reform efforts, Pinard notes, have been focused on

Transforming policing; disconnecting law enforcement from public schools; decriminalizing certain activities; legalizing certain activities; electing reform-minded prosecutors; diverting matters away from the criminal legal system; eliminating cash bail; diversifying juries; funding public defender officers adequately; reversing mass incarceration; abolishing jails, prisons, probation, and parole; easing the devastating effects of criminal records, including: expanding expungement and sealing laws, forbidding employers from automatically denying applicants based on their criminal records, and restoring voting rights to individuals immediately upon release from prison—with a now growing chorus of advocates voicing the need to extend the franchise to the incarcerated population;
and reducing prison sentences for individuals incarcerated for nonviolent offenses.294

These types of reforms attempt to treat the symptoms—and are necessary to help stop the bleeding—but are largely inadequate to cure the larger systemic disease.

The current system is focused on redemption. “[R]edemption, in this context, is the process individuals undergo as they strive to move past their interactions with the criminal legal system.”295 Many people spend years or their whole life striving for redemption. But the system is inherently unfair in requiring black individuals, who are criminalized based on their race, to prove their worthiness and redeem themselves.296 Instead, any solution needs to involve reclamation. “[T]he goal is for individuals to reclaim who they were, unburdened by the criminal record, through whatever means that are appropriate and fair to the given circumstances.”297 But Pinard notes that even reclamation may not fix the root problem of race criminalization. “The ultimate aim of criminal legal system reform cannot be to lessen racial disparities; the endpoint must be to eliminate these disparities altogether.”298

294 id. at pp. 128–30.
295 id. at p. 132.
296 id. at p. 133.
297 id. at p. 135.
298 id.
Works Cited


## APPENDIX A

### TOP FIVE MISDEMEANOR CONVICTIONS BY OFFENSE CLASS

<table>
<thead>
<tr>
<th>Class A1 Misdemeanors</th>
<th>Total Convictions = 8,987</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault on a Female</td>
<td>#</td>
</tr>
<tr>
<td>Domestic Violence Protective Order Violation</td>
<td>4,025</td>
</tr>
<tr>
<td>Assault on a Government Official or Employee</td>
<td>1,227</td>
</tr>
<tr>
<td>Assault with a Deadly Weapon</td>
<td>1,068</td>
</tr>
<tr>
<td>Child Abuse</td>
<td>711</td>
</tr>
<tr>
<td></td>
<td>500</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Class 1 Misdemeanors</th>
<th>Total Convictions = 43,265</th>
</tr>
</thead>
<tbody>
<tr>
<td>Larceny of Property (worth $1,000 or less)</td>
<td>#</td>
</tr>
<tr>
<td>Possess Drug Paraphernalia</td>
<td>12,625</td>
</tr>
<tr>
<td>Driving while Licensed Revoked for Impaired Driving</td>
<td>7,330</td>
</tr>
<tr>
<td>Possess Marijuana (more than 1/2 ounce up to 1 1/2 ounce)</td>
<td>5,134</td>
</tr>
<tr>
<td>Breaking or Entering Buildings</td>
<td>1,513</td>
</tr>
<tr>
<td></td>
<td>1,484</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Class 2 Misdemeanors</th>
<th>Total Convictions = 12,414</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resisting Public Officer</td>
<td>#</td>
</tr>
<tr>
<td>Simple Assault</td>
<td>4,828</td>
</tr>
<tr>
<td>Carrying a Concealed Gun</td>
<td>2,176</td>
</tr>
<tr>
<td>Disorderly Conduct</td>
<td>754</td>
</tr>
<tr>
<td>Injury to Personal Property</td>
<td>637</td>
</tr>
<tr>
<td></td>
<td>411</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Class 3 Misdemeanors</th>
<th>Total Convictions = 21,509</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possess Marijuana (1/2 ounce or less)</td>
<td>#</td>
</tr>
<tr>
<td>Second-Degree Trespass</td>
<td>7,144</td>
</tr>
<tr>
<td>Possess Marijuana Paraphernalia</td>
<td>3,952</td>
</tr>
<tr>
<td>Simple Possession of Schedule VI Controlled Substance</td>
<td>2,952</td>
</tr>
<tr>
<td>Shoplifting/Concealment of Goods</td>
<td>2,757</td>
</tr>
<tr>
<td></td>
<td>1,753</td>
</tr>
</tbody>
</table>

Note: This table includes only the convictions for which an AOC offense-specific offense code was used to record the convicted offense.
Convictions that did not fit within the appropriate cell in the Felony or Misdemeanor Punishment Charts due to discrepant offense classes, prior record/convictions levels, or for other reasons were excluded from this table.