

# **Disproportionate Criminal Justice Contact: A System Working as Designed?**

Marty A. Davidson, II  
[martydav@umich.edu](mailto:martydav@umich.edu)

Kaneesha R. Johnson  
[krjohnson@g.harvard.edu](mailto:krjohnson@g.harvard.edu)

Frank R. Baumgartner  
[frankb@unc.edu](mailto:frankb@unc.edu)

## **Abstract**

Disproportionate contact with the criminal justice system has been widely noted. African-Americans and other marginalized groups have substantially higher rates of contact for many types of arrest. We document and measure these rates of contact for hundreds of demographic groups in North Carolina, defining the groups by age, race, gender, and estimated income levels. We also go the next step to ask if these differences in contact are merely coincidental, or if laws may have been written with the specific intent of creating these patterns. We focus on a set of laws passed in the 1960s relating to “riots” and protests. These were indeed designed to allow arrest of black protesters and they are still used today differentially on those who engage in “protesting while black.”

Keywords: Criminal Justice, Intersectionality, Disparate Impact, Discriminatory Intent

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## **Introduction**

It will surprise no reader of this journal to know that young black men have greater contact with the criminal justice system than middle-aged white women. But why does this happen? What particular laws are different types of individuals accused of breaking? When were those laws written? Were they designed to ensnare certain people, or does it just so happen that different groups of people are more likely to break certain parts of the criminal code more often than others? Does differential policing have much to do with it? Here, we assess these questions using a large database consisting of every arrest, from traffic tickets to homicide, from the administrative records of the court system in one state, North Carolina, with over 13 million charges from 2013 through 2019.

We first define “contact” as an arrest, and we analyze contact separately for traffic infractions, misdemeanors, and felonies. Because we take seriously Kimberlé Crenshaw’s (1989, 1991) admonitions to consider various intersectionality identities in combination, we count the numbers of arrests separately for population groups defined by sex, age-group, race, and neighborhood socioeconomic status. We are able to compare these to census data for the same demographic groups in order to calculate rates of contact per 100 members of the population. We use average housing values in each neighborhood in order to estimate income, giving us hundreds of different identity groups, each of which has different levels of social advantage or disadvantage, and different rates of contact with the criminal justice system, and with regards to different parts of the criminal code.

We provide two bits of evidence that differential contact is a result of a system working exactly as designed, rather than an aberration in an otherwise neutral legal system. First, we take advantage of the fact that police departments operate at the local (municipal) level, and there are over 400 such departments in the state. These departments differ substantially by their size per

capita; some municipalities have more police and some fewer, controlling for population size. When there are more police, one might expect more arrests. We find that this is indeed the case, but only for members of disadvantaged minorities; there is no such correlation for white- and Asian-Americans.

Finally, we dig more deeply into one part of the criminal code, laws passed in the 1960s to restrict “rioting” and street protesting. This provides at least one prominent example to show how laws designed to respond to a surge of (black) civil-rights actions by rendering such acts illegal are still used today to restrict black, but rarely white, street protests. The crime of “protesting while black” is written into the legal code and enforced accordingly across the state.

### **An Intersectional Definition of Social Identities and its Connection to Criminal Justice Contact**

We begin by describing two different measures of intersectional identity: Disadvantage score and contact score. We use these measures throughout our research agenda to better understand how a defendant’s identity characteristics correlate with various legal system outcomes.

***Disadvantage Score:*** We construct a continuous scale using age, gender, race, and an estimate of economic status based on the average value of real estate in the neighborhood where the individual lives. Because all of these bits of information are also available through the US Census, we can use the Census as a baseline to calculate rates of contact per 100 individuals of a given demographic and economic profile. To our knowledge, this has not been previously estimated for an entire US state. This scale allows us to compare, for example, a young black man living in a poor neighborhood with any other individual in the state, based on those four identify factors of age, race, gender, and income. For the purposes of this paper, we simplify our scale and calculate it as follows:

- Race: One point for those who are black, Hispanic, or Native American; zero for white and Asian-Americans.
- Sex: One point for males; zero for females.
- Age: + 1 if 18 to 34; + 0.75 if 35 to 44; + 0.5 if 45 to 54; + 0.25 if 55 to 64; and zero otherwise.
- Economic: +1 if in the lowest 20 percent of neighborhood housing value; +0.75 for the next 20 percent; +.50 for the third group; +0.25 for the fourth group; and zero for those in the highest 20 percent of neighborhood housing value.<sup>1</sup>

The resulting index of disadvantage would have a score of zero for any individual who was most advantaged on each of the four indicators laid out above: White or Asian; female; aged 65 or older; and living in a neighborhood in the top 20 percent of income. By contrast, someone at the opposite end of the distribution (e.g., a young black / Hispanic / Native American male living in a poor neighborhood) would have a high score on the index. The index is normalized to vary between zero and one with one indicating the maximum degree of disadvantage.

**Contact Score:** For each group defined in the previous section, we construct a “contact score” estimating the odds of contact with the criminal justice system. For every 100 individuals with that demographic profile, how many are arrested? We distinguish here among speeding, traffic, vehicle, property, drug, violent, and sexual offenses, but our database allows us to do so for any type of crime (e.g., traffic offenses, wildlife violations, drug offenses, or violent felonies). Note that these contact scores are not statistical estimates; they are observed values. For any demographic group, we can count how many such people live in the state of North Carolina and the number who are arrested for various crimes. Thus, for any crime, we can see the

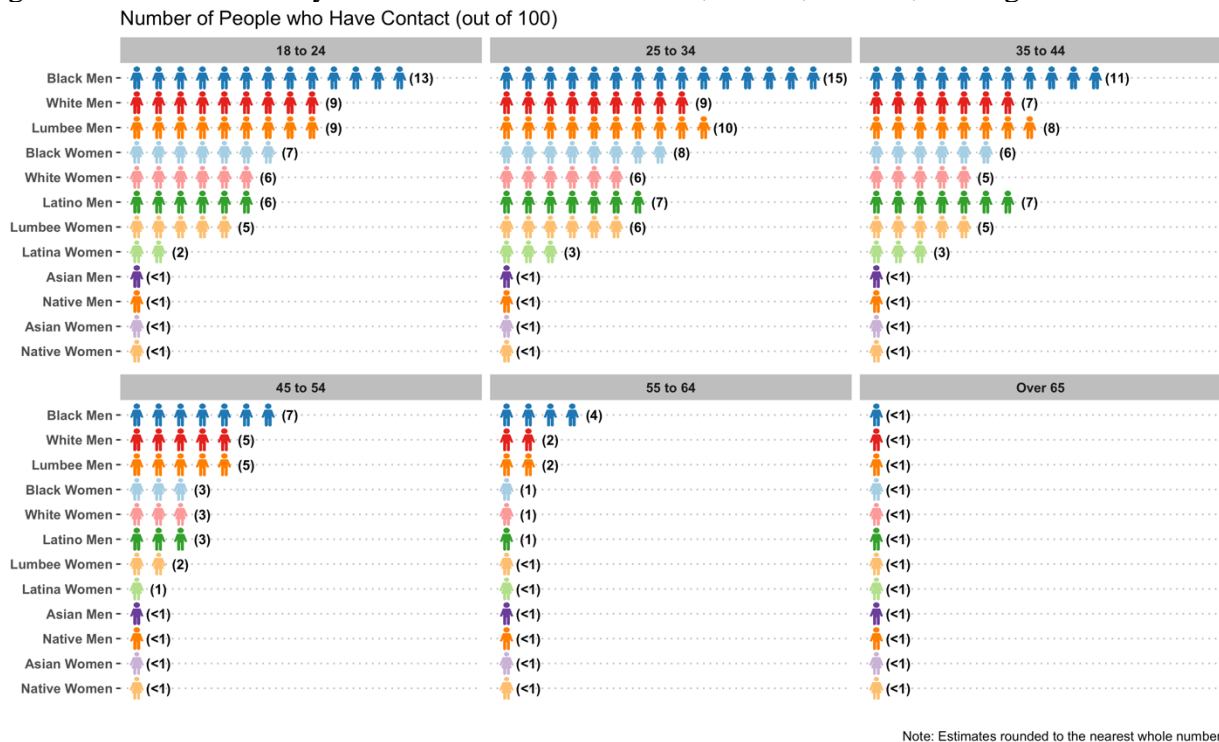
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<sup>1</sup> Note that we exclude individuals residing outside of North Carolina when we make use of the neighborhood housing values.

demographic profile of what groups of individuals have the greatest or the lowest odds of such an arrest.

**Overall Rates of Contact:** Our four-fold definition of social identity proves to be helpful in understanding contact. Men have more contact than women, disadvantaged minorities moreso than white- and Asian-Americans, the young more than the old, and the poor more than the rich. But the combination of all these factors at the same time shows their relative importance. Figure 1 illustrates the overall rated of contact by race, gender, and age. It shows, for example, that people over the age of 65 have very little contact with the criminal justice system no matter what their race or gender. This may not surprise, but it shows the importance of a more complete definition of social identity.

Figure 1. Estimated Yearly Contact Rates Across Racial, Ethnic, Gender, and Age Cohorts<sup>2</sup>



<sup>2</sup> Note: we distinguish between Lumbee and Native-Americans here because of the distinct disadvantage of members of the Lumbee Tribe in the eastern North Carolina counties of Hoke, Robeson, and Scotland.

These rates of contact of course differ substantially across types of crimes, which Table 1 summarizes. It shows the number of individuals in each of 10 categories of our social disadvantage scale as well as the breakdown of defendants in various arrest categories (overall, and separately for speeding, traffic, vehicle, property, drug, violent, sexual). The Table shows the percentage of people arrested in each category of offense by their social disadvantage score. Recall that the highest values on the score represent those with the greatest disadvantage. Looking at that group shows that they represent just less than five percent of those cited for speeding, but over 13 percent of those arrested for drug crimes, 12 percent of those arrested for violent crimes, and so on. The “overall” column shows the overall rate of contact across all arrest categories, similar to what is presented in Figure 1.

Table 1. Percent of those Arrested by Social Disadvantage Score.

Values	Speeding	Traffic	Vehicle	Property	Drug	Violent	Sexual	Overall	N
(0.938,1]	4.98	7.25	7.29	10.05	13.28	12.45	13.78	7.88	464,021
(0.875,0.938]	4.74	6.68	7.29	7.03	9.34	8.97	11.67	6.97	410,288
(0.75,0.875]	9.22	11.60	12.12	11.03	13.28	13.01	17.16	11.56	680,748
(0.688,0.75]	10.00	11.38	11.64	13.65	12.09	13.55	12.42	11.74	691,615
(0.625,0.688]	9.57	10.44	11.09	11.35	10.46	10.72	11.56	10.73	632,302
(0.562,0.625]	10.11	10.21	10.57	10.14	9.71	9.76	10.02	10.29	605,818
(0.5,0.562]	10.21	9.34	9.17	7.93	7.90	7.73	8.82	9.01	530,443
(0.438,0.5]	11.32	9.73	9.13	8.84	8.40	8.03	7.43	9.51	560,424
(0.312,0.438]	14.44	12.23	11.91	11.71	9.82	9.40	5.41	12.11	713,925
[0,0.312]	15.41	11.14	9.79	8.27	5.72	6.38	1.73	10.2	600,671
Col. %	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	
Row %	23.24	47.13	39.27	11.62	8.73	7.28	0.06		100.00
N	1,368,925	2,775,879	2,313,086	684,344	514,108	428,521	3,753		5,890,255
Hi-Lo Ratio	0.32	0.65	0.74	1.22	2.32	1.95	7.97	0.77	

At the bottom of Table 1 we also show the total number of individuals arrested under different parts of the code, and show the ratio of the percent of those at the highest level of the social disadvantage score to the percent at the lowest level who are arrested under each part of the code. Almost half of all arrests related to the traffic code whereas property crimes are less

than 12 percent of all persons arrested, drugs represent just less than nine percent of the total, violent crimes are seven percent, and sexual crimes are statistically very rare: less than 0.1 percent.<sup>3</sup>

Comparing the rows at the top and the bottom of the table shows the difference in the types of crimes that are statistically more common among the socially advantaged compared to the socially disadvantaged. The socially advantaged, at the bottom of the Table, represent a relatively high share of those cited for speeding, traffic, vehicle, and property offenses, whereas the socially disadvantaged constitute higher relative shares of those arrested for drugs, crimes of violence, and sexual crimes. Indeed, the ratios at the bottom of the Table show this very precisely: For speeding, the ratio of 0.32 means that those with high social disadvantage are only one-third as likely to appear in the list of those arrested for speeding compared to those the highest social advantage. However, the socially disadvantaged are 1.2 times as likely to appear among those with property crimes, 2.32 times as likely to be arrested for drug-related crimes, twice as likely to be arrested for crimes of violence, and eight times as likely to be arrested for sexual crimes compared to those with the lowest scores on the social disadvantage scale.

## **Policing Intensity and Criminal Justice Contact**

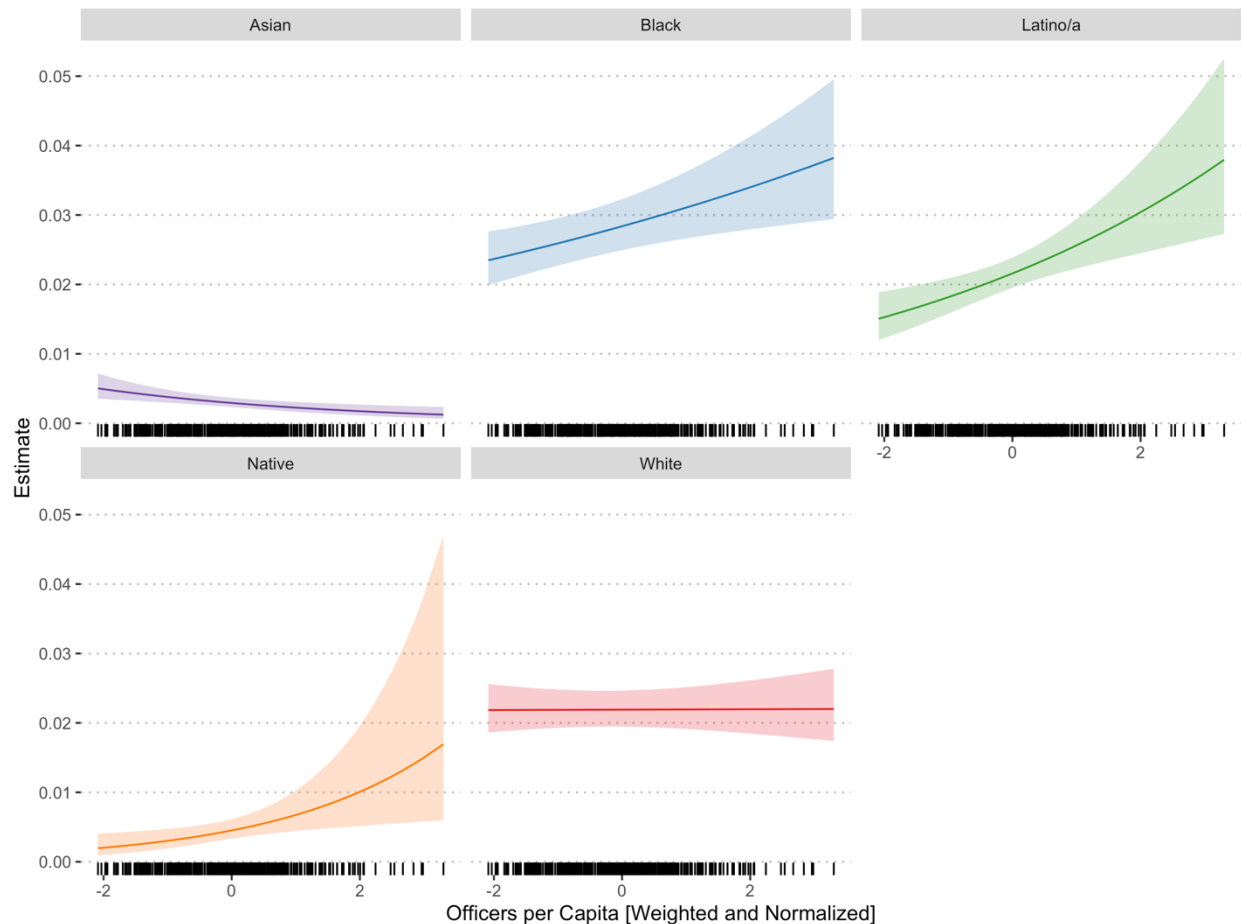
Different communities have different levels of policing. North Carolina's 400+ municipalities operate local police departments which range in size based on the population of the community, but also in terms of the number of officers on the force per 1,000 members in the local

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<sup>3</sup> Note that the categories shown in Table 1 can overlap: Speeding is a subset of all Traffic violations, for example. Also, the N refers here to the number of individuals. The same person may be arrested for more than one charge during the same incident, and in separate incidents over time. Also note from above that our disadvantage score is calculated for those whose residence is within the state. This leaves us with approximately 5.9 million North Carolina residents with an arrest shown in Table 1, out of a total of approximately 6.5 million individuals when we include those with residences out of state. Also, the same individual may have a drug charge as well as, for example, a traffic charge. Such a person would appear in both columns in the Table. The Ns refer to the total number of individuals with the relevant types of charges.

population. What happens when a community is relatively under- and relatively over-policed, compared to average? That is, when there are more police officers, are there more arrests? Figure 2 shows that the answer is yes, but not for white individuals or Asian-Americans.

Figure 2. Police Officers per Capita and Contact Rates by Race<sup>4</sup>



We measure police officers per capita by dividing the number of residents (using the Census) by the number of sworn officers (from the FBI’s Uniform Crime Reports (UCR); see US DOJ, FBI 2019). In the case of black, Latinx, and Native-American residents, more officers

<sup>4</sup> Note: North Carolina has a number of communities in the mountains and along the coast with relatively few permanent residents, but large numbers of seasonal visitors, such as beach towns on the Outer Banks. These communities often have more police officers than would be expected based on their year-round populations. To avoid misinterpretation, we weight the police officers per capita by the proportion of non-seasonal permanent residents and then normalize the data. Vacation jurisdictions, such as beach and mountain communities, have high police officers per capita rates due to the low number of permanent residents



means more arrests. For Asians and whites, however, there is no such relationship. Several possible reasons could explain this pattern. On the one hand, communities with high rates of minority crime might hire more police officers. On the other hand, having more police officers per capita may allow those departments with excess capacity to generate more high-discretion arrests for low-level crimes while targeting minority communities for increased surveillance.

We can gain some further understanding of these different patterns of police contact by looking at different neighborhoods within the same city or region. Jurisdictions with high police officers per capita tend to be relatively segregated in their residential patterns; this allows the pattern observed above, where more police leads to more contact for some groups, but not others. Figure 3 illustrates our estimated rates of contact with the criminal legal system for Charlotte-Mecklenburg. In the right side of the figure, we estimate contact rates for 1km x 1km neighborhood grid cells. In the left side of the figure, we estimate the economic disadvantage of each grid cell based on average household income and the proportion of minority residents.

Figure 3. Population Demographics and Police Contact in the Charlotte Area.<sup>5</sup>

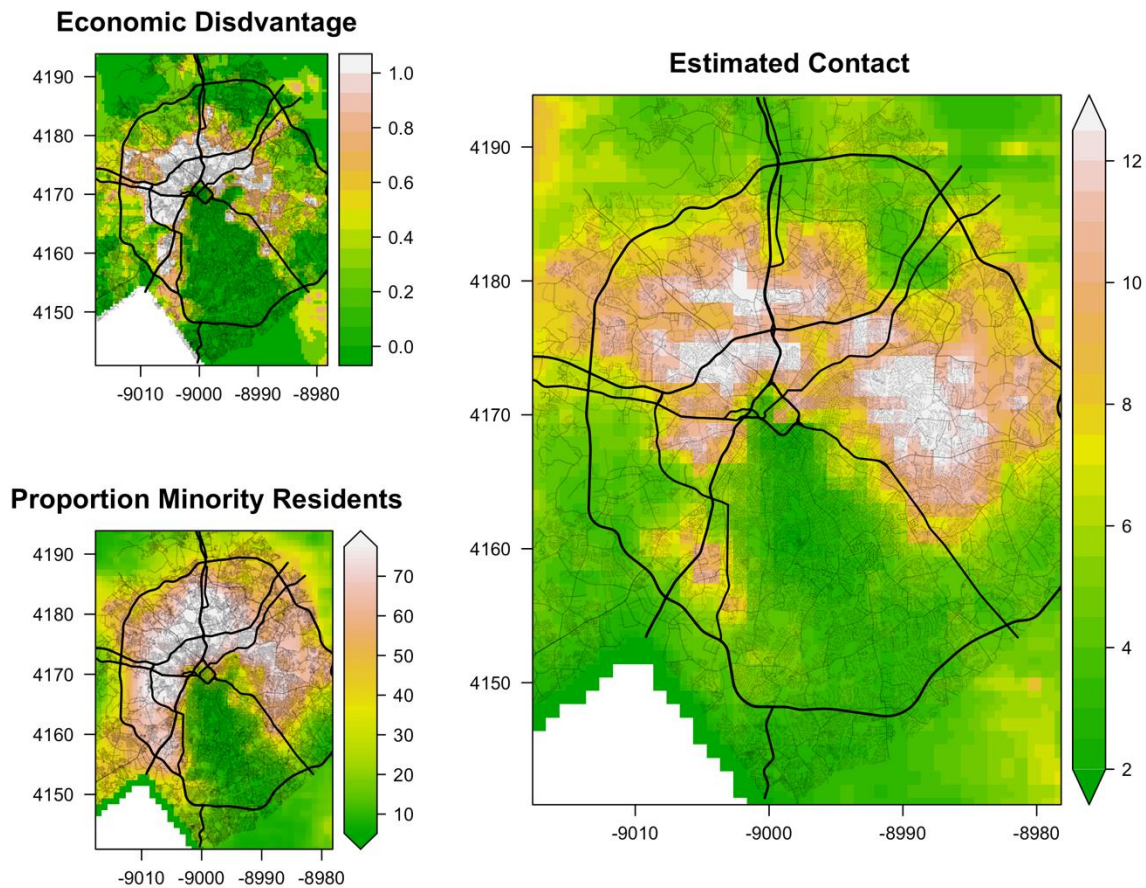


Figure 3 makes clear that patterns of residential segregation by race and by economics are almost perfectly mirrored in rates of contact with the criminal justice system. Therefore, it is plausible that the patterns we saw in Figure 2, showing high levels of police contact for disadvantaged minorities, but not for whites and Asian-Americans, where there are excess police officers, is due to differential policing rather than differential offending.

While we have not gotten to the bottom of all one might want to explore with regards to our social disadvantage score and contact with the criminal justice system, we have certainly demonstrated that there are wide disparities in levels of contact and that these are correlated with

<sup>5</sup> Note: We calculate population estimates for each grid cell using data from the Oak Ridge National Laboratory LandScan database.

race, age, gender, and economics. This is of course no surprise, but it is useful to show the degree of disparity; it is high. One question remains: Is this a coincidence, a mere artifact of the law written for other purposes having these effects, or is it a direct result of laws being passed in previous periods of history with the purpose of social control of disadvantaged populations?

### **Assessing Legislative Intent**

The 1950s marked a new beginning of racial tensions in the United States. Following the passage of *Brown v. Board of Education* (347 U.S. 483. 1953) and the successes of the civil rights movement, the Ku Klux Klan revived its activity across the nation. In an attempt to curtail the efforts of the Klan, the North Carolina legislature passed a number of laws, including Article 4A, prohibiting “Secret Societies and Activities.” Chapter 14.12 of the NCGS was amended in 1953 to include a number of statutes that directly prohibited activities taken by the Klan. The article included 11 punishable offenses, most of which were considered a class 1 misdemeanor, which carries a maximum penalty of 1 day in jail and a discretionary fine, while three others were considered a class I felony, which carries a maximum penalty of three to 12 months in prison. Table 2 presents a list of secret society crimes, the associated statutes, and punishments.

Table 2: Secret Society and Activities Statutes

Statute	Punishment Class	Minimum punishment
1 14-12.3 Certain secret societies prohibited	Class 1 Misdemeanor	1-day community punishment
2 14-12.4 Use of signs, grips, passwords or disguises or taking or administering oath for illegal purposes	Class 1 Misdemeanor	1-day community punishment
3 14-12.5 Permitting, etc., meetings or demonstrations of prohibited secret societies	Class 1 Misdemeanor	1-day community punishment
4 14-12.6 Meeting places and meetings of secret societies regulated	Class 1 Misdemeanor	1-day community punishment
5 14-12.7 Wearing of masks, hoods, etc., on public ways	Class 1 Misdemeanor	1-day community punishment
6 14-12.8 Wearing of masks, hoods, etc., on public property	Class 1 Misdemeanor	1-day community punishment
7 14-12.9 Entry, etc., upon premises of another while wearing a mask, hood, or other disguise	Class 1 Misdemeanor	1-day community punishment
8 14-12.10 Holding meetings or demonstrations while wearing masks, hoods, etc.	Class 1 Misdemeanor	1-day community punishment
9 14-12.12 Placing burning or flaming cross on property of another or on public street or highway or on any public place	Class 1 Misdemeanor (b) Class H Felony	1-day community punishment
10 14-12.13 Placing exhibit with intention of intimidating, etc., another	Class H Felony	5-month community or intermediate punishment
11 14-12.14 Placing exhibit while wearing mask, hood, or another disguise	Class H Felony	5-month community or intermediate punishment

Note: Minimum punishments taken from structured sentencing grid from 1994, and refer to defendants with no prior points.

The passage of anti-Klan legislation is a good example of a legislature acting to solve a social problem as the problem arises. Clearly, these punishments were designed to target a specific group, though no racially distinct language appears in the statute. Also, it is notable that the most active period of the Klan in North Carolina was before World War Two, but these laws were passed in the 1950s, when much of the activity had subsided. Further, note that many of the offenses were defined narrowly, not broadly; Statute 14-12.12, for example, prohibits a flaming cross, but not a bonfire or a fire in a shape other than a cross. Finally, in our review of 13 million

arrest charges, we have found not a single case of an arrest under these statutes, despite ample evidence to believe that there are events that could be punished by those statutes. In sum, we can see from Table 2 some apparent efforts to target the Klan, but these efforts came late, they were narrowly targeted and easily avoided, and they have led to not a single arrest in the current period. Let us compare this with some laws that target African-Americans.

Whereas the anti-Klan legislation came in the 1950s, the following decade saw the civil rights movement gain significant momentum; protests and actions reached their heights in the mid-1960s. In response to the civil rights uprisings and lack of legal authority to curtail public protests, North Carolina Governor Dan K. Moore formed the Governor's Committee on Law and Order (GCLO) in 1967. The GCLO was tasked with studying the existing criminal code, recommending new legislation, and providing guidance on how to reform and build local and state law enforcement agencies with the influx of funding from federal legislation. One particular focus was the various aspects of the law that pertained to riots and civil disorders.

In February 1969, the GCLO released a report, *Proposed Legislation Relating to Riots and Civil Disorders*, which presented an overview of existing laws relating to civil unrest and protest and put forth proposed legislation. The proposed legislation outlined in the report was formulated into House Bill 321, and ultimately enacted by the North Carolina General Assembly as Article 36A of Chapter 14 of the General Statutes. The introduction of a June 1969 report from the GCLO entitled, *Assessment of Crime and the Criminal Justice System in North Carolina*, frames the civil rights uprisings as, "recurring riots and civil disturbances in American cities have provided a most striking and visible example of crime in the streets. All but a few Americans have been affected by these outbursts of violence and disorder" (GCLO, 1969). The Committee portrayed the protests of the 1950s and 1960s civil rights movement as one the

gravest public safety failings, which could only be remedied through the criminal legal system.

Table 3 presents the civil rights protest-related statutes.

Table 3: Riot and Civil Disturbances Statutes

Statute		Punishment Class	Minimum punishment
1	14-288.2: Riot, Inciting to Riot	Class 1 Misdemeanor	1-day community punishment
		Class H Felony if there is property damage in excess of \$1,500 OR any participant has in their possession a deadly weapon	5-month community or intermediate punishment
2	14-288.3. Provisions of Article intended to supplement common law and other statutes.		
3	14-288.4. Disorderly conduct	First offense: Class 1 misdemeanor	1-day community punishment
		Second offense: Class I felony	4-month community punishment
		Third or more: Class H felony	5-month community or intermediate punishment
4	14-288.5. Failure to disperse when commanded	Class 2 misdemeanor; can be elevated to 14-288.2 (class 1 misdemeanor)	1-day community punishment
5	14-288.6. Looting; trespass during emergency	Class H felony	5-month community or intermediate punishment
6	14-288.7. Transporting dangerous weapon or substance during emergency; possessing off premises	Repealed in 2012 Class 1 misdemeanor	1-day community punishment
7	14-288.8. Manufacture, assembly, possession, storage, transportation, sale, purchase, delivery, or acquisition of weapon of mass death and destruction	Class F felony	13 months intermediate or active punishment
8	14-288.9. Assault on emergency personnel	Class F felony	13 months intermediate or active punishment
9	14-288.10. Frisk of persons during violent disorders; frisk of curfew violators		

10	14-288.11. Warrants to inspect vehicles in riot areas or approaching municipalities during emergencies		
11	14-288.12. Powers of municipalities to enact ordinances to deal with states of emergency	Repealed 2012 Class 3 misdemeanor	1-day community punishment
12	14-288.13. Powers of counties to enact ordinances to deal with states of emergency	Repealed 2012 Class 3 misdemeanor	1-day community punishment
13	14-288.14. Power of chairman of board of county commissioners to extend emergency restrictions imposed in municipality	Class 3 misdemeanor	1-day community punishment
14	14-288.15. Authority of Governor to exercise control in emergencies	Repealed 2012 Class 2 misdemeanor	1-day community punishment
15	14-288.16. Effective time, publication, amendment, and rescision of proclamations	Repealed 2012	
16	14-288.17. Municipal and county ordinances may be made immediately effective if state of emergency exists or is imminent	Repealed 2012	
17	14-288.18. Injunction to cope with emergencies at public and private educational institutions		
18	18-38.1. Authority of the Governor to direct closing of A.B.C. stores		
19	18-129.1. Authority of the Governor to limit sale of nine and malt beverages		
20	14-49. Malicious use of explosive or incendiary	Class D felony	44-month active punishment
		Class G felony	10 months intermediate or active punishment
		Class E felony	20 months intermediate or active punishment
21	14-50. Conspiracy to injure or damage by use of explosive or incendiary; punishment	Repealed in 1994	
22	14-50.1. Explosive or incendiary device or material defined	Provides definition	
23	14-34.1. Discharging firearm into occupied property	Class E felony	20 months intermediate or active punishment
		Class D felony	44-month active punishment
		Class C felony	50-month active punishment

24	14-132. Disorderly conduct in and injuries to public buildings and facilities	Class 2 misdemeanor	30 days community punishment
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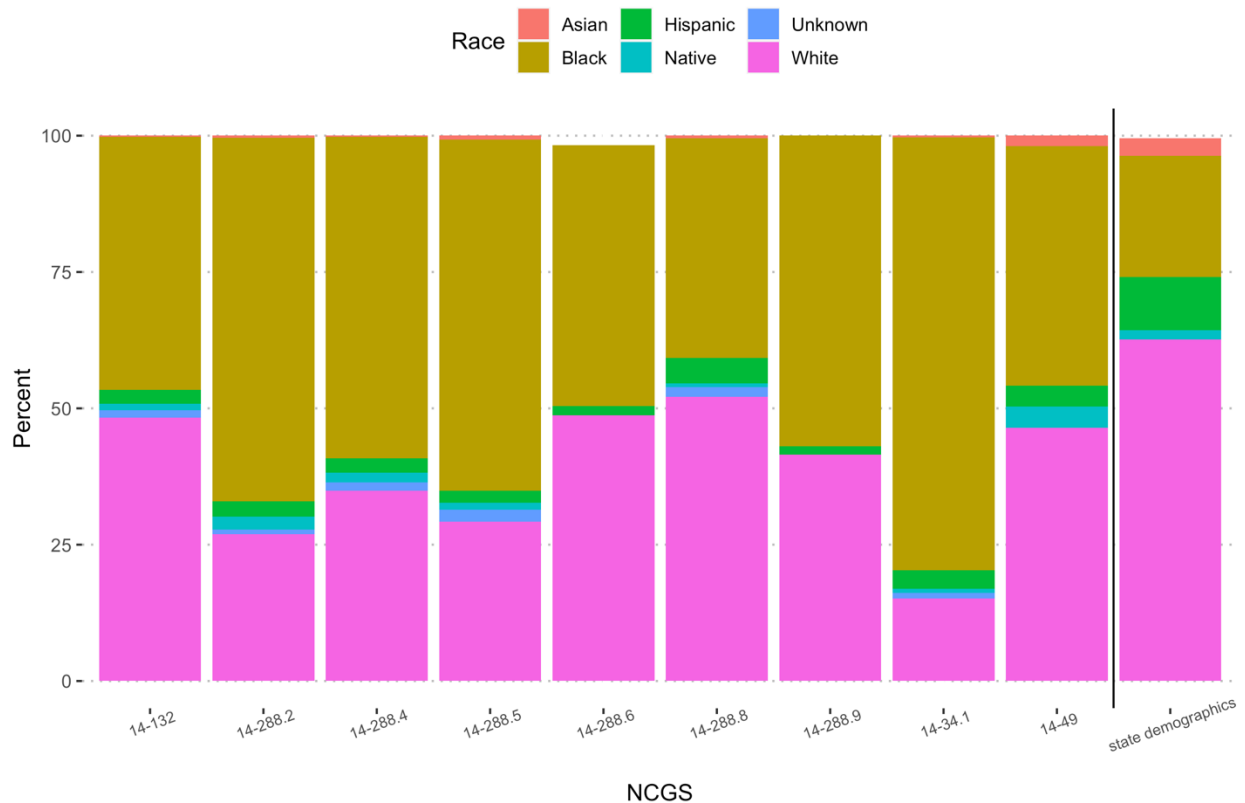
Note: minimum punishments were pulled from structured sentencing from 1994 and may have been different at the time the legislation was passed; these punishments refer to defendants with no prior points. Some of the statutes appearing in the table are used as a filler, to lay out emergency powers of local authorities, or for definition purposes, and therefore do not carry a punishment.

Several notable differences are clear between the punishments laid out in Table 2, relating to the KKK, and Table 3, relating to civil rights protesters. First, the punishments are vastly different in severity. North Carolina implemented structured sentencing in 1994, which outlined the minimum and maximum punishments available for any given offense class. We use the earliest version of the structured sentencing guidelines to gauge an understanding of how serious each of the offenses would have been measured by the courts in 1994. The majority of the secret society statutes carry only one day community sentence, with two offenses carrying a minimum of five months of community punishment. Civil rights era protest laws, however, were penalized much more harshly. Eight of the statutes carry a 1-day community sentence and seven of them carry more than a year in prison.

We also see notable differences in modern day enforcement of protest related laws. We noted above that no one has been arrested under the laws laid out in Table 2. However, over 40,000 charges have been filed under the laws laid out in Table 3 during the period from 2013 to 2019. And, since the laws were explicitly written to curtail mostly black protests, it should come as no surprise that those arrested under these laws are mostly black. Figure 5 shows the racial share of charges under each protest related statute appearing in the AOC data and compares those rates with their population share.



Figure 5. Percent of Individuals Arrested under Various Anti-Protesting Statutes, by Race.



The right-most column in Figure 5 shows the population demographics of the state as of 2010, according to the US Census. Blacks represent approximately 22 percent of the population. Depending on the particular statute in question, however, they represent anywhere from 40 to 80 percent of those arrested under different sections of the anti-riot and anti-protesting legislation passed in the 1960s.

We are also able to tell when the protest related arrests occurred across the state. We sum the number of protest related arrests by week and display those totals by race. Figure 6 shows the number of arrests by week across the entire state, and Figure 7 shows the black and white race trends in those arrests.

Figure 6. Number of Arrests per Week

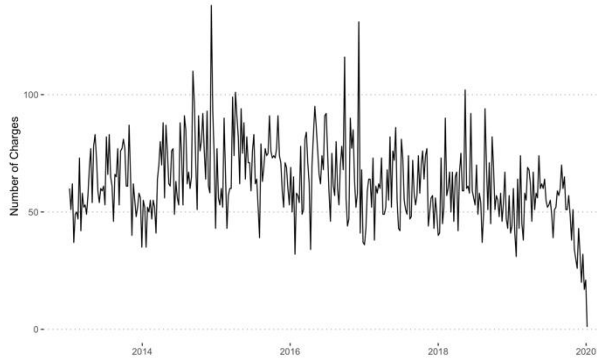


Figure 7. White and Black Arrest Numbers

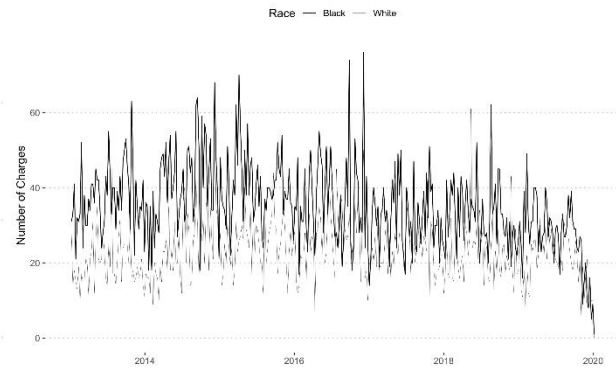


Figure 6 shows that it is not uncommon for 100 or more people to be arrested in any week under the laws laid out in Table 3, and Figure 7 shows that these tend to be black, rather than white, residents. Of the 366 weeks included in the AOC data, there were only 48 weeks, roughly 13 percent of the time periods, where the white count of state total arrests exceeded the black arrest count.

While there are clear racial differences in who is arrested under protest statutes, there are also clear peaks and valleys in charging trends over time. We can make use of the time-series nature of the data to see whether certain protest events may be associated with particular surges in arrests. In order to determine whether there is a relationship between increased arrests and certain protest events, we first identify and extract the highest protest arrest weeks in the AOC database and then calculate the number of white and black people arrested. Finally, using a combination of the Crowd Counting Consortium data and our own internet archive newspaper searches, we document the protest event that happened in the relevant county and week. The results of this analysis are displayed in Table 4.

Table 4. Identifying Protest Events for High Arrest Weeks

County	Week Ending	Event	Total Charges	Black Charges	White Charges
Wake	8-Oct-18	Stop Kavanaugh protest	148	147	0
Harnett	11-Feb-19	Annual Social Justice March	144	144	0
Harnett	12-Feb-18	Annual Social Justice March	138	56	2
Mecklenburg	1-Dec-14	Protest against Ferguson decision	100	93	5
Mecklenburg	16-Oct-17	Police shooting of Ruben Galindo	80	78	2
Durham	16-Apr-18	Anti-KKK protest	75	75	0
Harnett	14-Aug-17	Toppling of confederate monument	69	32	37
Durham	28-Nov-16	Anti-Trump protest	55	55	0
Wilson	1-Sep-14	Ferguson Protest	54	54	0
Mecklenburg	26-Sep-16	Police shooting of Keith Lamont Scott	51	38	7

Table 4 lists all the times when more than 50 people were arrested for protesting or rioting in a single week in a single county; of the ten events listed, just one had a significant number of white protesters arrested; these were white individuals protesting alongside blacks in a protest culminating in the toppling of a confederate monument. All the other cases, including cases involving protests about a Supreme Court nomination, annual social justice marches, and other black-lives-matter related protests, involved an overwhelming share of blacks arrested compared to whites.

Are there other protests that do not generate so many arrests? In order to identify protests that have not been subject to law enforcement intervention, we identified a number of events that could plausibly be subjected to protest related offenses, but nevertheless resulted in no arrests. Two events were related to white supremacist organizations, and one is a large college sporting event in Chapel Hill. Figure 8 provides photos of those events.

Figure 8. Three Relatively Un-Policed Public Protests or Celebrations.  
A. Hillsborough, August 24th, 2019



B. Alamance County, May 20, 2017



C. Chapel Hill, April 3, 2017



Figure 8A shows a KKK rally in Hillsborough, NC clearly depicting two individuals wearing masks and Klan garb standing in front of the county courthouse. Recall from Table 2 that section 14-12.8 of the code prohibits Wearing of masks, hoods, etc., on public property, and that section 14-12.10 outlaws holding meetings or demonstrations while wearing masks, hoods, etc.

Figure 8B shows a protest by Alamance County Taking Back Alamance County (ACTBAC NC), a neo-confederate group, on Saturday May 20th, 2017. (Source: SPLC).

Figure 8C shows 55,000 people, largely UNC students and basketball fans, rushing Franklin Street following the NCAA basketball championship (Source: <https://www.unc.edu/discover/franklin-street-celebration/>). This event included seven injuries, and other photos (not shown here) depicted individuals hanging from light posts, from street signs, and in trees on public property. The tradition of burning couches, often in public streets, was again treated as a charming if slightly dangerous prank rather than an act deserving of arrest.

We were unable to find records of any arrests under the laws laid out in Tables 2 and 3 associated with the three events depicted in Figure 8. We do not mean by this analysis to suggest that students celebrating a national championship should be thrown in jail because they obstruct traffic with their celebrations. (We would, however, prefer that those wearing Klan masks in public be arrested.) Our point, rather, is that the protesting and rioting laws depicted in Tables 2 and 3 are subject to differential enforcement depending on who is protesting.

We can gain further purchase on this question by focusing in on specific counties within North Carolina to better examine when law enforcement use their discretion to enforce, or not enforce, protest-related laws. We identify two counties in North Carolina where there were frequent arrests made for protest related events—Mecklenburg and Durham. We then identify weeks when high-profile protests were occurring in the county to determine which events intersect with weeks when there were a high number of arrests. While we do not have the universe of protests that occur in each county for the entire time period, we find weeks that have a high number of arrests intersect with specific kinds of protests; Movement For Black Lives protests, immigration-ban protests, and protests in support of wage increases. We also identify other protests, such as the women’s march, that are not subject to the same arrest outcomes.



Figure 9. Protest charges and select protest events in Mecklenburg, NC

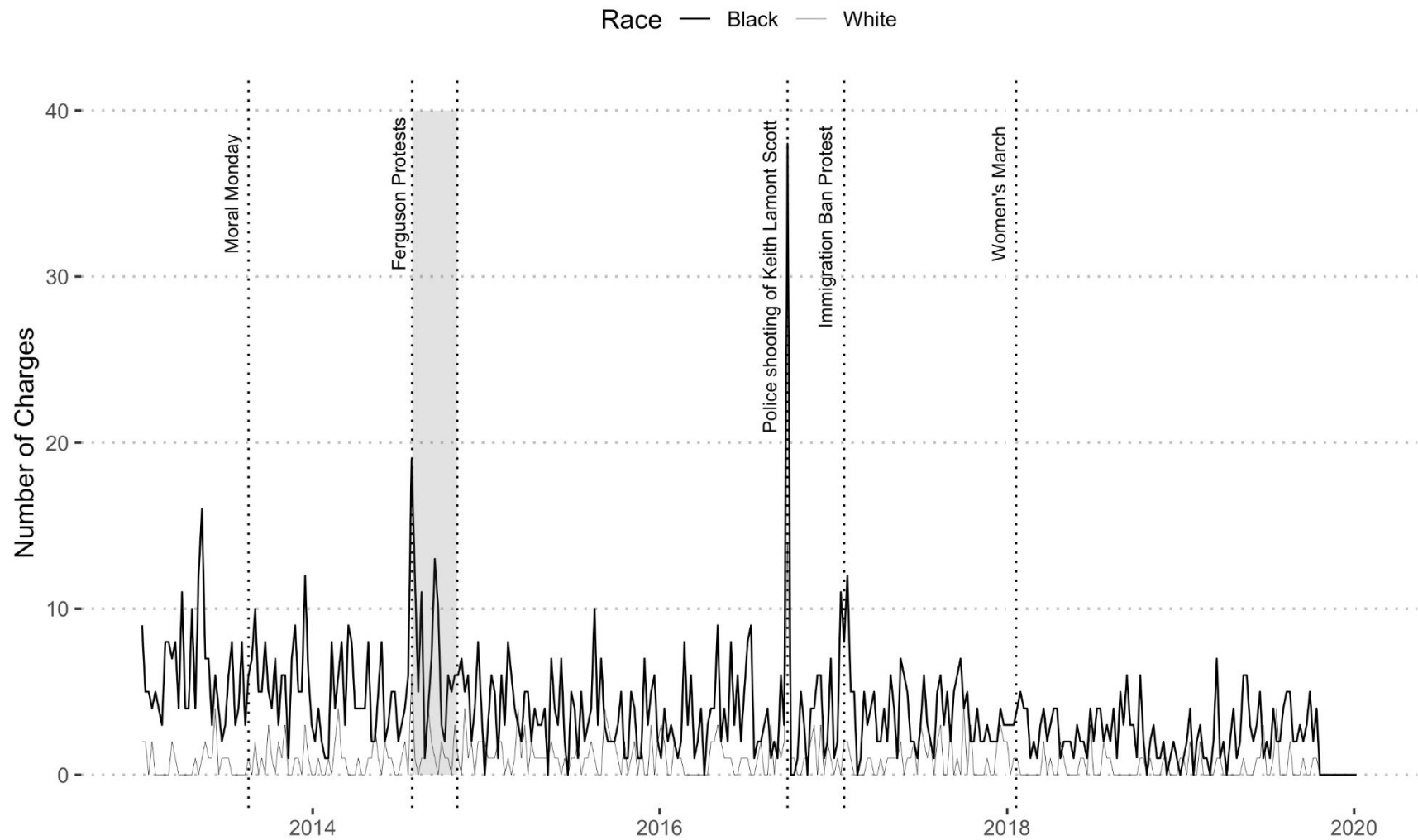
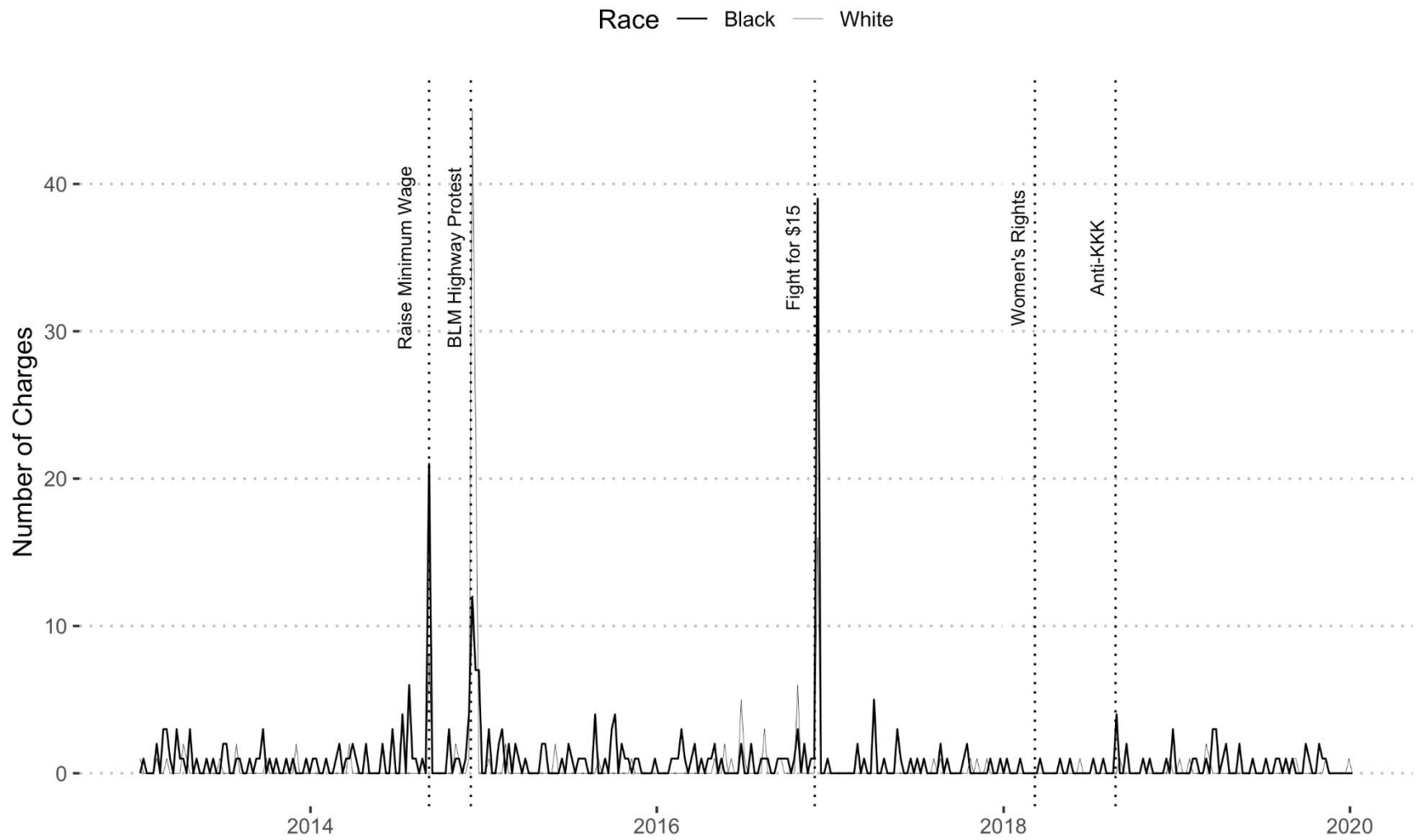


Figure 10: Protest charges and select protest events in Durham, NC





Figures 9 and 10 clearly show a number of BLM and other protests leading to large numbers of arrests, whereas other protests do not. In Mecklenburg County, protests associated with Ferguson, Keith Lamont Scott, and the Trump Immigration Ban led to spikes in protests, but the women's march did not even register the slightest blip. In Durham, protests associated with raising the minimum wage, BLM, the Fight for \$15 saw large numbers of arrests, but the women's march and an anti-KKK march in 2018 show no such surge. In sum, some protests are tolerated and others are not. The laws passed by the legislature in the 1950s and 1960s give the police the opportunity, but not the requirement, to arrests those exercising their right to free speech in the public place. The police use this discretion exactly as it was intended by the legislature.

## **Conclusion**

Legal scholars and others distinguish between demonstrations of the disparate impact of the law on various social groups and showing discriminatory intent on the part of the legislature or other government entity (see for example Rothstein 2017). Generally, while one might bemoan disparate impact, another can argue that it is caused by differential behaviors or that there was no intent to create these disparities when the law was written. We have attempted to push this conversation forward here. At least in some areas of the law, further marginalization of the already marginalized appears clearly to be the purpose. Laws are generally adopted in order to solve some newly recognized social problem. In the 1960s, white elites reacted with alarm to a number of forceful demonstrations of discontent among Africa-Americans demanding greater freedoms. Legislative actors are elected officials and there is no reason to believe that they would be immune to the passions and prejudices of their time; quite the contrary. A pertinent question for the rest of us is, what to do with the legacy of racist laws that continue to work as intended?

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## About the authors

Marty Davidson ([martydav@umich.edu](mailto:martydav@umich.edu)) is a PhD candidate in Political Science at The University of Michigan at Ann Arbor. He is a 2016 graduate of UNC-Chapel Hill and co-author of *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford University Press, 2018).

His dissertation, entitled *The Caller Advantage: Private Citizens, 911 Calls, and Influence on Police Behavior*, is on target for completion during the 2022-23 academic year.

Kaneesha R. Johnson ([krjohnson@g.harvard.edu](mailto:krjohnson@g.harvard.edu)) is a PhD candidate in Government at Harvard University. She is a 2016 graduate of UNC-Chapel Hill and co-author of *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford University Press, 2018). She will complete her MLS degree at the University of Chicago School of Law in May 2022 and is planning to complete the work for her dissertation entitled *The Punishing State: Punishment and Social Control in North Carolina Social Services* during the 2022-23 academic year.

Frank R. Baumgartner ([frankb@unc.edu](mailto:frankb@unc.edu)) is the Richard J. Richardson Distinguished Professor of Political Science at UNC Chapel Hill. He holds his PhD from the University of Michigan (1986), and is the author of numerous books in the fields of US public policy, comparative public policy, and criminal justice, including work focused specifically on the North Carolina criminal justice system. He was inducted in the American Academy of Arts and Sciences in 2017. He has been on the UNC faculty since 2009.

Together, Davidson, Johnson and Baumgartner are working on a book entitled *Working as Intended: Race, Class, Gender and the Law* from which this article is drawn.