

Unjustified:

Reckoning with the racialized legacy
of misdemeanors in the United States



Introduction

What number best captures the vastness and impact of misdemeanor arrests and prosecutions in the United States? Is it that 13 million misdemeanor charges were brought in 2016, or that misdemeanors make up 74% to 83% of court caseloads? (Stevenson & Mayson, 2018) Is it the few seconds that some courts take to handle a misdemeanor case, or the fact that over 95% of misdemeanor convictions are the product of a guilty plea? (Natapoff, 2018) Perhaps it is a Bureau of Justice Statistics study of misdemeanor cases in 13 jurisdictions, finding that Black people were over-represented in every single one. (Rick & Scott, 2022)

A misdemeanor is considered a crime less serious than a felony, and the punishment is supposed to be commensurately less harsh, usually less than 12 months in jail. At first glance, the way the criminal legal system adjudicates misdemeanors appears chaotic—overwhelmed by huge caseloads, with few guardrails for the innocent and a disproportionate impact on Black, Latinx, Indigenous and other marginalized communities. A much more cohesive picture emerges, however, when an antiracist lens is brought to bear. The high rates of arrest, the lack of due process protections, and most importantly, the lopsided and oppressive enforcement of misdemeanors against Black and Indigenous people, stem from the roots of a historical, racist design. The flaws are the features and they happen overwhelmingly in the pretrial phase.

Understanding the historical framework of why and how misdemeanors have been employed in the United States allows us to challenge long-standing practices and rethink how we deal with them. To truly achieve antiracist misdemeanor reform, it's not enough to chip away at the numbers. We must deliberately question why the handling of misdemeanors is focused on surveillance and intensifying punishments.

This paper explores the historical context of misdemeanor offenses and their impact on the pretrial process specifically, and then discusses relevant reforms grounded in antiracist principles. These principles require partnership between system actors and community members, and the collaborative pursuit of solutions grounded in equity, accountability and safety, rather than punishment.

As you read on, we urge you to remain conscious of your own values and beliefs with regard to misdemeanors. Ask yourself questions like: What purpose should misdemeanor arrests and convictions serve? How should people charged with misdemeanors be treated? Why does our society criminalize such a broad spectrum of behaviors, when the action is not harmful to another person—or when it reflects a greater need, such as housing, substance use treatment, or mental health care? How does the history and enforcement of misdemeanors against Black, Indigenous and other marginalized people continue to harm communities today?



In the misdemeanor system, many of the worst injustices occur pretrial without fanfare, scrutiny or data. This new paper from PJI shines a light on this important phenomenon and how we might collectively address it.

— ALEXANDRA NATAPOFF,
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In the Jim Crow era, misdemeanor charges were systematically imposed to exploit Black labor. Shown here, workers leased to Harvest Timber, Florida, 1915.

<https://www.loc.gov/item/2021689926/>

History of Misdemeanors

In Douglas Blackmon's Pulitzer Prize-winning book, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*, the author recounts how courts operated in rural southern counties before the Civil War and immediately after. Cases were uncommon, and incarceration was rarely the desired or actual outcome during the antebellum period.^a Instead, the victim often acted as the surety to the accused party, and the accused party would pay restitution to the injured party, often through labor. Cases were usually brought before a country store owner or large land owner acting as justice of

the peace. An enslaved person might be brought before a court on very rare occasions, but typically petty offenses were handled through "an informal system of plantation justice" that was permitted and encouraged by the law. (Freeman, 1974)

In the post-Civil War era, the criminal legal system changed radically. The 13th Amendment abolished slavery "except as a punishment for crime." Southern states, faced with a loss of their captive labor and an upheaval of the social order, employed this exception to use the criminal legal system as a tool for reestablishing racial subordination and exploiting Black

labor. The criminal legal system became the new domain of the law through which white economic and political control could be continued, and a wave of mass incarceration began.

Legislature passed Black Codes, laws that made it impossible for Black people "to participate in mainstream American life, in any meaningful way." (Pollard, 2012) The law made it illegal, for example, to meet or congregate except for written permission by the police; for Black men to speak loudly in the presence of white women; or to sell farm products after dark. Perhaps the most famous example was the enforcement



The intersection of interests in financial gain and social control in the misdemeanor system diminished the value of the lives of Black people, to the point that death was a very possible and acceptable consequence for a misdemeanor.

of vagrancy statutes, which criminalized the lives of Black men if they could not prove they were employed.

The particular status of misdemeanors was important. People charged with felonies were put in the control of state prison systems, but local sheriffs were in control of people charged with misdemeanors. (Baughman, 2018) Sheriffs tracked debts, profited from court fees, and received an allowance from the state for feeding and housing incarcerated people. Sheriffs created and profited from misdemeanor convict leasing systems, arresting people based on the ebb and flow of local labor demands and hiring out laborers to the highest bidder.

Civil disputes transformed into criminal acts. A white farmer who advanced money to Black tenants would no longer evict those who fell behind on payments, but swore out warrants accusing them of fraud.^b From the farmer's point of view, this achieved their economic goals. An eviction would end the financial relationship; a conviction of fraud created control over the tenant's labor power. The complainants would act as surety for the

accused, the accused would "confess judgment," and then the complainant would forfeit the bond. The accused would then work under a contract to pay back the debt. (Blackmon, 2008)

This use of the court system also profited the sheriff, who took a portion of fees associated with bringing someone to court. The entire system was so profitable that sheriffs downgraded felony charges to misdemeanors to keep the proceeds of their convict lease. (Baughman, 2018) Meanwhile, people who were brought into court, often based on trumped up accusations or meaningless descriptions of suspects, suffered from the presumption that they must be guilty of *something*, so the best hope for lessening any punishment was to "negotiate the most bearable form of forced labor." (Ibid)

The broad enforcement of misdemeanors specifically targeting Black people was not limited to the southern states. As slavery was abolished in the northern states in the first half of the 19th century, the modern penitentiary came to the fore, and its populations were

disproportionately Black. (Hinton & Cook, 2021) A close study of misdemeanor enforcement in Pittsburgh from 1892 to 1923 found that Black people were summarily convicted of misdemeanors in numbers disproportionate to their presence. (Ibid)

The intersection of interests in financial gain and social control in the misdemeanor system diminished the value of the lives of Black people, to the point that death was a very possible and acceptable consequence for a misdemeanor. People who worked in county run convict-lease systems did not receive state-level protections; a report on conditions for people in the Jefferson County, Alabama, system in the early 20th century reported a death rate of 90 men per 1,000. (Convict-Lease System, n.d.)

This imbalance between misdemeanors and the risk of death continues today; the police encounters that led to the murders of George Floyd, Freddie Gray, and Eric Garner, to name just a few, all began with suspicions of misdemeanor offenses.

a. "The point of the prosecution and conviction was not so much to mete out justice from the government, but to establish definitively that an offense had been committed and compel the guilty party and the victim to resolve their differences... Incarceration was an expensive and impractical outcome in a society where cash rarely exchanged hands." Blackmon, D. *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II*. Doubleday: New York NY. (2008), 62.

b. In some states, including Georgia, South Carolina and Ohio, citizens may initiate a criminal prosecution by taking out a warrant for another person's arrest. Welty, J. *Private Citizens Initiating Criminal Charges* (April 9, 2015). Criminal Law, a UNC School of Government Blog

Conversations around the systemic racism of the criminal punishment system often overlook the widespread harm caused by the mass coercion of misdemeanor pleas through pretrial detention.

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Misdemeanors Today

The distortion of the criminal legal system through misdemeanors created a system unable or unwilling to adjudicate cases accurately, and disconnected from any sense of what kind of resolution might be fair or just. The addition of a profit motive further warped the system by putting the interests of the individual and the system at odds with one another. These influences are still apparent today.

At the same time, there has been a huge increase in the number of activities that are criminalized. Over the past 150 years, the criminal code (including both misdemeanors and felonies) has expanded from 131 to 421 crimes in Illinois, 170 to 495 in Virginia, and 183 to 643 in the federal code. (Stuntz, 2001)

Most courtrooms handling misde-

meanors today bear a striking resemblance to the ones described by Blackmon in *Slavery By Another Name*. “Swift, uncomplicated adjudication was the key to the system. Trials were discouraged; lawyers for black misdemeanor defendants were scant.”

Today, courts around the country handle misdemeanor cases in a matter of minutes, if not seconds. (Natapoff, 2018) While legal counsel is required if there is any risk of substantial jail or prison time (*Alabama v. Shelton*, 2002), lawyers, usually public defenders, may or may not be present. When public defenders are present, their caseloads are often so high as to make active representation difficult. (Boruchowitz, Brink & Domino, 2009)

Coupled with overcharging, pretrial detention, and the “trial tax” (i.e., the threat of greater punishment for not accepting a plea bargain) the lack of access to meaningful representation leads to rushed convictions and limited constitutional protections. The whole system, according to Alexandra Natapoff, Harvard Law professor and author of *Punishment Without Crime: How Our Massive Misdemeanor System Traps the Innocent and Makes America More Unequal*, is “enormous, sloppy, and fast.” (Natapoff, 2018)

If a case is not resolved at initial appearance, a person may be released on their own recognizance, released with certain conditions such as drug testing or check-ins with a pretrial services officer,



or they may be required to post bond. If they cannot afford their bond right away, they must stay in jail until they or their families can pull together the necessary funds, or wait in jail until their case is resolved, whether through plea bargain, the dropping of charges, or agreeing to enter into a diversion or supervision program.

At this point, pleading guilty becomes a path to freedom when the offer is for time served, even though a person may have a factual or legal argument in their favor. In some cases, pleading guilty is even preferable to pretrial release on supervision, because the financial cost of being on supervision might be hundreds of dollars a month for several months at a time. (Electronic Monitoring Fees, 2022)

When a person fails to pay the mandated supervision costs, even if it's because they cannot afford it, or if they do not meet some other condition of their release, they risk being jailed for the duration of their case, even though many misdemeanors do not ultimately carry sentences of incarceration. The average time to resolve a misdemeanor case is 193 days, or just over six months. (Ostrom, Hamblin & Schauffler, 2020)

Pleading guilty has its own type of cost. Although many people are led to believe that a misdemeanor conviction is “no big deal,” the consequences are significant. For example, a background check for employment, housing or credit

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will reveal a misdemeanor conviction. A violation of misdemeanor probation can generate a new charge of a misdemeanor or felony. A probation violation for a misdemeanor disqualifies people for Temporary Assistance to Needy Families, food stamps, low-income housing, and Supplemental Security Income. (Natapoff, 2018)

Studies show that people with a misdemeanor conviction have their annual earnings reduced by an average of 16 percent. (Craigie, Grawert & Kimble, 2020) As of 2015, 25% of the workforce requires a state-issued license—which, in some states, people with a misdemeanor conviction may be ineligible for, even if the conviction is unrelated to the job requirements. (Umez & Gaines, 2021)

Fines and fees (known collectively as legal financial obligations or LFOs) also still play a significant role in misdemeanor cases. A study of the impact of court-mandated LFOs in Washington


State found that after four years, less than half of the LFOs charged in conjunction with a misdemeanor had been paid off. (Rafael, 2023) Unpaid LFOs can result in additional fees, additional jail time, loss of driving privileges and an inability to access credit.

Legal scholar Issa Kohler-Hausmann argues that all these dynamics make the enforcement of misdemeanors less focused on the adjudication of the case, and more focused on marking certain individuals and managing their lives through the criminal legal system.

In her book *Misdemeanorland*, Kohler-Hausmann writes, the most common outcomes for people charged with misdemeanors are “a set of ongoing entanglements with and obligations to various organs of the criminal justice system—from police to courts to private social service providers—and result in people cycling in and out of various legal statuses over time, often based on how they perform under these obligations.”



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In Baltimore, a form that police used to document trespassing was pre-filled with the race and gender "BLACK MALE."

—ALEXANDRA NATAPOFF

Enduring Racism

The way people are arrested, charged, prosecuted and punished for misdemeanors continues to be racist. A recent study by the Bureau of Justice Statistics found that in every jurisdiction where data was available, white people were underrepresented among misdemeanor charges filed, and Black people were overrepresented. (Rich & Scott, 2022) An analysis of seven jurisdictions by the Research Network on Misdemeanor Justice found that even amidst declining arrests for misdemeanors, Black people were arrested at the highest rates of all racial/ethnic groups at all the sites examined. (Cadoff, Chauhan & Bond, 2020) In New York City, Black people account for 50% of people charged with misdemeanors, which is more than twice their representation in the city's general population. (Butcher & Rempel, 2022)

Many of the greatest racial disparities in misdemeanor charging involve significant officer discretion, including resisting arrest, false impersonation, obstruction of governmental administration and aggressive solicitation. Jaywalking enforcement

is telling. In Los Angeles, a city with a population that is 9% Black, police issued one-third of jaywalking tickets to Black pedestrians. (Fonesca, 2021) In New York City, police issued 90% of illegal walking tickets to Black and Latinx people, even though they make up 55% of the population. (Kutzman, 2020) In Baltimore, a form that police used to document trespassing pre-filled the race and gender with "BLACK MALE." (Natapoff, 2018)

Black people are less likely to receive beneficial plea bargaining terms, such as having the principal charge dropped or reduced. A study of plea bargains in Wisconsin found that white people charged with misdemeanors were 75% more likely than Black people to plead guilty to reduced charges carrying no possible jail time, or not be convicted at all. (Subramanian et al, 2020; Berdejó, 2017)

A round-up of diversion studies by the Prison Policy Initiative (PPI) found that marginalized groups were also much less likely to benefit from prosecutor-led diversion programs. (Wang, 2023) While these studies did not specifically focus

on misdemeanor cases, the disparities in race are instructive. In one study of 40 jurisdictions, for example, Black, Latinx, Asian and Indigenous males were *always* less likely to receive pretrial diversion than white people with similar legal characteristics. (Schlesinger, 2013)

Deflection, which seeks to avoid any criminal legal involvement by offering services relating to mental health, substance use or housing in lieu of arrest, also raises questions. In one jurisdiction, Black men diagnosed with schizophrenia spectrum disorder or other psychotic disorders were more likely than any other race, gender or diagnosis to be arrested following a deflection effort. Researchers noted, "Experiences with racism, cis-sexism, heteronormativity and homophobia, ableism and stigma while engaged in previous treatment programs might also explain an individual not wishing to engage with the treatment options offered by an officer at the point of contact." (Magnuson et al, 2022)

The PPI study attributed the dispar-

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ities in access to pretrial diversion to systemic barriers and individual bias. Seemingly “neutral” criteria, such as those that favor people with little to no criminal history, are more likely to exclude Black people, who are disproportionately stopped by police, jailed and imprisoned. (Wang, 2023)

User-funded or “pay to play” programs also exclude Black and Latinx people because of the relationship between wealth, race and ethnicity in the United States. Finally, the decision to divert is often a highly subjective decision, influenced by the decision maker’s perception of who is “worthy” or “capable” of participating. A study of 38,000 felony cases found that even after controlling for criminal history, Black and Latinx people were less likely to receive diversion for a drug-related offense than their white peers. (Wang, 2023)

RACIAL DISPARITIES PERSIST DESPITE REFORMS

The harms of misdemeanor enforcement have been intensifying for more than a century, and marginalized communities have been bearing the brunt of that harm for generations. Growing recognition of the outsized harms caused by how we handle misdemeanors have spurred some changes in the system. For example, prosecutors around the country have pledged not to prosecute

low-level offenses. States like New Jersey have prioritized cite and release, in which an individual receives a citation with instructions to appear at a future date rather than arrest or detention. Large-scale litigation in Harris County, Texas, has created a framework of defaulting to pretrial release in misdemeanor cases. In many instances, however, racial disparities remain.

A concerted effort by jurisdictions participating in the Safety and Justice Challenge to reduce their jail populations have resulted in dramatic reductions in bookings and/or jail populations; however, racial disparities have persisted or even become more severe.^c (Low-Weiner & Spencer, 2022)

While a wave of prosecutors have been elected on platforms to address mass incarceration and its impact on Black people, other parts of the system still exact disproportionate harms. In his 2023 Racial Injustice Report, Philadelphia District Attorney Larry Krasner noted that from 2015 to 2022, Black and Latinx people were 3 to 5 times more likely than white people to be stopped by police. (Philadelphia District Attorney’s Office, 2023)

c. Nearly all jurisdictions saw a greater decline in bookings for white populations, resulting in greater disparities for other racial and ethnic groups. Even in jurisdictions that reported declines in bookings for Black populations, disparities worsened relative to the white population; a similar pattern followed in jurisdictions that had reductions in bookings for Latinx populations. Low-Weiner, C. and Spencer, K. Declining Populations, Rising Disparities (2022). CUNY Institute for State & Local Governance and the Safety and Justice Challenge.

d. Among complaints received, 44.6% received by Black people were complaint-warrants and 55.4% were complaint-summonses; by contrast, just over 30% of complaints received by whites people were complaint-warrants, and nearly 70% were complaint-summonses. Grant, G.A. Annual Report to the Governor and the Legislature, Criminal Justice Reform (2022). New Jersey Courts.

In 2017, New Jersey implemented a series of pretrial reforms, including emphasizing the use of complaint-summons, another term for cite and release, to people charged with minor offenses. While the reforms have resulted in a significantly lower jail population, Black people are more likely to receive a complaint-warrant, which prompts a period of incarceration when issued by a judge.^d (Grant, 2022)

In 2017, the Maryland Court of Appeals issued a new court rule encouraging the use of release on recognizance or, alternatively, the least onerous conditions. After the rule change went into effect, Black people on average paid more for bonds, and were also held without bail more often for lower-level charges. (Blumauer et al, 2018)

The persistence of these disparities tells us that more needs to be done, urgently and on a larger scale, to directly confront systemic racism in the pretrial system. These changes must be durable, that is, able to withstand outlier cases that attract headlines, and allow people to generate solutions grounded in safety, equity and justice.

A photograph of three people walking outdoors on a path lined with trees. On the left, a man with a beard and glasses, wearing a light blue button-down shirt and grey trousers, is walking and looking towards the center. In the middle, a woman with glasses and a patterned orange and black top under a tan vest is walking and looking towards the right. On the right, a woman with dark hair, wearing a dark blazer over a light green shirt and dark trousers, is walking and looking towards the camera. She is carrying a white handbag. The background is filled with lush green foliage.

The Path Forward

Reforming the misdemeanor system requires more than chipping away at numbers, or focusing on a select group of “low-level” offenses that reduce arrest or detention rates, while failing to address racial disparities. Technical solutions do not address historical harms and oppressive mindsets. Addressing the harms caused by misdemeanor arrest and prosecution requires a deeper look at why the system seeks to surveil and punish Black, Latinx, Indigenous and other marginalized people—and what systems and society might look like with an orientation toward fairness, accountability and safety.

Understanding Misdemeanors: Policies, Practices and People

As a first step, people seeking to change local culture and practice regarding misdemeanors must interrogate the current system from various perspectives and influences, such as:

- ▶ Behaviors that are criminalized through state laws and local ordinances;
- ▶ The policies of elected and appointed decision makers;
- ▶ Community narratives on crime and safety;
- ▶ Local policing practices; and
- ▶ Local court rules and cultures, both formal and informal.

Community members and system stakeholders must reflect on what they hope to achieve through the misdemeanor system—and whether or not those outcomes are being realized. This includes asking difficult and necessary questions about racism and the systemic deprivations that drive mass incarceration. People who have been impacted by the misdemeanor system, and communities that are disproportionately subject to it, need a central voice in the process.

In this context, it is important to note a growing body of research suggests that limiting criminal legal system contact is a surer path to safer communities. Following one district attorney's decision not to prosecute certain low-level cases, researchers looked at the outcomes of nearly 70,000 misdemeanor cases, and found that people who were not prosecuted were 58% less likely to commit crimes. (Agan, Doleac & Harvey, 2021) Meanwhile, another study of hundreds of thousands of misdemeanor cases in Harris County, Texas, found that people who are detained pretrial are more likely to commit future crime. (Heaton, Mayson & Stevenson, 2017) A study of over 1 million people booked into jail in Kentucky showed that pretrial detention for any length of time is associated with a higher likelihood of rearrest. (Lowenkamp, 2022)

Local changes to pretrial practice can reduce the impact misdemeanors have on local communities. Partnerships between community members and system actors, grounded in principles of safety and well-being, can create supportive systems that enhance community wellness rather than policing individual behaviors.

Local Starting Points

- Explore the role that misdemeanors play in your community. Who is getting arrested, charged and convicted, and why? Many people who are arrested repeatedly for misdemeanors are among our society's poorest, sickest and most disadvantaged. What local resources help people with homelessness, mental health or substance use? What barriers exist to accessing that care?
- Form both a quantitative and qualitative understanding of the impact of misdemeanor enforcement. What data already exists, and how can additional data be gathered?
- Analyze data on why people call 911. Who is stopped, arrested, charged or has their case/charges dropped? Look at who is detained, and what conditions of release are imposed, and why. What does the data tell you about your community's values, fears, and actions?
- Map the course of common misdemeanor cases and how this process affects community stability. What happens to someone's housing, employment, education or family when they are charged with a misdemeanor?
- Talk with key decision makers about their role in the misdemeanor system. How do they see their role intersecting with their values? Where do they feel limited or inspired to cultivate more equitable outcomes?
- Have frank conversations about the goals and values underpinning your misdemeanor system. Are misdemeanor arrests being used to respond to social frustrations or to perpetuate overpolicing? How much time do your local courts spend on misdemeanor cases compared to issues that impact community safety? Is the system consistently producing results that are not aligned with local values?

Reinforcing the Fundamentals of Pretrial Justice

Basic constitutional principles in pretrial justice require that people be considered innocent until proven guilty, and that any limitations on pretrial liberty be minimal and tailored to the individual's circumstances. Localities fulfill their constitutional obligations when they change the scope of misdemeanor response to:

- Limit pathways into the pretrial process through deflection;
- Curtail jail admissions through citation release;
- Minimize surveillance through the judicious use of release conditioning;
- Limit detention through rigorous court processes; and
- Create alternative responses to behaviors that cause community concern.

In this way, fewer people enter the system, leaving courts more time to address those facing serious charges, those who pose a specific safety threat, and (although rare) people who are likely to flee prosecution.

Equitable and just processes can co-exist with the goals of the pretrial process. A study in Hudson County, New York, found that the presence of counsel at first appearance (CAFA) produced a significant increase in release on recognizance, as well as reductions in bail amounts and pretrial detention in misdemeanor cases. (Worden, Shteyberg & Davies, 2020) Clients of The Bail Project, which provides wraparound support to people facing charges, have a 92% court appearance rate. Statistics from the Harris County, Texas misdemeanor reforms show a significant increase in the number of people released pretrial, from 60% to 87%, while rearrest rates have declined slightly. (Staudt, 2023) The question now is whether these practices were implemented in an antiracist way, with racially equitable outcomes.

Local Starting Points

- Acquire a mutual baseline understanding of the purpose and legal foundations of the pretrial system, as well as the state of current research around pretrial practices. (PJI's course on [Equitable Pretrial Justice](#) can help.)
- Review the detention process in your jurisdiction. Is it a separate hearing? Are there opportunities to present evidence? Are lawyers present?
- Look at who is in your local jails, and why, including their charges and any money bond or other pending conditions of release.
- Consider the context of who is being arrested and detained. Consider interventions at each decision point that will keep people from coming into contact with the pretrial process in the first place, such as 911 alternatives and decisions to arrest or prosecute.

This photo by Yorel Warr was featured in PJI's Liberated Voices exhibition, including works from 16 Ohio artists exploring the intersection between racial justice & pretrial justice. See more at liberatedvoices.art

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Developing Antiracist Literacy and Values

Localities must understand their own racist legacy in order to actively work to dismantle it. Antiracist work goes beyond data-driven attempts to reduce disparities; it requires introspection into one's own experiences and beliefs, and a commitment to authentic collaboration and power sharing so that solutions come from impacted community members. Importantly, reform must not involve trading one form of oppression for another, e.g. replacing detention with electronic monitoring. Without culture change and deeper insights into how racism manifests, systems and system actors—with or without intention—will continue to perpetuate inequality and oppression.

Local Starting Points

- Explore the relationship between marginalized communities and your local criminal legal system, including historical legacies of oppression. Encourage community members with lived experience to share how the prosecution of misdemeanors has impacted them and the community.
- Map the people and organizations that hold power in the pretrial space, both formal and informal. How does that power structure reinforce structural racism? What would it take to shift power to impacted communities?
- Participate in racial equity and antiracism training and self-reflection. How does progress on an equity journey change perspectives on misdemeanor practices and commitments to reform?
- As new policies and practices are being considered, assess the racial impact. Where might new forms of oppression occur? Reevaluate any recent reforms that may have reduced system involvement but intensified racial disparities. (If there's no data available, that's also an issue to reckon with.)

What is an antiracist lens?

Antiracism is an active process of identifying and eliminating racism in systems, organizations, policies, practices and attitudes. It originates from the idea that eliminating racism will not be achieved through “not being racist,” but by an intentional and deliberate approach. Bringing an antiracist lens to the pretrial legal system means looking at both the systemic and individual level with regard to racialized impact. It involves considering the historical intentions and current systems that have created and perpetuated disparities and harm.

In examining carceral systems, we must assume that inequity exists or will exist, because the criminal legal system in the United States is an outgrowth of intentional and systemic racism. Inequity and control is woven into its being. Even if all individual actors acted without bias, systemic oppression would occur because these systems follow a path of control and punishment.

While data is an important component of creating transparency and a baseline understanding of the extent of disparities, an antiracist lens requires a deeper level of inquiry. Here are some questions you might ask when reviewing a pretrial policy or practice through an antiracist lens:

- What is the racialized history of this locale, these residents, and this institution?
- Where can we anticipate inequities based on this history? What are the unintended consequences? What could go right/wrong?
- What are the comprehensive identities of the population? In what other systems (particularly ones that feed the criminal legal system) are these identities marginalized or oppressed?
- Who needs the most support?
- Who is more likely to benefit or be burdened by this policy or practice? Can this outcome be influenced by access, application, or both?
- Who was present when decisions were made? Who wasn't?
- What assumptions exist? What other approaches could reach the goals of the system?

In order to use an antiracist lens properly, the integrity of the inquiry process is critical. This process—and any resulting policies or practices—must include, recognize and value the perspectives and experiences of impacted people; share power and decision-making with communities of color; and require solutions that explicitly name and address systemic deprivations.

The long, difficult history of attempts at pretrial reforms has shown what happens when considerations of racial equity are not at the forefront. Electronic monitoring has resulted in overwhelming numbers of Black and brown people in modern-day shackles. Onerous conditions of pretrial release, and penalties for failing to adhere to all of the conditions, has helped swell the number of Americans under some form of court supervision to over 5 million people. Pretrial risk assessments have provided a scientific veneer to the pretrial process, while overstating risk, particularly among Black men.

The common thread among all of these reforms is a failure to orient solutions toward the agency, freedom and wellbeing of marginalized people and their communities. Much of what is said here can also be applied to forms of oppression and harm of other identities, including ability, gender identity, class, and sexual orientation. An antiracist lens is our opportunity to get at real, longlasting reductions of harm, redistribute power and agency in communities, and move toward solutions that keep all people safe.

Editor's Note: A previous version of this guide referenced an “Equity Lens.” Team PJI decided to use “Antiracist Lens” moving forward to accurately convey our values and goals. This process of shared leadership and iterative reflection is part of our commitment to work as an antiracist organization.

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If we believe the system we are trying to reform is founded/steeped in white supremacy and structural racism, how do we create solutions grounded in antiracism? Do we want reform, or are we talking about something different?”

— MICHAEL FINLEY,
THE W. HAYWOOD
BURNS INSTITUTE



Conclusion

There are many steps communities can take to reduce the number of people coming into contact with the criminal legal system due to misdemeanor charges. Indeed, many places have implemented interventions that reduce arrests and jail populations, or that have prioritized services over sanctions for people in crisis. However, the fact that racial disparities persist—and sometimes get worse—tells us that there are still fundamental structural flaws that need to be addressed.

The harm caused to Black people by the misdemeanor system is astonishingly consistent over time. In their study of the scope of misdemeanors in 2018, legal scholars Megan Stevenson and Sandra Mayson found that Black people have been arrested 1.7 times more than white people for misdemeanors since 1980.

We cannot and will not define success only by a percentage decrease in the jail population, or a reduction in the number of people prosecuted for cannabis possession. We need to ask bigger questions, like whether Black men can walk down the street without fear of arbitrary police stops; whether unhoused people are no longer labeled as vagrants; and whether our public safety systems make everyone feel safe.

Only in finding the courage to ask big questions will we get transformative answers. That must start with a brutally honest look at our history and its influences on how we operate today, so that we can create a clear-eyed vision for the future.

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