

Working as Intended Race, Class, Gender and the Law

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Over the seven-year period from 2013 through 2019, prosecutors filed over 13 million charges against millions of individuals in the state of North Carolina. Many of these alleged offenses were for speeding or other traffic offenses, others were for fishing and wildlife offenses or property crimes such as robbery and theft, and a small percentage were for violent crimes such as assault and homicide. Few outside the system may realize that fewer than five percent of all felonies are in fact crimes of violence. During this observed period, non-violent felonies included filing a false lien, taking a milk crate, stealing pine straw, simulating a court process, or failing to disclose the true name and address of the manufacturer of a musical recording. Similarly, misdemeanors included damaging a computer, inhaling toxic vapors, manufacturing a slot machine, and exposing a child to a fire. These observations prompt us to ask: Is the legal system keeping us safe from violent acts, or has it accumulated over the decades into a system that also includes many other goals, including social control of marginalized communities?

In this book, we make use of a comprehensive database covering every arrest over seven years in a single state, providing a comprehensive look into a state's criminal legal system from start to finish. How many people are arrested for which types of crimes? Who are those people: rich, poor, young, old, male, female, black, white, Native American, or some other race, residing in urban, rural, small towns, or a big city? What are they charged with? What are the consequences of these interactions with the criminal justice system? Are individuals punished in similar manners for similar crimes? Do the poor and the wealthy come out of the process with similar outcomes? Who gets a lawyer, who defends themselves, and who is assigned legal assistance by the court system? How often do people go to trial before a jury, and how often are they found innocent at trial? Do those who plead guilty before trial come out better than those who maintain their innocence? What punishments are eventually meted out? Are there systematic or idiosyncratic disparities in who receives harsher or more lenient treatment, and who escapes law enforcement altogether, though they may violate a law?

By describing from head to toe the internal workings of the North Carolina criminal legal system, we seek to understand how the state constructs social orderings. Which groups does the legal code target and which ones does it protect? Which behaviors are outlawed, and which crimes have enhanced punishments depending on the characteristics of the victim? Did the state legislature intend for this targeting (and protection) to occur, or do any observed disparities represent an unintended consequence, a simple artifact of differential behavior? That is, we seek to understand whether observed disparities are mere coincidences, or whether they represent the result that the state legislature had in mind when it outlawed this or that behavior.

We also seek to understand the extent to which laws are designed to keep us safe or whether they are designed to criminalize certain groups of people. Of course, all criminal laws are justified by the need to criminalize behaviors a legislative majority deems unacceptable. In their effort to regulate society, however, legislatures also define the social groups deemed deserving of enhanced protections. For example, section 14-33 of the NC General Statutes deals with assault; it specifies higher punishments when the victim is a child, a woman, a sports official, and when a domestic partner is assaulted in front of or within earshot of the couple's children. Two men fighting may be guilty of assault, but a man who hits a woman, particularly in front of their children, deserves more punishment, according to of the NC General Statutes. A parent who cannot resist attacking the referee at their kid's soccer game deserves more severe punishment than a man who assaults another. These decisions reflect a judgment about what behaviors will not be tolerated, and which categories of persons deserve enhanced legal protections.

While most citizens will never commit certain crimes, the vast majority will (likely unknowingly) be in violation of the law, sometimes on a daily basis. The traffic code, for example, renders virtually every driver an outlaw. When everyone violates the law, only the police can decide when and where to enforce the law. By looking across the board, at every single arrest in an entire state over a seven-year time period, we can assess not only what our leaders say and expressly value by putting these items into the state code, but we can also see where our collective law enforcement resources are allocated: how many people are arrested for which types of crimes? Who are those people? Are the crimes we routinely target the ones that make us the most unsafe? Or are certain laws used to control the behaviors of the most powerless? By the end of our book, both professional and lay audiences will understand just how important social identity is to the criminal legal system; both in its construction and its implementation.

This book proposal proceeds by describing the two major themes of our book and then describes our chapter outlines.

The first theme we explore involves *public safety, social control, and legislative intent*. For this theme, we primarily focus on data concerning who gets arrested for which types of crimes, documenting social disparities in the rates of arrest for different parts of the criminal code. Then we assess whether these aspects of the code were designed at the time they were passed into law to target those precise demographic groups. We make use of the historical record to explore a number of important sections of the code that were passed in particular historical moments and with particular intent to prohibit certain behaviors by certain demographic groups, generally black men. Here we focus on the traffic code in the 1930s, a series of laws regulating public protest and riots in the 1960s, and the drug laws of the 1980s and 1990s.

The second theme we explore involves *legal sprawl, police discretion, and unequal enforcement*. For this theme, we primarily focus on crimes bolstered by police discretion. This includes the vast number of laws regulating illicit drug use and socially undesirable actions but not crimes of violence. Why is it illegal to sleep on a park bench? What problem is that law designed to solve? How do police use their discretion when faced with the opportunity to arrest virtually any citizen? For this analysis we look at crimes associated with such things as resisting arrest, possession of marijuana, and other low-level crimes.

Throughout our eight proposed chapters, we demonstrate how these two themes determine social orderings within society and inequitable outcomes in the criminal legal system. We link these outcomes to legislative intent, and we discuss how far the legislature has moved from laws designed to keep us all safe from violent attacks and from having our property stolen. In writing *Working as Intended*, we demonstrate how many of the racial, gender, and class based disparities in the criminal legal system are by design and not happenstance.

Public Safety, Social Control, and Legislative Intent

Scholars have proposed a range of theories to explain of the purpose of the law. Two dominant perspectives include public safety and social control. Under the public safety perspective, the purpose of the law is to protect people from violent acts, to protect private property, and to deter undesirable or anti-social behavior of various sorts. Under the social control perspective, the law is understood as a mechanism of control of marginalized groups by dominant groups. Under the social control theory, the law is a form of power, and those who wield power use it in ways that criminalize groups that are already marginalized in order to maintain a social hierarchy. What share of the system appears to be protecting us from violent crimes? How much relates to property? How much concerns quality of life offenses such as noise ordinances? And what crimes on the books are rarely enforced but provide the police what might be called a legal justification for a conversation, an opportunity to explore the behaviors of someone who appears to be out of place, suspicious, or perhaps of interest to the officer for reasons the officer cannot quite explain? Using our comprehensive database, we can precisely state which elements of the code are more likely to ensnare which types of individuals.

For example, we find that white females are more likely than those from other demographic groups to be arrested for corporate embezzlement. Black women are more likely to be arrested for welfare fraud. Hispanic males are particularly likely, compared to others, to be arrested for driving without proper documentation, and for related violations. White men are more often arrested for violations of the wildlife laws as well as those prohibiting sexual contact with students in the K-12 educational system. And of course, black and Latinx men are considerably more likely than other groups to be arrested for a wide range of laws, particularly drug-related ones. In sum, disparities are glaringly obvious in the data, and we can assess them comprehensively.

But are these racial and identity-based disparities mere coincidences, driven by differential rates of offending, or do they reflect a legislative intent to criminalize certain people, rather than actions that place other people or property in serious danger? This is of course a key question, but a difficult one. We provide considerable evidence that, at least in many instances and for particular elements of the criminal code, the racial and identity-based disparities we observe are not simple coincidences but reflect legislative intent as well as police discretion. We document these findings with extensive review of legislative intent and link that intent at the time of passage of certain laws with their disparate impact today. Of course not all areas of the law correlate with racially biased legislative intent, but some important ones do, and these continue to affect millions of Americans today.

We target our analysis on issues of identity: Race, gender, geography, and social class. Certainly it may be true that some people break the law more than others. What person would steal a loaf

of bread if they could easily purchase it? So the motivation to break the law, and actual rates of doing so, may well be different in different social groups; various statistics show that they are. But what behaviors are punished, and which ones are allowed to pass without legal sanction? Almost all automobile drivers break the traffic law virtually every time they drive their car, but few are punished. Many of us jaywalk, loiter, or wander about without a clear destination, but for most of us, this never leads to an interaction with police. For others, it does.

We are not the first to suggest that the law has been used to target certain segments of the population (Bass 2001). Pauper laws were struck down because they targeted poor people. Jim Crow laws targeted Black people. Sodomy laws and laws banning inter-racial marriage were designed to discriminate against LGBTQIA+ individuals and those who might want to marry a person of another race. These laws are no longer on the books. Are there laws still on the books that were passed with equally discriminatory intent, but perhaps worded in less racial legislative language, and that are still having the impact for which they were designed? In this book, we highlight that despite their neutral language, many of the existing laws on the books were created with discriminatory intent, and that they continue to operate in the way that they were intended.

Legal Sprawl, Police Discretion, and Unequal Enforcement

One driving question throughout our analysis here will be how the myriad of laws are enforced. For example, possession of marijuana is relatively widespread, and many people are arrested for it (in fact, over 200,000 people were arrested for offence code 3550, possession of less than one-half ounce of marijuana). Who were those people? Which people committed the same offense but were not arrested? Similarly, almost 1.4 million individuals received a citation for speeding (offence code 5450).¹ But speeding is virtually ubiquitous, so who sped with impunity? Virtually every driver. As readers will see, our point is not that these laws should be more widely enforced. Rather, our point is that laws prohibiting many actions are routinely not enforced, leaving great degrees of discretion to individual police officers in deciding when, against whom, and in what situations to enforce the law. How do they use this discretion?

Charles Reich and James Baldwin help us frame our understanding about the role of police discretion. Writing in the 1960s, Yale law professor Charles Reich (1966) described his multiple (and ultimately judicially inconsequential) interactions with police as he did things like take late-night strolls near his family's summer home in New York, near his own home in Maryland, at a later residence in Connecticut, or while travelling in California for a professional conference: "My problem is that I like to walk" (see Reich 1966, 1161). Sarah A. Seo (2016, 2019) later expanded on Reich's analysis to suggest that the automobile has transformed police discretion to investigate citizens for no apparent reason so much that she suggests separating out traffic enforcement from the investigation of crime (2016, 1616). Reich summarized his concerns this way:

If I choose to get in my car and drive somewhere, it seems to me that where I am coming from, and where I am going, are nobody's business; I know of no law that requires me to

¹ Only 98,310 individuals were convicted of this same offense; others had their charges reduced to an infraction, code 4450 (over 475,000 cases), or to "improper equipment - speedometer" (almost 600,000 convictions). We will return later in the book to the question of who is able to gain these advantageous reductions in charges, and who is not.

have either a purpose or a destination. If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight. (Reich 1966, 1172).

In the same year that Reich raised concerns over the increasing authority of the police to monitor and investigate an individual, James Baldwin published *A Report from Occupied Territories* (1966), which detailed the hostile treatment that Black Harlemites were subjected to at the hands of police officers. In his account, he described the increasing encroachment of the police in public and private space:

This means that the citizens of Harlem who, as we have seen, can come to grief at any hour in the streets, and who are not safe at their windows, are forbidden the very air. They are safe only in their houses—or were, until the city passed the No Knock, Stop and Frisk laws, which permit a policeman to enter one’s home without knocking and to stop anyone on the streets, at will, at any hour, and search him. Harlem believes, and I certainly agree, that these laws are directed against Negroes. They are certainly not directed against anybody else (Baldwin 1966, np).

Reich and Baldwin’s accounts have an important commonality. They were concerned not only with the issue of arrest and judicial sanction, our main focus in this book, but in police patrols and investigations, the things that make an officer view a wanderer with suspicion and give the officer the authority to investigate that individual, even if the investigation leads the officer to conclude that the individual has broken no law, or at least does not merit arrest. As Seo describes in her 2019 book on the legal consequences of the rise of the automobile, the car transformed policing because, to the surprise of the police at the time, it revealed that virtually everyone was willing and able to violate the law.

But there is also an important divergence between Reich and Baldwin’s narratives. Reich seemed concerned that the police’s expanded capacity to monitor was a blanket policy that would hinder the enjoyment one might have on a leisurely walk or drive. By contrast, Baldwin’s concern was that the laws were constructed with the explicit intent to target the black body and placed them in extreme danger of either physical harm or incarceration. The difference lies in the outcome of the police interaction. Privileged individuals from prestigious social backgrounds routinely broke the traffic laws. Did they deserve arrest? Officers eventually realized that they should use the utmost of discretion in enforcing the traffic laws, and any driver knows that minor violations are routinely ignored. But many of us forget that even a technical violation of a “minor law” opens us to arrest and detention if the officer so chooses.

Of course, some laws are so powerful and important that they are almost always enforced if the perpetrator is discovered: homicide, violent assaults, home invasions, robbery. But others, like sex trafficking, domestic abuse and anti-protest laws, may rarely be enforced in spite of their unarguable seriousness. Compare human trafficking to prostitution, for example. According to the state of North Carolina, “Human trafficking is one of the fastest growing crimes in the United States with North Carolina among the most affected states. Major interstate highways, a large and transient military population surrounded by sexually oriented businesses, numerous rural

agricultural areas with a high demand for cheap labor, and an increasing number of gangs all contribute to making our state a hotbed for human trafficking” (NC DOA 2022).

In the period of our study, 2013 to 2019, North Carolina officials arrested 537 people for sex trafficking crimes (codes 1150 to 1155 in the Criminal Code, generally involving human trafficking, involuntary servitude, or sexual servitude, all felonies), and 34 such verdicts were handed down. By contrast, 5,450 charges were made for prostitution-related crimes, and 1,297 criminal verdicts were rendered. If sex trafficking is more serious than prostitution, and most of those arrested for prostitution-related crimes are women accused of prostitution, not the men who are often their customers, why are there 38 times more convictions for the less serious crime compared to the more serious one? Of course it could be that there are more individuals involved in prostitution than in sex trafficking. But the 34 convictions for sex-trafficking belie the state’s contention that eliminating the practice is a major focus of law enforcement, given that the state is a “hotbed” of the practice. Social control and marginalization of (mostly) women involved in sex work generates much more legal activity in the state than the public safety goal of eliminating sex trafficking, judging from the numbers of arrests and convictions for these two types of crimes.

Other laws may have been written explicitly with the purpose of targeting particular types of individuals. A prominent example is a spate of laws passed in the 1960s targeting “riots” and street protests. NC General Statute 14-288.5 makes it illegal for any group of three or more persons to remain in place if a police officer orders them to disperse. This law was passed in 1969, at a time when the legislature was concerned about black street protests and “riots.” As we will show in the chapters to come, this and related elements of the NC criminal code remain disproportionately enforced against Black people. In this case, based on the legislative record, we can show that this is precisely the intent of the law, and it continues to work precisely as intended. In sum, some laws are designed to keep the community safe from violent and serious crimes, and other laws may have other purposes, purposes more focused on social control than on public safety. The racial disparities apparent in arrest statistics may not be a result of social disadvantage; they may be the product of a system working precisely as designed.

Tentative Chapter Outlines

We document the differential rates of contact with the criminal justice system across multiple identity categories based on; race, age, gender, neighborhood of residence, and estimated income. We further explore the process of adjudication, looking at who comes out of the process with lesser v. greater punishments, and why. We note that the vast majority of criminal justice activities concern relatively low-level crimes. If we want to understand why the courts are overwhelmed, why prosecutors and public defenders seek plea agreements rather than trials in the vast majority of cases, then we need look no further than the drug and traffic laws. We find that fewer than five percent of felonies are crimes that involve physical violence, so when we think of whether the criminal code is keeping us safe, we should be troubled to see that such a small share of it concerns crimes of violence. We address head-on the question of whether the identity-based disparities that we document can be linked to discriminatory legislative intent. While we cannot discern intent in every case, we explore a number of examples where legislative intent was clearly discriminatory and where the current-day effect of the laws enacted sometimes many decades ago remains highly disproportionate. Some examples are the traffic laws

(generally passed in 1939); anti-rioting and street protesting laws (from the late-1960s); and the 1980s “war-on-drugs” laws. Finally, we explore the effect of these patterns on citizen engagement and discuss a vision of the legal system that would involve more attention to serious crimes and greater racial equity. We also make use of a new database generated by a team of historians at UNC-Chapel Hill. The “On The Books” project documents historical “Jim Crow laws”, identifying more than 1,000 laws that codified the Jim Crow system. We link these laws to their current-day criminal justice impact.

Ch. 1. Introduction. Explains the motivation of the work and the distinction between safety and social control.

Ch. 2. Arrests, Offenses, and Resolutions: How the NC Justice System Works. Explains our database and its characteristics, provides summary statistics and an overview of the system.

Ch. 3. Poverty, Race, Place, and Identity. Explains our innovative methodology of defining social identity based on race, gender, age group, neighborhood of residence, and estimated income. This allows direct comparison to US Census data, making possible the calculation of rates of contact with the criminal justice system as a percentage of the resident population of the same characteristics.

Ch. 4. What Laws are on the Books? We develop a new classification of offense codes and isolate for example crimes of violence, sexual assaults including such violence, property crimes, and other types of crimes. We find that fewer than five percent of felonies (not to mention misdemeanors and traffic offenses) involve violence. We link these different categories of offense to differential focus on protecting society from violent predators, those who would steal our property, and other social protection functions as compared to other goals more associated with social control. Great numbers, of course, are linked to drug abuse and the crimes often committed by individuals with addiction disorders. We note the costs of moving the issue of drug addiction into the criminal justice system rather than treating it in other ways.

Ch. 5. Who Gets Arrested, for Which Crimes? We use the method described in the two previous chapters to assess which elements of the criminal code generate arrests among which groups, based on their social identity characteristics.

Ch. 6. Working as Intended? Here we assess the intent of the legislature at the time when certain laws were passed. We focus on laws that continue to have highly disparate impacts in the Black community: traffic laws from the 1930s, rioting and protesting laws from the 1960s, and the drug laws from the 1980s. Using different historical methodologies in each of the three examples, we show that these laws were designed to do what they are doing: have a disproportionate impact on Black individuals. [Note this is a key chapter and may require a second chapter to fully cover the material with enough examples to be convincing.]

Ch. 7. Lawyers, Pleas, Prior Points, and Outcomes. For each arrest charge, we also know the final disposition of the case. Which individuals come out with an acquittal, with charges dropped or reduced, and which are found guilty as charged? How does this related to such process variables as the county of jurisdiction, the use of a private attorney, and the prior record of the

individual accused of the crime? What punishments are handed out, and how are these related to social identity?

Ch. 8. Envisioning Equity. What would a criminal justice system look like that focused on social equity? We can explore this difficult question because the previous chapters isolate those characteristics of the system that generate the greatest inequities. We explore the implications of our findings for the criminal justice system and propose possible reforms that could allow the system to do a better job of keeping us all safe from violence but reduce the social inequities that are so prevalent throughout the criminal justice system. And we explain how these reforms might save the taxpayers significant amounts of money as issues such as mental health treatment could be better handled outside of the context of police, judges, and attorneys. Much better would be a system where health issues are in the province of doctors, nurses, and other health-care providers. Beyond only this, we also explore the implications of a radical reduction in the scope of the law and a movement away from a legislative impulse to make vast swaths of behavior subject to the criminal code, but to trust the police to enforce the law with appropriate discretion. Such a system has generated intolerable racial and social inequities, rendering many people aware of their second class citizenship. It has made the police and the courts the largest mental-health providers in the nation, with terrible effect. To address these issues, we need to address the underlying legal systems that have generated them. In our last chapter, we explore a number of possible options for reform.

References.

Appendices. We expect a number of on-line appendices making available data, maps, and allowing readers to dive deeply into our accumulated data and analysis for different geographic regions of the state or for particular aspects of the criminal code. The printed book will provide overviews of state-wide trends and give illustrations of some geographical trends but will point to the appendix where more detailed analysis will be available.

About the authors. Baumgartner holds the Richard J. Richardson Distinguished Professorship of Political Science at UNC-Chapel Hill. He is the author of numerous other books, including *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race* (Cambridge, 2018), a book that was similar to this one in that it was based on a large administrative database in North Carolina. Davidson is a PhD candidate at the University of Michigan. Johnson is a PhD candidate at Harvard University. Both Davidson and Johnson are graduates of UNC-Chapel Hill and co-authors, with Baumgartner, of *Deadly Justice: A Statistical Portrait of the Death Penalty* (Oxford, 2018). Both are completing dissertations dealing with race, poverty, politics, and criminal justice.

Audience and Competing Books. We expect the book to be of interest to students, scholars, and practitioners involved in the study of the law, in the field of race and ethnic politics, and in the area of racial disparities in the criminal justice system. It will fit into a range of books such as a series of books on traffic stops (e.g., Epp et al., *Pulled Over*, Chicago, 2014; Sorin, *Driving While Black*, WW Norton, 2020; Seo, *Policing the Open Road* Harvard, 2019) and racial disparities in the criminal justice system more generally (e.g., Lerman and Weaver, *Arresting Citizenship*, Chicago 2014; Burch *Trading Democracy for Justice*, Chicago 2013; or Walker

Mobilized by Injustice: Criminal Justice Contact, Political Participation, and Race, Oxford 2020).

Status of the manuscript. In April 2022, we presented two conference papers explaining the methods core to Chapter 5, and exploring the rioting and public protesting aspects of Chapter 6. We are currently drafting other chapters and expect to have a completed draft by summer 2023. We expect the manuscript to be on the order of 80,000 words with perhaps 30 tables and 30 figures, similar to the scope of *Suspect Citizens*.