
Reducing Racial Disparities and Overcriminalization

Legislative Options for Reforming Misdemeanor Justice in New York

By Krystal Rodriguez, Michael Rempel, and Fred Butcher

 Center
for
Court
Innovation

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Center for Court Innovation
520 Eighth Avenue, 18th Floor
New York, New York 10018
646.386.3100 fax 212.397.0985
www.courtinnovation.org

For correspondence, please contact Michael Rempel at mrempel@jjay.cuny.edu or Krystal Rodriguez at rodriguez@courtinnovation.org.

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Foreword

New York City Mayor Eric Adams and his administration are wrestling with challenging questions in how to respond to the recent uptick in violent crimes in various communities around the city. At times like these, it is critical that public policy is informed by data and evidence that encourage public safety without criminalizing poverty and needlessly building up our jail population.

For the past 30 years, Robin Hood has invested in innovative and effective programs that enable New Yorkers to move out of poverty and realize economic opportunity. A growing part of Robin Hood's work involves identifying and reforming the policies, structures, and systems that have entrenched New Yorkers, particularly communities of color, in a multi-generational cycle of poverty and hardship. Research shows that even minor interactions with our criminal legal system can have devastating, long-term impacts. Time spent in prison can reduce a person's lifetime earning potential by half a million dollars, while misdemeanor convictions reduce lifetime earnings by 16 percent.

In Part 1 of this brief, researchers from the Center for Court Innovation add to the breadth of research which shows the significant racial disparities within our criminal legal system and the harms they create for those impacted by it. In New York City and across the country, most criminal cases are misdemeanors—often victimless crimes like possession of a controlled substance or driving with a suspended or revoked license. Black New Yorkers accounted for half of all misdemeanors prosecuted in 2019 and 2020, despite representing less than a quarter of New York City's population overall. The data show significant disparities when looking at charges determined by police discretion, as compared to those brought by civilians.

Although these prosecutions rarely result in convictions and are often dismissed or downgraded to non-criminal violations, the lengthy process it takes to arrive at that outcome exacts its own form of punishment, including arrest, detention, and long waits for typically cursory court appearances. These types of needless interactions with the legal system jeopardize New Yorkers' freedom, educational success, employment prospects, job retention, health, housing, and family stability. New York City cannot meaningfully reduce poverty or racial inequality without prioritizing measures that reduce New Yorkers' involvement with the criminal legal system and the harmful collateral consequences that stem from that involvement.

In the brief that follows, researchers from the Center for Court Innovation outline pathways for reforming how misdemeanor charges are handled by our legal system. Recommendations range from decriminalizing certain low-level, victimless misdemeanor offenses, to limiting jail use, to expunging prior records to mitigate the collateral consequences of convictions. These recommendations were developed using data and evidence from other cities which

find that prosecuting low-level misdemeanors does not advance public safety. Importantly, researchers also highlight opportunities to connect individuals with relevant social and community services that address the underlying socioeconomic or health issues related to their charges rather than processing these individuals through the traditional court system.

Together, these evidence-based recommendations offer a range of policy options that would increase fairness and promote racial equity in our criminal legal system while also protecting and prioritizing public safety. It is false to think that we need to choose one or the other.

Richard R. Buery, Jr

CEO, Robin Hood

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Reducing Racial Disparities and Overcriminalization

Legislative Options for Reforming Misdemeanor Justice in New York

This policy brief makes legislative recommendations for reforming misdemeanor justice in New York State. Drawing on data from New York City, our goal is to curtail the outsized racial disparities and counter-productive web of punishment that can result from current misdemeanor enforcement. Recommendations include: (1) decriminalizing both “victimless” misdemeanors that lack any civilian complainant and additional misdemeanors that rarely end in a conviction; (2) requiring automatic pre-filing diversion for a range of additional charges; (3) addressing racial disparities by requiring prosecutors to engage in early determinations of any relevant disciplinary history of an arresting officer; (4) significantly shrinking the legal option to sentence people to jail on a misdemeanor; and (5) enacting an expungement law to mitigate the potentially lifetime collateral consequences of a misdemeanor conviction.

A companion [research brief](#) analyzes the almost 190,000 misdemeanor cases processed in New York City’s criminal courts in 2019 and 2020, yielding data-driven findings and conclusions that formed the basis of the recommendations contained here.

I. The Challenges of Misdemeanor Justice

Misdemeanors comprise the bulk of criminal cases locally and nationally, yet their prosecution can lack a clear social purpose, while disproportionately ensnaring Black and Brown people. In New York City, misdemeanors made up 77% of criminal cases prosecuted in 2019 and 68% in 2020. In absolute terms, misdemeanors totaled almost 190,000 cases in those two years.

A companion [research brief](#) found sizable racial disparities in the city’s misdemeanor justice system,¹ echoing national trends.² Black New Yorkers accounted for 50% of those charged with misdemeanors in 2019 and 2020—more than double their representation in the 2020 general population. To a lesser degree, Hispanic/Latinx New Yorkers were also overrepresented, numbering almost 1.4 times their fraction of the city’s general population. Disparities grew larger for some charges, especially those without a civilian complainant or “victim” who experienced either physical harm or property loss.

Limited Public Safety Value of Misdemeanor Prosecution

Alongside the perpetuation of racial inequities, evidence from multiple cities indicates that the traditional prosecution of low-level misdemeanors does not advance public safety. Research in Boston found that *not* prosecuting nonviolent misdemeanors reduced re-offending by almost 60% over two years, a signal finding given the size of the effect.³ In Baltimore, after the city’s attorney stopped prosecuting low-level drug possession and prostitution cases, research found little serious recidivism over a 14-month follow-up period, nor was there any uptick in civilian 911 complaints over the same timeframe.⁴ In New York City, a pilot diversion program for 16- and 17-year-olds resulted in dramatically fewer cases either filed with the court or ending in a conviction, without adversely impacting recidivism; indeed, while the difference was within the margin of error, re-arrest rates one year out were modestly *lower* for diversion participants than the comparison group that experienced traditional prosecution (14% vs. 17%).⁵ Pre-filing diversion of drug cases also significantly reduced recidivism in Chicago,⁶ as did diversion through Seattle’s Law Enforcement Assisted Diversion (LEAD) model.⁷

Alongside growing evidence that the traditional prosecution of nonviolent misdemeanors is counter-productive to public safety, adding a jail sentence at the end appears to only add further harm. For misdemeanors and felonies alike, evidence indicates that the potential stigma, trauma, loss of housing, and reductions in employment and earnings that jail produces are *criminogenic*—leading to higher rates of recidivism than would have otherwise arisen had people been released.⁸ An average of results from 116 studies—a “meta-analysis”—found that, overall, incarceration modestly *increased* recidivism, and the effect was greater when short jail stays were involved.⁹

In New York City, studies have linked both pretrial detention and jail sentences, respectively, to *higher* post-release recidivism when compared to similarly situated individuals who were not jailed.¹⁰ In one study, sentencing New Yorkers charged with a misdemeanor to jail increased their likelihood of re-arrest by 8 percentage points over two years, net of the effects of other characteristics. Even among people classified as “high risk” for re-arrest, sentencing them to jail on a misdemeanor only further increased their future risk.¹¹

Process is Punishment Effects

A widely acknowledged function of criminal prosecution is to fairly adjudicate unlawful conduct and hold people found guilty accountable through proportionate sanctions. Yet despite consuming significant judicial, prosecutorial, and defense resources,¹² the reality today is that traditional misdemeanor prosecution routinely fails to achieve meaningful accountability or to address underlying needs that may have fueled alleged misconduct in the first place. Only a little more than one in 10 misdemeanors disposed in New York City in 2019 and 2020 (12%) ended in a criminal conviction. Another 32% pled guilty to a reduced violation or infraction, which are not technically crimes. Indeed, when cases are charged with

a violation-level offense from the outset, rather than as a part of a plea deal at the end of a case, they are often handled in civil proceedings in lieu of the criminal courts. The remaining 56% of misdemeanors were dismissed outright or granted an “adjournment in contemplation of dismissal,” which virtually always culminates in an actual dismissal over the next year.

Although the city’s misdemeanor system ostensibly yields lenient outcomes for most people, they gain this benefit only after enduring what are known as “**process is punishment**” effects: an oftentimes dehumanizing experience of arrest, booking, court date(s), and waits for hours (or all day) to see the judge, only to be sent home with no formal penalty or obligation.¹³ Churning cases in this fashion have led some to question whether the New York City Criminal Court, which primarily focuses on low-level offenses, serves a valid purpose.¹⁴

Alongside the prevailing use of process is punishment justice for most misdemeanors, the Brennan Center found that when misdemeanors *do* end in a conviction, let alone a sentence to jail, they can result in long-term socioeconomic harms. The Brennan Center analysis indicated that a misdemeanor conviction led to a 16% relative reduction in *lifetime* earnings. Aggregated nationwide, as of 2017, this translated to \$240 billion in lost earnings among people with a misdemeanor conviction on their record.¹⁵

II. Purpose and Methods of This Policy Brief

With funding from the Robin Hood Foundation, the purpose of this report is to identify statewide legislative changes that could mitigate the harms of New York’s misdemeanor justice system. To ground our conclusions, we began by reviewing the research cited above in New York and elsewhere, which suggests that most present-day misdemeanor prosecution fails to advance racial equity, public safety, or accountability and often takes the form of “process is punishment” justice in lieu of due deliberation over guilt or innocence.

We also undertook an original analysis of New York City data, focusing especially on the nature and prevalence of racial disparities. In turn, the intent of our resulting recommendations was to be responsive both to our quantitative findings (fully documented in our accompanying research brief) and to themes in the research literature.¹⁶ We note from the outset that a limitation of our approach is that we were only able to conduct an original data analysis for New York City, not for the rest of the state.

As a practical matter, we assumed policymakers would be more receptive to new legislative solutions for nonviolent misdemeanors, as against misdemeanors involving violence. For this reason, the specifics of several recommendations entail mostly leaving the status quo intact when it comes to misdemeanors involving domestic violence, sex offenses, and other violent conduct involving either physical injuries or threats.

While our recommendations are specific, they are not meant to be final; we encourage a range of system and community stakeholders to offer their perspective before any legislative changes come to pass. With this report, our task was to set the stage for such discussions by following the data where it led us.

III. Misdemeanor Prosecution in New York City

First, we review several key findings from our research brief.¹⁷ It combined New York City data from 2019 and 2020, an effort to balance the pre-pandemic year of 2019 with the upheavals occasioned by COVID-19.

- ***People charged with misdemeanors were overwhelmingly Black or Brown:*** Almost nine out of 10 people prosecuted on a misdemeanor charge were Black (50%) or Hispanic/Latinx (37%), although these groups currently comprise about 24% and 27% of the city’s general population, respectively. Fourteen percent of people facing misdemeanor charges were white, compared to 32% of the general population. All told, despite making up less of the population, Black New Yorkers faced about 60,000 more misdemeanor charges than white New Yorkers over the 2019-2020 period.
- ***Disparities were present for every charge, though their magnitude varied:*** Across the 31 most often charged misdemeanors in 2019 and 2020, Black New Yorkers made up a high of 76% charged with unlicensed vending and a low of 31% charged with driving while intoxicated—but in every instance, the percentage charged exceeded Black people’s share of the general population. Disparities were substantially smaller for Hispanic/Latinx New Yorkers, though they were at least modestly overrepresented among all but two of the 31 most common misdemeanors. (Our list of misdemeanors included those with 200 or more cases in at least one racial/ethnic subgroup in 2019 and 2020 combined; the 31 classified as “most charged” accounted for 93% of all misdemeanors arraigned in those two years.)
- ***The seven charges with the greatest disparities generally lack a civilian complainant and stem from interactions with police officers.*** Shown on the next page, all seven charges with the greatest overrepresentation of Black people are ostensibly “victimless.” Most rely on *police discretion* to determine whether the observed behavior of the accused rises to the level of a crime. For instance, **resisting arrest and obstructing government administration in the second degree** both depend on police officers’ judgment that someone impeded their ability to perform their job—by, respectively, preventing an arrest or intentionally impairing the police or some other government function. Neither of these charges requires alleged violence. **False personation** depends on an officer’s conclusion that someone intentionally misled police about their identity. **Aggressive solicitation** involves an officer’s perception that someone was employing intimidation while soliciting money. **Marijuana charges** notoriously involve racially disproportionate enforcement; the marijuana charge listed below was repealed in 2021.

- **Misdemeanors rarely ended in a criminal conviction.** Only 12% of misdemeanors arraigned in 2019 or 2020 ended in a misdemeanor conviction. Another 32% ended in a guilty plea to a reduced non-criminal offense, typically a violation. Of the 31 most common misdemeanors, 21 charge-categories ended in a criminal conviction *less than 10% of the time*—including all seven of the charges with the starkest disparities by race.¹⁸ (See the accompanying research brief for charge-by-charge results.) Of the subset that received either a misdemeanor or lesser conviction, the court sentenced only a small fraction to community service (6% of such convictions) or social services (no data available, but experience suggests this figure would be even smaller). There may also be a small fraction of cases where an individual initially pled guilty to an offense but had the plea vacated in favor of a dismissal at a later time as a result of completing services (data is similarly unavailable). Notwithstanding the net infrequency of community-based sanctions that could ostensibly achieve both formal accountability and linkages to needed services, putting people through the court process is not a requirement for achieving these outcomes; people can also participate in services through pre-arraignment diversion (further discussed below).¹⁹

New York City Misdemeanor Charges Exhibiting the Greatest Racial Disparities in 2019-2020

Charge	Offense Code	Black		Hispanic/Latinx		White		Total	
		%	n	%	n	%	n	%	N
NYC General Population		24%		27%		32%			
Total Misdemeanors		49.8%	86,612	36.7%	63,813	13.6%	23,644	100%	174,069
Unlicensed Vending	AC 20-453	76.0%	215	22.6%	64	1.4%	4	100%	283
Criminal Sale of Marijuana 4°	PL 221.40	66.9%	949	31.1%	441	2.0%	28	100%	1,418
Obstructing Govt. Administration 2°	PL 195.05	65.6%	1,153	25.9%	456	8.5%	149	100%	1,758
Resisting Arrest	PL 205.30	64.6%	1,294	28.4%	569	6.9%	139	100%	2,002
False Personation	PL 190.23	63.7%	313	31.8%	156	4.5%	22	100%	491
Criminal Poss. Forged Instrument 3°	PL 170.20	61.5%	2,192	32.4%	1,156	6.1%	219	100%	3,567
Aggressive Solicitation	AC 10-136	60.4%	437	28.1%	203	11.5%	83	100%	723

Note: Seven percent of all 2019-2020 arraignments were missing race/ethnicity and are omitted. Asian and additional racial/ethnic groups accounted for 0.1% of misdemeanors and were also excluded. Charges analyzed had at least 200 cases in one or more groups.

- **Jail was rarely used.** Among the subset of convicted misdemeanors, only 9% were then sentenced to jail, a figure that declined to 5% for “victimless” misdemeanors. In raw numbers, 6,600 misdemeanors ended in a jail sentence in 2019 or 2020, 35% for the single charge of petit larceny. Only modest racial disparities were present at sentencing, with 10% of Black, 8% of Hispanic/Latinx, and 9% of white people receiving a jail sentence from a conviction. Nonetheless, jail sentences reproduced the vast disparities that began in the front end of the system when Black people were far more likely than others to be arrested and charged. Ultimately, Black people were sentenced to jail 2.1 times more often that would have been predicted based on their representation in the city’s general population.
- **Deliberative adjudication culminating in trial verdicts was rare:** In 2019 and 2020, more than a quarter (27%) of misdemeanors were disposed at their initial arraignment. In 2019, only 0.3% of cases went to trial, a figure that dropped to 0.1% (one out of 1,000 cases) in 2020. Of the few trials that took place, almost half were before a judge, with no

jury. There were 205 misdemeanor *jury trials* in 2019 (0.15% of disposed misdemeanors) and 21 in 2020 (0.04% of disposed misdemeanors).

- **Prior criminal history drove case outcomes.** Jail sentences resulted in convictions in 14% of cases involving people with a prior criminal history, but in only 2% without a criminal history. After controlling for people’s demographic background, borough of arraignment, and the current charge, people with a prior arrest and/or conviction were considerably more likely than others to be both convicted and sentenced to jail.
- **People’s race/ethnicity impacted their accumulation of a criminal history:** Given the heightened surveillance and heavier police presence common to predominantly Black and Brown communities,²⁰ they will inevitably see disproportionate police-civilian interaction. This dictates that Black and Brown people facing misdemeanor charges will more often have had prior arrests or convictions than white people. In our data, 66% of Black, 56% of Hispanic/Latinx, and 48% of white people had a prior arrest; and 55%, 46%, and 42%, respectively, had a prior conviction.²¹

Ten Charges Accounting for the Most Jail Sentences Among New York City Misdemeanors in 2019-2020: Ordered Based on Total Number of Jail Sentences

Charge	Offense Code	Black		Hispanic/Latinx		White		Total	
		%	n	%	N	%	n	%	N
NYC General Population		24%		27%		32%			
Jail Sentences		9.9%	3,503	7.5%	2,083	8.8%	1,009	8.9%	6,595
Petit Larceny	PL 155.25	20.4%	1,215	18.5%	711	18.8%	411	19.5%	2,337
Crim. Poss. Controlled Substance 7°	PL 220.03	11.3%	384	9.6%	307	11.5%	171	10.7%	862
Assault in the 3°	PL 120.00	11.4%	524	6.2%	229	6.9%	91	8.8%	844
Operation with Susp. or Rev. License	VTL 511	2.0%	155	1.6%	112	1.1%	24	1.7%	291
Endangering the Welfare of a Child	PL 260.10	28.8%	109	37.9%	132	39.1%	43	34.0%	284
Criminal Contempt 2°	PL 215.50	16.9%	133	14.4%	92	10.1%	38	14.6%	263
Criminal Mischief 4°	PL 145.00	11.4%	106	8.2%	59	7.3%	29	9.5%	194
Possession of Burglar’s Tools	PL 140.35	21.0%	53	24.7%	47	19.4%	14	22.2%	114
Menacing in the 2 nd	PL 120.14	10.4%	57	9.8%	38	9.6%	13	10.1%	108
Theft of Services	PL 165.15	6.6%	47	8.2%	24	14.8%	28	8.3%	99
All Other Misdemeanors		6.7%	720	4.1%	332	4.5%	147	5.5%	1,199

Note: The ten charges listed here made up 82% of jail sentences for NYC misdemeanors in 2019 and 2020. Percentages represent the proportion of convictions that resulted in jail sentences. Overall, 8.9% of all misdemeanor convictions resulted in a jail sentence.

IV. Legislative Recommendations

As noted above, the legislative recommendations that follow emanate from the New York City data (as well as from related prior research). Captured in the data, we sought especially to address three types of harms:

- **Outsized Racial Disparities:** The data revealed across-the-board disparities—especially among charges lacking a civilian complainant and stemming from police interactions.

- **Failure to Dispense a Meaningful Form of Justice:** Consistent with the national literature, the NYC data underscored the predominance of a “process is punishment” approach to misdemeanor case processing, with almost nine out of 10 cases resolved without a criminal conviction and, more often than not, culminating in the dismissal of all charges.
- **Rare but Harmful Uses of Jail:** The data pointed to infrequent jail sentences that, nonetheless, impacted several thousand New Yorkers per year and tended to increase recidivism according to prior research in New York and nationwide, while risking adverse collateral consequences for the affected individuals.

Our goal is to provide policymakers with a range of options for their consideration, not a single, prescriptive strategy. Accordingly, some sets of recommendations could be pursued in tandem, while others represent alternatives where legislators could logically choose one path or another, but not both. For example, in the first section below, we propose decriminalizing several types of offenses; if legislation indeed proceeded down this path, several subsequent recommendations for changing how those same offenses are handled within the criminal court process would become moot. The narrative attempts to clarify whenever a recommendation is an *alternative* that would be made unnecessary if legislators instead pursued a recommendation described earlier.

Our recommendations are organized around five types of strategies: (A) decriminalization; (B) pre-filing diversion; (C) disclosure of police disciplinary history; (D) jail exposure; and (E) expungement.

A. Decriminalization

Often misunderstood, decriminalization does not automatically mean legalization.

Decriminalization can *either* entail full legalization *or* can involve the reclassification of certain conduct from crimes to non-criminal violations, infractions, or summonses. Under reclassification, the offenses could then proceed in civil settings such as NYC’s Office of Administrative Trials and Hearings (OATH)²² or equivalent offices elsewhere in the state.

Passed in 2016, NYC’s Criminal Justice Reform Act could serve as a model for whenever legislators wish to opt for a pathway other than outright legalization. Under this Act, several extremely low-level city charges—such as being in a park after hours and displaying an open container of alcohol—were decriminalized.²³ However, law enforcement officers could still issue summonses, and people could still be subject to fines, community service requirements, or other obligations. In short, decriminalization in this instance did not erase accountability, but it did avert the criminal court process and the potential for collateral consequences. Other decriminalization efforts need not replicate New York City’s past legislation; specifics could be a subject of future state legislative discussions or flexible county-level implementation decisions.

Ostensibly, District Attorneys could take meaningful steps on their own, as those in Manhattan and Brooklyn, among other jurisdictions, have done by implementing policies not to prosecute select low-level offenses not covered in the Criminal Justice Reform Act. D.A.-driven change can play an important role; yet leaving the matter exclusively to county D.A.s would likely intensify disparate enforcement, given that the response to people’s behavior would depend on the county where the behavior took place.

1. Consider decriminalizing victimless misdemeanors—those that lack a civilian complainant and result in no direct harm, property damage, or loss.

Victimless misdemeanors, defined as lacking a civilian complainant, rarely result in criminal convictions and, as shown above and in our companion publication,²⁴ their oftentimes discretionary enforcement is vulnerable to racial disparities. These disparities are starkest for charges that stem directly from interactions with police officers, such as resisting arrest, obstructing governmental administration, and false personation cases.

Define offenses for which there is no direct harm or loss experienced by an identified civilian complainant or victim.

The New York Penal Law does not, but legislators could, explicitly delineate offenses for which there is no identified “victim” or complainant (or one rarely exists). We have attempted to do so in the Appendix, listing and reproducing the full text for charges whose elements involve neither alleged physical harm (including threats), nor property damage or loss. Our categorization captures 12 of the 31 most-charged misdemeanors.²⁵

We caveat that our proposed list is not objective or definitive. To illustrate where others might interpret differently, the Appendix includes three current drug misdemeanors: possession of a controlled substance 7^o (PL 220.03), possession of cannabis 3^o (PL 222.30), and criminal sale of cannabis 3^o (PL 222.50). Despite the lack of *direct* harm to a specific person, one might alternatively hold that public drug possession or low-level marijuana sales could adversely impact community conditions for a range of individuals, be the subject of frequent 311 calls and, therefore, not merit inclusion on the victimless charge list. But as noted above, while some charges listed in the Appendix might be legalized altogether, legislators could easily choose to move those in the drug misdemeanor category from the criminal to the civil justice system, which would maintain the underlying conduct as prohibited, while addressing harms specific to *criminal* prosecution.

We suggest prompt but thorough engagement with a range of legal system and community stakeholders to aid legislators in finalizing a definition and list of charges.

Consider decriminalizing victimless offenses resulting in no harm.

Legislators could decriminalize all charges meeting their agreed-upon definition. For each charge, legislators would need to choose between full legalization—i.e., eliminating the offense from all laws—and reclassification to a violation or other civil matter.

If legislators agreed to decriminalize all victimless offenses, the full list would likely include such charges as criminal trespass 3^o (PL 140.10), possession of a burglar's tools (PL 140.35), criminal possession of a forged instrument 3^o (PL 170.20), prostitution (PL 230.00), patronizing prostitution 3^o (PL 230.04), unauthorized sale of transit services (PL 165.16, e.g., agreeing to sell a MetroCard swipe), and all drug misdemeanors, among others. As we emphasize above, some charges could remain offenses, but ones handled in the civil summons system instead of the criminal courts.

One could imagine state legislative action on every misdemeanor charge Manhattan District Attorney Alvin Bragg has determined not to prosecute, reflecting the D.A.'s own review of the same research literature cited above.²⁶ From there, the Appendix identifies close to twice as many offenses for thoughtful consideration by legislators and stakeholders. All told, the Appendix includes **15 current misdemeanor criminal offenses** in the victimless category.

If legislators sought a less sweeping change, they could start by decriminalizing three key state charges stemming almost exclusively from observations by or interactions with police officers that do not allege violence or harm to an officer: (1) obstructing governmental administration 2^o (PL 195.05), (2) false personation (PL 190.23), and (3) resisting arrest (PL 205.30), where resisting arrest would be decriminalized when there is no other underlying misdemeanor or felony charge in the case. These three offenses comprised the top charge in 4,647 arraignments in 2019 and 2020. People facing them were 66%, 64%, and 65% Black, respectively, compared to 50% for all misdemeanors. When prosecuted, these charges did *not* tend to be sustained, ending in a misdemeanor conviction in only 7%, 14%, and 9% of the cases, respectively.

2. Consider decriminalizing mass transit fare non-payment.

Within the theft of services statute (PL 165.15), 89% of the more than 3,300 cases charged in 2019 or 2020 involved jumping the subway turnstile or non-payment of bus or other mass transit fares.²⁷ Frequently depicted as criminalizing poverty, both Brooklyn D.A. Eric Gonzalez and then Manhattan D.A. Cy Vance committed in 2018 to decline to prosecute most such cases. Alvin Bragg, the current Manhattan D.A., has stated his office will decline to prosecute all such cases.²⁸ Citywide, instances of these cases plummeted by 90%—from 26,092 filed in 2016 to 2,631 in 2019, suggesting that justice policymakers may already have reached or be close to a consensus to decriminalize.

A state decriminalization law²⁹ would address ongoing disparate enforcement in the criminal court cases that remain—with Black New Yorkers making up 59% of those charged with the relevant third sub-section of theft of services in 2019 and 2020. Underscoring the limited import of putting these cases through the criminal justice system, just 8% ended in a criminal conviction, with another 25% pleading to a non-criminal violation.

Notably, there are 11 total sub-sections within the theft of services law. The other ten—comprising only 11% of theft of services charges in 2019 and 2020—do involve theft from an individual or organizational entity other than the mass transit system; we are not similarly proposing those sub-sections for decriminalization.

3. Consider decriminalizing additional charges that commonly result in dismissal or a lack of criminal penalties.

Additional nonviolent charges that overwhelmingly result in “process is punishment” outcomes—straight dismissals, adjournments in contemplation of dismissal (ACDs), or even reduced pleas to non-criminal violations—could be reclassified as violations or other types of civil offenses.³⁰ (In New York State, ACDs are virtually always dismissed six or 12 months later depending on the original charge.)

Besides several of the charges already flagged above on other grounds, the table below includes additional nonviolent charges legislators may wish to consider, given the reality that they rarely result in a criminal conviction in the city. Key examples include:

- **Criminal Mischief:** *Criminal mischief 4^o (PL 145.00)*, for which 6% were convicted of a crime, 21% were convicted of a reduced non-criminal violation, and 73% received a straight dismissal or ACD in 2019 or 2020. (This charge could be another example where a shift to the civil system could be contemplated in lieu of legalization.)
- **Criminal Trespass:** *Criminal trespass 2^o (PL 140.15)*, for which 11% were convicted of a crime and 19% of a violation.
- **Possession of a Forged Instrument:** *Criminal possession of a forged instrument 3^o (PL 170.20)*, for which just 7% were convicted of a crime, though another 52% were convicted of a violation (suggesting a possible solution of simply moving the offense to the non-criminal civil justice system).
- **Prostitution:** Besides *engaging in prostitution (PL 230.00)* and *patronizing prostitution 3^o (i.e., as a “John,” PL 230.04)*, for which a mere 0.1% and 2%, respectively, were convicted of a crime, the data points to a range of other prostitution charges omitted from Appendix A that rarely result in criminal convictions in New York City (shown below).
- **Driving with a Suspended or Revoked License:** This Vehicle and Traffic Law misdemeanor (VTL 511) usually *does* result in a conviction, but as shown above, the final charge is rarely the original misdemeanor; it is nearly always reduced to a non-criminal level. This law has two subsections involving misdemeanor-level charges (VTL 511.1 and 511.2), respectively representing the third and second degree.

Select Misdemeanors with Low Conviction Rates in New York City (2019-2020)

Charge	Offense Code	Total Dispositions	Criminal Conviction	Violation or other Lesser Conviction	Straight Dismissal or ACD	Total (Criminal or Non-Criminal)
All Misdemeanors		188,541	11.6%	32.1%	56.3%	43.7%
Charges from Police Interaction						
Obstructing Govt. Administration 2°	PL 195.05	1,883	6.7%	29.0%	64.3%	35.7%
False Personation	PL 190.23	545	13.6%	49.2%	37.2%	62.8%
Resisting Arrest	PL 205.30	2,219	8.5%	27.5%	64.0%	36.0%
Theft of Services						
Non-payment of mass transit fare (sub. 3)	PL 165.15(3)	3,430	8.3%	23.5%	68.2%	31.8%
All other sub-sections (1-2 & 4-11)	PL 165.15(others)	422	16.6%	21.6%	61.8%	38.2%
Other Select Charges Rarely Convicted						
Criminal Mischief 4°	PL 145.00	8,512	5.7%	21.3%	73.0%	27.0%
Criminal Trespass						
Criminal trespass 2°	PL 140.15	2,055	11.1%	18.9%	70.0%	30.0%
Criminal trespass 3°	PL 140.10	2,202	9.3%	19.5%	71.2%	28.8%
Criminal Poss. of a Forged Instrument 3°	PL 170.20	3,801	6.9%	51.9%	41.2%	58.8%
Prostitution						
Prostitution	PL 230.00	771	0.1%	6.8%	93.1%	6.9%
Prostitution in a school zone	PL 230.03	216	0.0%	0.9%	99.1%	0.9%
Patronizing a person for prostitution 3°	PL 230.04	827	2.2%	38.6%	59.2%	40.8%
Promoting prostitution 4°	PL 230.20	90	3.3%	33.4%	63.3%	36.7%
Permitting prostitution	PL 230.40	13	7.7%	23.1%	69.2%	30.8%
Operation with Susp. or Revoked License						
Operation with susp/rev. license 3°	VTL 511.1	13,307	2.9%	79.2%	17.9%	82.1%
Operation with susp/rev. license 2°	VTL 511.2	604	12.4%	79.3%	8.3%	91.7%
Operation, susp/rev. lic. (sub. missing)	VTL 511(missing)	665	13.5%	72.5%	14.0%	86.0%
Unlicensed Vending ¹	AC 20-453	376	3.5%	32.7%	63.8%	36.2%

Note: Totals and percentages are for all cases disposed with the given charge, including those for which race/ethnicity data is missing. Some cases may have been initially arraigned earlier than 2019, though they were disposed in 2019 or 2020.

¹ This charge is not subject to state law and could only be the subject of legislation at the local level within New York City.

B. Pre-Filing Diversion

Diverting a case “pre-filing” means the individual performs community service, receives social services, or participates in restorative justice programming *prior to arraignment or any other court involvement*, with program completion effectively ending the matter.³¹

In **police-led diversion**, the police officer routes the individual to services at the point of arrest, in lieu of ever forwarding the case to the prosecutor.³² In **prosecutor-led diversion**, the prosecutor receives the case, but declines to file charges with the court.³³ In both scenarios, there are no court dates or criminal consequences, unless the individual fails to complete assigned diversionary programming. (There is a third diversion subtype, in which a court case is filed from the outset, but the completion of programming then leads the charges

to be dismissed or reduced. This last subtype is *not* pre-filing. While shown to be beneficial in other ways,³⁴ it does not avert all “process is punishment” effects associated with criminal court involvement and, as such, is not the present focus.)

In essentially proposing that legislators consider mandatory pre-filing diversion for people charged with nonviolent misdemeanors other than those handled through decriminalization, we largely suggest elevating to state law a policy now pursued by Manhattan D.A. Alvin Bragg,³⁵ which in turn aligns with policies previously recommended in 2017 by the Independent Commission on NYC Criminal Justice and Incarceration Reform (a.k.a. the Lippman Commission).³⁶ Legislation could have the added advantage of making it legally necessary for local law enforcement to actually link diversion-eligible people to service providers. Currently, there is a potential for such handoffs to be thwarted when providers do not receive accurate contact information to schedule participants for services, leading people to be prosecuted even when a good-faith intent to divert existed.

4. Consider requiring pre-court diversion for any remaining victimless offenses in the penal law and for additional nonviolent misdemeanors, regardless of whether the individual has prior criminal convictions.

For any of the victimless offenses noted above that legislators opt **not** to decriminalize, the next logical option would be to require an offer of diversionary programming at the point of arrest, in lieu of traditional prosecution. In addition, given prior research that links declining to prosecute or diverting a broader array of nonviolent misdemeanors to reduced recidivism, legislators could consider mandatory pre-filing diversion for a much larger number of misdemeanors—in particular, nonviolent property charges.

The single charge of petit larceny accounted for almost 24,000 misdemeanors in 2019 and 2020 combined—representing 13% of all misdemeanors. When this is coupled with the reality that this low-level property charge is often a crime of poverty stemming variously from unmet socioeconomic or behavioral health needs, it would be a prime candidate for early diversion to community services. In its 2017 report, the Lippman Commission recommended petit larceny for systematic pre-filing diversion, based on the frequency with which it signals underlying behavioral health needs.³⁷

Research indicates that effective diversion starts with an assessment that identifies behavioral health and social service needs and leads to appropriate programming.³⁸ At the same time, the literature on the public safety risks of prosecuting low-level offenses suggests that even absent a robust assessment, diversion is still likely to outperform prosecution.

Importantly, a new pre-filing diversion statute could specify that when the individual charged either declines the opportunity for diversion or is noncompliant with diversionary obligations, the prosecution could then file charges. For this reason, we expect that some cases falling under any diversion scheme would, nonetheless, ultimately be prosecuted.

Avoid determining access to diversion based on the individual’s criminal history; establish, instead, limited exceptions based on the current offense.

Given greater accumulation of criminal histories in the Black population due to policing practices and other factors, criminal history-based restrictions on who is eligible for pre-filing diversion would entrench disparities. Thus, any diversion law should curtail the role of criminal history in defining eligibility.

Specify limited exceptions where misdemeanors would not be diverted.

To establish a cut-off for misdemeanor cases that would be ineligible for diversion, legislators could take the practical step of looking to recent legislation involving Desk Appearance Tickets (DATs). In a revision to Criminal Procedure Law §150.20(1)(b)(iv-vii) put into effect in January 2020, police officers must now issue a DAT—allowing people to be released from the police precinct and able to report on their own for a later arraignment—in misdemeanors and class E felonies that do not fall under a specified exception. The exceptions include alleged domestic violence, sex offenses, cases where the police officer has a credible belief the judge will issue an order of protection, cases where a driver’s license may be suspended or revoked, cases where the individual has an open warrant or failure to appear history, and cases where identity cannot be established.

Legislators could add a short-list of additional exceptions involving clearly violent misdemeanor charges such as assault in the third degree, menacing, obstruction of breathing, unlawful imprisonment, aggravated harassment, or child offense misdemeanors in PL §260.

For any case falling under an exception, a pre-filing diversion option might not be required by statute but could still be offered at the discretion of the prosecutor.

Prevent net widening.

Any diversion legislation should be carefully crafted to avoid “net widening,” defined as a scenario where diversion requirements are more onerous to the individual than the avoided court process and any avoided sentencing obligations. Hard caps on numbers of diversion sessions would assure fairness and equity in the construction of diversion mandates for specific individuals (e.g., no more than one session or day of programming for most first-time misdemeanors, modestly graduating upwards if there are prior convictions or the nature of the misdemeanor charge is on the more serious end of the misdemeanor spectrum).

C. Disclosure of Police Disciplinary History

5. Consider having prosecutors review an arresting officer’s history of misstatements, inaccuracies, or disciplinary reports when drafting charges prior to arraignment, and further, promptly disclose such history to the defense and judiciary.

While prosecutors should consider the presence of racial disparities as a relevant factor at every discretionary stage, this is especially true when evaluating the charges brought by law enforcement. Reflected in the data, Black and Brown people and communities tend to be disproportionately policed, creating outsized exposure to police interaction, prosecution, criminal records, and jail.

While prosecutors may not be causing disparities in law enforcement contacts, they are pivotal actors, who can either exacerbate or mitigate disparities. To mitigate them without introducing variations in policy and practice in different counties, legislators could require prosecutors to take greater steps to review cases for racially discriminatory behavior or undue up-charging by police for behavior not usually criminalized in non-Black and Brown communities.

In broad outline, a new statute could augment the existing discovery law, requiring prosecutors to take an initial step towards determining exculpatory information tied to the arresting officer before arraignment; thus, at the case review stage, prosecutors would have to identify the potential for any “Brady” disclosures regarding the officers. Then, if prosecutors opted to pursue charges, legislation could require prosecutors to make an initial disclosure of potential exculpatory or disciplinary information at arraignment. Specific legislative provisions would have to set a feasible minimum requirement for early disclosure that did not unrealistically burden prosecutors during the tight window of time between arrest and arraignment, while allowing for more complete disclosure over longer timeframes that mirror New York’s discovery law.³⁹

With details to be developed in conjunction with future stakeholder engagement, prosecutors assessing a misdemeanor case before charging might be required first to review any lists or databases maintained by their office indicating which, if any, officers involved in the case have been deemed non-credible in the past. (Such a requirement would presuppose, and perhaps legislation would also require, that all district attorney’s offices engage in best efforts to create and maintain a list tracking such officers.) For practical reasons, in the cases of “online” arrests when the arraignment has to take place 24 hours later, this pre-charging requirement could solely apply to those misdemeanor charges yielding the greatest racial disparities—or perhaps to any “victimless” misdemeanors (as defined above) that were not already removed from the criminal courts by implementing the above decriminalization or diversion recommendations. To further ease the burden on prosecutors, there could be a modest pre-arraignment requirement simply to determine and share the name of any police officer who witnessed the alleged crime or made the decision to arrest, and who is also included on the office’s “Brady list.” The law would, therefore, permit prosecutors to research details of that history and make full Brady disclosures of relevant information—or indicate a need for a hearing regarding relevance—at a later time, in conjunction with existing discovery timelines.

Additionally, legislation might require prosecutors to research full details of an officer's disciplinary history prior to arraignment in all misdemeanors involving Desk Appearance Tickets (DATs), given that the arraignment in such cases is scheduled days or weeks after the arrest, alleviating the time pressure prosecutors otherwise face with online arrests.

While bill preparation, drafting, and advocacy may raise legitimate factors to consider when implementing this reform as a matter of state law, such legislative action is worthy of state consideration, given the underlying disparities it could help to address.

D. Jail Exposure

New York's current penal law permits sentences of up to 364 days for an A misdemeanor conviction, up to 90 days for a B misdemeanor conviction, and up to 15 days for a violation conviction. There are no other restrictions on the use of jail based either on the type of misdemeanor charge or the individual's history.

In practice, our analysis indicates that jail sentences are rare, accounting for just 9% of people initially charged with a misdemeanor and subsequently convicted of any level of offense in the criminal courts. This means there is no category of cases that consistently receives jail time. Hence, for the 9% of people who experience this outcome (out of the subset that is actually convicted of an offense), the system has imposed a penalty that many others with identical charges, criminal histories, and other characteristics did not receive, contributing to a potential for substantively unequal justice.

6. Consider eliminating jail outright for victimless offenses.

The harms and cost of incarceration in these low-level cases far outweigh any harm caused by their commission. For any remaining victimless offenses still subject to traditional prosecution after considering the other options described above, additional legislation could prohibit jail completely and ensure accountability through other means.

7. Consider mandating graduated criminal penalties before permitting jail for additional misdemeanor or lesser convictions.

The prior recommendation (#6) eliminates jail when there is a conviction for victimless offenses. The current recommendation (#7) restricts the use of jail, but does not eliminate it entirely, for *all other misdemeanors*, save limited charge-based exceptions noted below. The proposed restrictions on jail at sentencing would apply regardless of prior arrests or convictions, recognizing the demonstrated racial disparities in the accumulation of priors.

To be clear, we are proposing a statewide legislative ban on jail as an initial sentence in most misdemeanor cases. Far from unrealistic, it is already the case that research on the Red Hook Community Justice Center—a neighborhood-based court that prioritizes

community services in lieu of traditional prosecution and sentencing—found jail to be the initial sentence in just 1% of misdemeanor cases; this approach led to a 10% recidivism reduction relative to traditional prosecution in the downtown Brooklyn Criminal Court.⁴⁰

Require non-jail sentences except in instances of repeated noncompliance.

In lieu of jail, intermediate sanctions or alternatives could progress from one-day/one-session community service or social service interventions; to lengthier service mandates; to restorative justice programming; or treatment for significant behavioral health or other needs.

Obviously, legislation would not wade into the fine details of prescribing programming or delineating specific numbers of intermediate sanctions that would have to precede jail. Our approach would preserve some judicial discretion, while *eliminating jail as a permissible initial sentence*, prior to any determination that noncompliance of some kind had taken place.

To make feasible a significant reduction in jail sentences, state legislation could also include funding for local counties to conduct needs assessments that could inform programming.⁴¹

This recommendation could complement ones that are put into effect related to pre-filing diversion, as described above. Standard practice in most pre-filing diversion models is for people who fail to complete assigned diversionary programming to then have their case filed with the court. For such cases, this recommendation could ensure that any resulting conviction or sentence must still lead to a non-jail outcome unless and until there is continued noncompliance with other intermediate sentencing options.

Delineate exceptions—specific offenses or circumstances where jail is permissible prior to the use of intermediate, non-jail sentences.

Legislation could establish limited circumstances when jail sentences would be permissible from the outset—before someone has been noncompliant with a non-jail sentence. Presumably, exceptions would include domestic violence, sex offenses, and other misdemeanors that contain elements of violence or threats.⁴² Articulating exceptional circumstances—and then mapping them to specific charges—could be subject to further stakeholder engagement before legislation is finalized.

8. Consider allowing more “good time” credit when jail is imposed on low-level offenses.

Currently, the state penal law dictates that people sentenced to jail can earn one-third off the time they must serve with good behavior. In New York City, for example, release at the two-thirds mark of a jail sentence is the default.

To reduce jail exposure when the conviction is for a misdemeanor, they could instead be designated to receive half the credit of the sentence with good behavior. In cases when the

maximum 364-day sentence was imposed, individuals would be eligible for release after 182 instead of 243 days, a maximum difference of 61 days that could mitigate the trauma and harms of a lengthier jail stay while maintaining accountability in the more serious types of misdemeanor cases in which jail would remain permissible even after implementing the prior recommendations.

While awaiting such legislation, local policymakers could also make greater use of Correction Law 6-A, which permits jail administrators to release people serving sentences of under one year to community-based work-release programs. Mayor de Blasio invoked this law in mid-March 2020 to secure the emergency release of almost 300 people serving city jail sentences at the height of the COVID-19 pandemic.⁴³

9. Collect data on time served in pretrial detention and time owed thereafter.

New legislation could require the Office of Court Administration to add to data already made public under the STAT Act⁴⁴ by including the number of days served in pretrial detention prior to the imposition of any jail sentence and the number of jail days still owed at the time of sentencing. Such a provision would allow stakeholders and advocates to distinguish the impact of pretrial detention from time served *after* sentence imposition. Researchers could then disaggregate any racial disparities directly caused by pretrial detention (prior to and independent of sentence itself). This provision could apply to *all* jail sentences, regardless of whether the initial or final charge was a felony, misdemeanor, or lesser offense.

Given years of research that pretrial detention leverages people to agree to plea deals involving jail time at sentencing in exchange for their pretrial incarceration coming to an end,⁴⁵ it is especially important to understand the frequency and length of pretrial detention that *precedes* jail imposition—and the number of additional days tacked on at the end.

E. Expungement

10. Enact an expungement law, limiting the negative consequences of prior convictions and making reintegration possible.

The Clean Slate Act, introduced during the 2021-2022 legislative session (S1553A/A6399), would permit the *automatic* sealing of past records after three years from the most recent misdemeanor conviction and seven years from most recent felony conviction.⁴⁶ (Time periods are tolled—i.e., the three-year clock does not tick—for any time spent incarcerated or on community supervision.) Exceptions apply to select circumstances, such as convictions for a sex offense, which often requires registering and reporting for longer periods of time.

The Clean Slate Act or similar legislation could establish criteria based on specific offenses. For example, a less ambitious approach than the Clean Slate Act might limit expungement to misdemeanor convictions only, with select exceptions tied to the offense definition (e.g., sex

offenses, domestic violence, or other types of misdemeanors involving elements of violence). An even more restrictive approach could add a further requirement that the individual take “rehabilitative” steps (such as undergoing treatment, pursuing or maintaining gainful employment, or engaging in other efforts to avoid criminal justice involvement). If the criteria are fulfilled, then the individual should be automatically be eligible for expungement. By pointing out that legislators have an array of options for making progress, however, we are by no means advocating weaker legislation than the Clean Slate Act.

Expungement legislation would ensure that eligible people could earn a clean record—correcting past policing or legal system injustices and preventing often distant or irrelevant mistakes from hindering them for a lifetime, threatening to thwart employment and other opportunities.⁴⁷

Appendix. List of Non-Complainant Offenses

[All descriptions provided below quote the actual text in the New York Penal Law.]

Criminal Trespass in the 3rd degree (NY Penal Law § 140.10) - A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property (a) which is fenced or otherwise enclosed in a manner designed to exclude intruders; or (b) where the building is utilized as an elementary or secondary school or a children's overnight camp as defined in section one thousand three hundred ninety-two of the public health law or a summer day camp as defined in section one thousand three hundred ninety-two of the public health law in violation of conspicuously posted rules or regulations governing entry and use thereof; or (c) located within a city with a population in excess of one million and where the building or real property is utilized as an elementary or secondary school in violation of a personally communicated request to leave the premises from a principal, custodian or other person in charge thereof; or (d) located outside of a city with a population in excess of one million and where the building or real property is utilized as an elementary or secondary school in violation of a personally communicated request to leave the premises from a principal, custodian, school board member or trustee, or other person in charge thereof; or (e) where the building is used as a public housing project in violation of conspicuously posted rules or regulations governing entry and use thereof; or (f) where a building is used as a public housing project in violation of a personally communicated request to leave the premises from a housing police officer or other person in charge thereof; or (g) where the property consists of a right-of-way or yard of a railroad or rapid transit railroad which has been designated and conspicuously posted as a no-trespass railroad zone.
Criminal Trespass in the third degree is a class B misdemeanor.

Possession of Burglar's Tools (NY Penal Law § 140.35) - A person is guilty of possession of burglar's tools when he possesses any tool, instrument or other article adapted, designed or commonly used for committing or facilitating offenses involving forcible entry into premises, or offenses involving larceny by a physical taking, or offenses involving theft of services as defined in subdivisions four, five and six of section 165.15, under circumstances evincing an intent to use or knowledge that some person intends to use the same in the commission of an offense of such character.
Possessions of burglar's tools is a class A misdemeanor.

Theft of Services (NY Penal Law § 165.15) - A person is guilty of theft of services when:
... 3. With intent to obtain railroad, subway, bus, air, taxi or any other public transportation service without payment of the lawful charge therefore, or to avoid payment of the lawful charge for such transportation service which has been rendered to him, he obtains or attempts to obtain such service or avoids or attempts to avoid payment therefore by force, intimidation, stealth, deception or mechanical tampering, or by unjustifiable failure or refusal to pay ...
Theft of Services is a class A misdemeanor.

[Additional sub-sections of the Theft of Services law, including subsections 1-2 and 4-11, are omitted from the list of laws reasonably lacking a complainant.]

Unauthorized Sale of Certain Transportation Services (NY Penal Law § 165.16) - 1. A person is guilty of unauthorized sale of certain transportation services when, with intent to avoid payment by another person to the metropolitan transportation authority, New York City Transit Authority or a subsidiary or affiliate of either such authority of the lawful charge for transportation services on a railroad, subway, bus or mass transit service operated by either such authority or a subsidiary or affiliate thereof, he or she, in exchange for value, sells access to such transportation services to such person,

without authorization, through the use of an unlimited farecard or doctored farecard. This section shall apply only to such sales that occur in a transportation facility, as such term is defined in subdivision two of [section 240.00](#) of this chapter, operated by such metropolitan transportation authority, New York city transit authority or subsidiary or affiliate of such authority, when public notice of the prohibitions of its section and the exemptions thereto appears on the face of the farecard or is conspicuously posted in transportation facilities operated by such metropolitan transportation authority, New York City transit authority or such subsidiary or affiliate of such authority.

2. It shall be a defense to a prosecution under this section that a person, firm, partnership, corporation, or association: **(a)** selling a farecard containing value, other than a doctored farecard, relinquished all rights and privileges thereto upon consummation of the sale; or **(b)** sold access to transportation services through the use of a farecard, other than a doctored farecard, when such sale was made at the request of the purchaser as an accommodation to the purchaser at a time when a farecard was not immediately available to the purchaser, provided, however, that the seller lawfully acquired the farecard and did not, by means of an unlawful act, contribute to the circumstances that caused the purchaser to make such request.

3. For purposes of this section: **(a)** “farecard” means a value-based, magnetically encoded card containing stored monetary value from which a specified amount of value is deducted as payment of a fare; **(b)** “unlimited farecard” means a farecard that is time-based, magnetically encoded and which permits entrance an unlimited number of times into facilities and conveyances for a specified period of time; and **(c)** “doctored farecard” means a farecard that has been bent or manipulated or altered so as to facilitate a person’s access to transportation services without paying the lawful charge.

Unauthorized sale of transportation service is a class B misdemeanor.

Criminal Possession of a Forged Instrument in the 3rd Degree (NY Penal Law § 170.20) - A person is guilty of criminal possession of a forged instrument in the third degree when, with knowledge that it is forged and with intent to defraud, deceive or injure another, he utters or possesses a forged instrument. Criminal possession of a forged instrument in the third degree is a class A misdemeanor.

False Personation (NY Penal Law § 190.23) – A person is guilty of false personation when after being informed of the consequences of such act, he or she knowingly misrepresents his or her actual name, date of birth or address to a police officer or peace officer with intent to prevent such police officer or peace officer from ascertaining such information.

False personation is a class B misdemeanor.

Obstructing Governmental Administration in the 2nd degree (Penal Law 195.05) - A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service or by means of releasing a dangerous animal under circumstances evincing the actor’s intent that the animal obstruct governmental administration. Obstructing governmental administration is a class A misdemeanor.

Promoting Prison Contraband in the 2nd degree (Penal Law 205.20) - A person is guilty of promoting prison contraband in the second degree when:

1. He knowingly and unlawfully introduces any contraband into a detention facility; or

2. Being a person confined in a detention facility, he knowingly and unlawfully makes, obtains or possesses any contraband.

Promoting prison contraband in the second degree is a class A misdemeanor.

[Distributing or obtaining simple contraband such as toiletries or other personal items that cannot be used to harm another individual would constitute charges without a civilian complainant, as contrasted with “dangerous” contraband, the latter of which is covered under PL 205.25. Legislators could determine that certain contraband that might not meet the legal definition of “dangerous,” such as drugs or marijuana, would not be the subject of decriminalization or other recommendations in this report.]

Resisting Arrest (NY Penal Law § 205.30) - A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police officer or peace officer from effecting an authorized arrest of himself or another person.

Resisting arrest is a class A misdemeanor.

Criminal Possession of a Controlled Substance in the 7th degree (NY Penal Law § 220.03) – A person is guilty of criminal possession of a controlled substance in the seventh degree when he or she knowingly and unlawfully possesses a controlled substance; provided, however, that it shall not be a violation of this section when a person possesses a residual amount of a controlled substance and that residual amount is in or on a hypodermic syringe or hypodermic needle obtained and possessed pursuant to section thirty-three hundred eighty-one of the public health law, which includes the state’s syringe exchange and pharmacy and medical provider-based expanded syringe access programs; nor shall it be a violation of this section when a person’s unlawful possession of a controlled substance is discovered as a result of seeking immediate health care as defined in paragraph (b) of subdivision three of section 220.78 of the penal law, for either another person or him or herself because such person is experiencing a drug or alcohol overdose or other life threatening medical emergency as defined in paragraph (a) of subdivision three of section 220.78 of the penal law.

Criminal possession of a controlled substance in the seventh degree is a class A misdemeanor

Criminal Possession of Marihuana in the 4th degree (NY Penal Law § 221.15) – (REPEALED) A person is guilty of criminal possession of marihuana in the fourth degree when he knowingly and unlawfully possesses one or more preparations, compounds, mixtures of substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than two ounces.

Criminal possession of marihuana in the fourth degree was a class A misdemeanor until decriminalized on March 31, 2021.

Unlawful Possession of Marijuana in the 1st degree, formerly Criminal Possession of Marihuana in the 5th degree prior to August 28, 2019 ((NY Penal Law § 221.10) – (REPEALED) A person is guilty of unlawful possession of marihuana in the first degree when he knowingly and unlawfully possesses one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or 3 substances are of an aggregate weight of more than one ounce (or 28.35 grams).

Unlawful possession of marihuana in the first degree was a class B misdemeanor until August 28, 2019 and a violation punishable only by a fine of not more than \$200 until decriminalized on March 31, 2021.

Criminal Sale of Marihuana in the 4th degree (NY Penal Law § 221.40) – (REPEALED) A person is guilty of criminal sale of marihuana in the fourth degree when he knowingly unlawfully sells marihuana except as provided in section 221.35 of this article.

Criminal sale of marihuana in the fourth degree was a class A misdemeanor until decriminalized on March 31, 2021.

Criminal Possession of Cannabis in the 3rd degree (NY Penal Law § 222.30) – (EFFECTIVE March 31, 2021) A person is guilty of criminal possession of cannabis in the third degree when he or she knowingly and unlawfully possesses:

1. cannabis and such cannabis weighs more than sixteen ounces; or
2. concentrated cannabis and such concentrated cannabis weighs more than five ounces.

Criminal possession of cannabis in the third degree is a class A misdemeanor.

Criminal Sale of Cannabis in the 3rd degree (NY Penal Law § 222.50) – (EFFECTIVE March 31, 2021) A person is guilty of criminal sale of cannabis in the third degree when:

1. he or she knowingly and unlawfully sells more than three ounces of cannabis or more than twenty-four grams of concentrated cannabis; or
2. being twenty-one years of age or older, he or she knowingly and unlawfully sells or gives, or causes to be given or sold, cannabis or concentrated cannabis to a person less than twenty-one years of age; except that in any prosecution under this subdivision, it is a defense that the defendant was less than three years older than the person under the age of twenty-one at the time of the offense. This subdivision shall not apply to designated caregivers, practitioners, employees of a registered organization or employees of a designated caregiver facility acting in compliance with article three of the cannabis law.

Criminal sale of cannabis in the third degree is a class A misdemeanor.

Promoting Gambling in the 2nd degree (NY Penal Law § 225.05) – A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity. Promoting gambling in the second degree is a class A misdemeanor.

Prostitution (NY Penal Law § 230.00) – A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee.

Prostitution is a class B Misdemeanor.

Patronizing a Person for Prostitution in the 3rd degree (NY Penal Law § 230.04) – A person is guilty of patronizing a person for prostitution in the third degree when he or she patronizes a person for prostitution. Patronizing a person for prostitution in the third degree is a class A misdemeanor.

Endnotes

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¹⁶ Butcher, F. & Rempel, M. (2021), Op Cit.

¹⁷ Butcher, F. & Rempel, M. (2021), Op Cit.

¹⁸ Given recent decriminalization conversations in New York State, it is noteworthy that all marijuana and prostitution-related misdemeanors charged at least once in 2019 or 2020 ended in a misdemeanor conviction less than 10% of the time.

¹⁹ See, e.g., Dalve, K. & Cadoff, B. (2019), Op Cit.; Collins, S. E., et al. (2017), Op Cit.; Rempel, M., et al. (2018), Op Cit.

²⁰ Epp, C. R., Maynard-Moody, S., & Haider-Markel, D. (2017). "Beyond Profiling: The Institutional Sources of Racial Disparities in Policing." *Public Administration Review* 77(2): 168-178. See also, Brunson, R. K., & Miller, J. (2006). "Young Black Men and Urban Policing in the United States." *British Journal of Criminology* 46(4): 613-640.

²¹ Technically, our dataset measures prior arrests as prior arraignments, as the data only includes arrests that the prosecutor files with the court.

²² See NYC Office of Administrative Trials and Hearings (OATH). Available at: <https://www1.nyc.gov/site/oath/index.page>.

²³ In its first six months of implementation, research demonstrated that the Criminal Justice Reform Act led 90% of city laws related to an open container of alcohol, being in a park after hours, littering, public urination, and unreasonable noise to be handled in OATH instead of the criminal courts. See Mulligan, K., Cuevas, C., Grimsley, E., & Chauhan, P. (2018). *The Criminal Justice Reform Act Evaluation: Post Implementation Changes in Summons Issuance and Outcomes*. New York, NY: Data Collaborative for Justice at John Jay College. Available at: <https://datacollaborativeforjustice.org/work/citations/the->

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²⁷ We identified all cases with a top arraignment charge of theft of services (PL 165.15) and then examined the sub-section distribution. Of 3,388 such charges, 113 were missing sub-section information, and of the remainder, 89% involved fare non-payment. Technically, the fare non-payment sub-section could apply to local mass transit fares or to planes or taxis; but reporting on this topic for years suggests that it is predominantly applied to mass transit.

²⁸ Bragg, A. L. (January 3, 2022), Op Cit.

²⁹ As proposed in S.B. 581, 2021-2022 Leg. Sess. (NY 2021). Available at: <https://www.nysenate.gov/legislation/bills/2021/S581>.

³⁰ See Butcher, F. & Rempel, M. (2021), Op Cit. for comprehensive case outcomes for each of the top 31 charges.

³¹ See, e.g., Labriola, M., Reich, W. A., Davis, R. C., Hunt, P., Rempel, M., & Cherney, S. (2018). *Prosecutor-Led Pretrial Diversion: Case Studies in Eleven Jurisdictions*. New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/publications/prosecutor-led-pretrial-diversion-case-studies-eleven-jurisdictions>.

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³⁴ See, e.g., George, C., Orwat, J., Stemen, D., Cossyleon, J., Hilvers, J., & Chong, E. (2015). *An Evaluation of the Cook County State's Attorney's Office Deferred Prosecution Program*. Chicago, IL: Loyola University, Center for Urban Research and Learning. Available at: http://www.icjia.state.il.us/assets/pdf/researchreports/cook_county_deferred_prosecution_evaluation_0715.pdf; Lowry, M. & Kerodal, A. G. (2019), Op Cit.; Rempel, M., et al. (2018), Op Cit.

³⁵ Bragg, A. L. (January 3, 2022), Op Cit.

³⁶ Lippman, J., et al. (2017), Op Cit.

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³⁸ Arora, A. & Bencsik, P. (2021), Op Cit.; and Kopak, A. M., & Frost, G. A. (2017). "Correlates of Program Success and Recidivism Among Participants in an Adult Pre-Arrest Diversion Program." *American Journal of Criminal Justice* 42(4): 727–745. Available at: <https://link.springer.com/article/10.1007%2Fs12103-017-9390-x>.

³⁹ Rodriguez, K. (2020). *Discovery Reform in New York: Major Legislative Provisions. (Updated after April 2020 Amendments.)* New York, NY: Center for Court Innovation. Available at: <https://www.courtinnovation.org/publications/discovery-NYS>.

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⁴² Any agreed-upon charge exceptions would apply whether they constitute the top charge or not. For instance, sex offenses might not always constitute the formal “top charge” on a given case, but legislation could easily stipulate that sex offense convictions could still precipitate an option to impose jail time if the offense is included in any of the charges.

⁴³ Pooler, T. & Wada, C. (2020). *The Early Release 6A Program Documented Results: Six Month Update (September 22, 2020).* New York, NY: Center for Court Innovation, New York City Criminal Justice Agency, and CASES. Available at: <https://www.courtinnovation.org/publications/Rikers-early-release>.

⁴⁴ See New York State Unified Court System. *OCA-Stat Act Report.* Available at: <https://ww2.nycourts.gov/oca-stat-act-31371>.

⁴⁵ See, e.g., Dobbie, W., Goldin, J., & Yang, C. (2016). “The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges.” NBER Working Paper Number 22511. Available at: <https://www.nber.org/papers/w22511.pdf>; Hahn, J. (2016). *An Experiment in Bail Reform: Examining the Impact of the Brooklyn Supervised Release Program.* New York, NY: Center for Court Innovation. Available at: http://www.courtinnovation.org/sites/default/files/documents/BK%20SRP_Research%20Report_FINAL.pdf; Lowenkamp, C., VanNostrand, M., & Holsinger, A. (2013a). *Investigating the Impact of Pretrial Detention on Sentencing Outcomes.* Houston, TX: The Laura and John Arnold Foundation. Available at: http://www.arnoldfoundation.org/wpcontent/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf; Rempel, M., et al. (2017), Op Cit.

⁴⁶ The New York State Senate. (2021-2022 Legislative Session). *Senate Bill S1553C.* (Assembly Bill A6399). Available at: <https://www.nysenate.gov/legislation/bills/2021/S1553>.

⁴⁷ Craigie, T., et al. (2020), Op Cit.