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SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

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Volume 97 | Number 2

Article 5

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1-1-2019

# Lots of Squeeze, Little (or No) Juice: North Carolina's Habitual Misdemeanor Larceny Statute, a Law Where Results Do Not Justify Costs

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## Recommended Citation

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**Lots of Squeeze, Little (or No) Juice: North Carolina’s Habitual Misdemeanor Larceny Statute, a Law Where Results Do Not Justify Costs\***

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INTRODUCTION

Marcus was poor, he was African American, and he seemed to suffer from mental health issues.<sup>1</sup> One day, he walked into a major

\* © 2019 William O. Walker.

1. “Marcus” is the fictitious name of a real client the author helped represent during a summer internship at a North Carolina public defender’s office. Other minor details are altered to protect the client’s identity. This account is taken from his arrest warrant and his client intake interview.

retailer and decided to put several packs of playing cards into his backpack. After placing the merchandise in his bag, Marcus headed for the door. Just as he stepped into the parking lot, however, he was stopped by one of the store's security officers. During an interview, Marcus told me that as soon as the officer confronted him about taking the cards, he admitted to the act and handed over the merchandise. Still, the security officer called the police and kept Marcus on the premises until they arrived. Marcus was arrested, jailed, unable to post any bail, and indicted on one count of habitual misdemeanor larceny. The indictment charged him with stealing fourteen packs of cards valued at \$60, though Marcus maintained that it was only four packs.

Assuming the indictment was accurate, Marcus committed the larceny of \$60 in playing cards. Normally, this crime would qualify as misdemeanor larceny, a penalty carrying a maximum, but unlikely, sentence of 120 days incarceration.<sup>2</sup> In Marcus's case, however, the act of stealing several packs of game cards was charged as a Class H felony because Marcus had four prior convictions or guilty pleas for misdemeanor larceny. Therefore, his latest offense brought him under North Carolina's habitual misdemeanor larceny statute.<sup>3</sup>

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2. N.C. GEN. STAT. §§ 14-72(a), 15A-1340.23(c)(2) (2017). A resolution to Marcus's case was put on hold as he underwent a mental health screening. Ordinarily, it would have been unlikely for Marcus's case to proceed to trial and result in the maximum punishment of a Class H felony. Instead, a plea deal to a misdemeanor would be the typical result. As will be discussed below, even at trial, judges can impose relatively light felony sentences, but they cannot remove the felon designation if the jury returns a guilty verdict on a habitual misdemeanor larceny count. *See infra* Part III.

3. *See id.* § 14-72(a)–(b)(6). The pertinent part of the statute reads as follows:

(a) Larceny of goods of the value of more than one thousand dollars (\$1,000) is a Class H felony. . . . Larceny as provided in subsection (b) of this section is a Class H felony. . . .

(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is any of the following:

...

(6) Committed after the defendant has been convicted in this State or in another jurisdiction for any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times. A conviction shall not be included in the four prior convictions required under this subdivision unless the defendant was represented by counsel or waived counsel at first appearance or otherwise prior to trial or plea. If a person is convicted of more than one offense of

In North Carolina, it is a Class H felony to commit larceny where the property in question is not more than \$1000 and the defendant has four prior larceny convictions.<sup>4</sup> Without the previous convictions, larceny of property totaling not more than \$1000 would otherwise be a Class 1 misdemeanor with a worst-case punishment of 120 days incarceration.<sup>5</sup> A Class H felony, on the other hand, carries a potential active sentence of thirty-three months and lifetime branding as a “felon.”<sup>6</sup> In Marcus’s case, because of his prior larceny convictions, stealing \$60 worth of playing cards could result in the severe Class H felony punishment.

Increasing criminal penalties for recidivists is not a novel concept. Blackstone noted it was a “heavy misdemeanor” to defend the Pope’s power within England; the second time, however, it was “high treason.”<sup>7</sup> The American colonies utilized some early forms of recidivist statutes. For example, the Massachusetts Bay Colony punished repeat burglars more seriously than first-time offenders, and the colony of Virginia punished “repeat hog stealers” more harshly than neophytes.<sup>8</sup> The use of recidivist statutes continued after the

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misdemeanor larceny in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used as a prior conviction under this subdivision; except that convictions based upon offenses which occurred in separate counties shall each count as a separate prior conviction under this subdivision.

*Id.*

4. *Id.*

5. *Id.* §§ 14-72(a), 15A-1340.23(c)(2).

6. *Id.* § 15A-1340.17(c)–(d). This sentence length assumes the highest prior conviction record and aggravating factors and is determined by using the chart included within the statute. First, enter the chart on the left at felony level H. *Id.* § 15A-1340.17(c). Next, move to the right until reaching the appropriate “Prior Record Level” column. *Id.* Within that box are three ranges: mitigated (the lowest), presumptive (middle), and aggravated (highest). *Id.* The aggravated range for a Class H felony with the highest prior record level is 20–25. *Id.* Next, take the highest number in that range, 25, and move to the “Minimum and Maximum Sentences” chart that follows the main sentencing chart. *Id.* § 15A-1340.17(d). Locate 25 in the chart labeled “For Offenses Class F Through I” and read the available range (25–39). *Id.* Without aggravating factors, but still with the highest prior record level, the maximum active sentence allowed is 20–33 months. *Id.* A presumptive range with a prior record level of III could still include a sentence of 10–21 months. *Id.*

7. 4 WILLIAM BLACKSTONE, COMMENTARIES \*87. Blackstone also states in his introduction that the worst punishments “ought never to be inflicted, but when the offender appears *incorrigible*: which may be collected . . . from a repetition of minuter offences.” *Id.* at \*12 (emphasis added).

8. Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit on Punishment*, 97 CORNELL L. REV. 45, 52–53 (2011).

Constitutional Convention, but it was not until the early twentieth century that such statutes became commonplace.<sup>9</sup>

North Carolina has habitual statutes for misdemeanor assault,<sup>10</sup> driving while intoxicated (“DWI”),<sup>11</sup> and, since 2012, misdemeanor larceny.<sup>12</sup> All of these provisions use a defendant’s prior misdemeanor record to significantly increase the level of punishment prosecutors may seek and, most devastatingly, impose felon status upon defendants. As the historical tradition suggests, North Carolina is not alone in its use of recidivist statutes.<sup>13</sup> In fact, all fifty states and the federal government have enacted some type of recidivist provision.<sup>14</sup> Notably, North Carolina’s habitual misdemeanor larceny statute uses prior larceny offenses—misdemeanor or felony—as the only factor needed to apply felony sanctions.<sup>15</sup>

Though recidivism statutes come with a historical pedigree, they also come with costs that demand an objective examination of their benefits and worth. Arguably, this demand is even greater for misdemeanors, where the harms and threats to society are less significant than for felonies.<sup>16</sup> This is especially true with misdemeanor larceny in North Carolina, where the value of the property taken is not more than \$1000.<sup>17</sup>

This Comment examines North Carolina’s habitual misdemeanor larceny statute. After comparing the costs of creating more felons and giving longer prison sentences with the supposed benefits of increased punishments for those who habitually steal \$1000 or less in property, it concludes that the benefits do not justify the costs. North Carolina’s

9. *Id.* at 53; see also Michael G. Turner et al., “*Three Strikes and You’re Out*” *Legislation: A National Assessment*, 59 FED. PROB. 16, 17 (1995) (noting that several states in the 1920s became enthusiastic about the prospect of harsh sentences targeted at habitual felons).

10. N.C. GEN. STAT. § 14-33.2 (2017).

11. *Id.* § 20-138.5.

12. *Id.* § 14-72(b)(6).

13. See, e.g., ALASKA STAT. § 11.46.130(a)(6) (LEXIS through 2018 SLA, all legis.) (“[The offense is a Class C felony if] the value of the property, adjusted for inflation as provided in AS 11.46.982, is \$250 or more but less than \$750 and, within the preceding five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction . . .”).

14. *Parke v. Raley*, 506 U.S. 20, 26–27 (1992) (noting this fact and mentioning other cases).

15. See N.C. GEN. STAT. § 14-72(a)–(b)(6) (2017); Andrew Katbi, Note, *Crossing the Line: An Analysis of Problems with Classifying Recidivist Misdemeanor Offenses as Felonies*, 31 ALASKA L. REV. 105, 123 (2014) (discussing the use of felony charges on the sole basis of prior misdemeanor offenses).

16. See Katbi, *supra* note 15, at 111–13.

17. N.C. GEN. STAT. § 14-72(a) (2017).

habitual misdemeanor larceny statute comes with a lot of squeeze: the cost to the state of prosecuting and imprisoning more felons, the societal costs of creating more felons, and the individual costs to offenders with felon status. Punishing petty larceny recidivists as felons with slightly longer prison sentences comes with a significant cost and negligibly serves the alleged benefits of the law—deterrence and prevention. In fact, some research suggests longer prison sentences may take minor criminals and turn them into violent offenders.<sup>18</sup> With the uncertain efficacy and possibly deleterious effects of longer sentences in the misdemeanor larceny context, it is important to explore other punishment options that are more cost effective and avoid the long-term consequences of felon status.

The argument proceeds in three parts. Part I examines the “squeeze” created by costs to the state, society, and the individual. Part II explores the “juice” the statute seeks to yield by examining the deterrence effect of increased punishment for misdemeanor larceny recidivists and possible criminogenic effects of longer prison sentences for minor offenders. Finally, Part III reaches the conclusion that a law with such high costs and so little yield is not worth the squeeze to get the juice, but offers possible alternative solutions to North Carolina’s habitual misdemeanor larceny statute.

#### I. THE “SQUEEZE”: THE COST OF CREATING MORE FELONS

Creating more felons comes with fiscal costs, societal costs, and individual costs. Of course, the costs of the law depend very heavily on the decisions of a key player in the North Carolina criminal justice system: the prosecutor. It is the prosecutor who decides what charges to seek and what laws to use in administering criminal justice.<sup>19</sup> Indeed, there is research showing that prosecutors are reluctant to use newer laws.<sup>20</sup> Regardless of this variable’s effect, however, the potential costs are great, and the actual costs, when the law is used, demand evaluation. The North Carolina General Assembly, however,

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18. JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED? 21 (2016), <https://www.brennancenter.org/publication/how-many-americans-are-unnecessarily-incarcerated> [<https://perma.cc/HRL6-PFQM>]; see also *infra* Section II.C.

19. See, e.g., *State v. Murphy*, 193 N.C. App. 236, 238, 666 S.E.2d 880, 883 (2008) (noting that a prosecutor “has discretion” to prosecute a defendant as a habitual felon when the defendant has three prior felony convictions).

20. See Jeff Welty, *Overcriminalization in North Carolina*, 92 N.C. L. REV. 1935, 1950 (2014) (“As it turns out, North Carolina has many new laws that are rarely used. In fact, data collected by the North Carolina Administrative Office of the Courts reveal that in North Carolina, most new crimes are effectively dead letters from the beginning.”).

seemingly failed to thoroughly conduct this evaluation when it first contemplated the habitual misdemeanor larceny statute.

*A. Legislative Genesis: Rushing to Judgment*

Though creating an entirely new group of felons is a significant choice, the legislature appears to have made the decision to do so without any meaningful consideration of habitual misdemeanor larceny's costs. Scant information exists about the initial impetus to pass a habitual misdemeanor larceny statute, but there is evidence that it came about at the urging of law enforcement officials. One news story cites Henderson, North Carolina, police officers as advocating for a recidivist larceny law similar to one that exists in Virginia.<sup>21</sup> Indeed, it was the Democratic representative for Henderson, North Carolina, who introduced and sponsored the original version of the bill in the North Carolina House of Representatives.<sup>22</sup> Police preference for such a law again dominated the Senate Judiciary II Committee meeting that discussed the proposed habitual misdemeanor larceny provision.<sup>23</sup>

The North Carolina General Assembly passed the habitual misdemeanor larceny statute during the 2011–2012 legislative session.<sup>24</sup> At the initial House committee meeting, the only expert recorded as having spoken was a representative from the North Carolina Retail Merchants Association.<sup>25</sup> One committee member, Representative Bryant, appears to have discussed “best practices in loss control,” but there are no other recorded comments challenging the efficacy of greater punishments for misdemeanor larceny recidivists.<sup>26</sup> At the end of the meeting, the committee opened the floor to public comment, but no comments were made.<sup>27</sup> A Bill

21. Beau Minnick, *Henderson Police Want Tougher Law for Habitual Thieves*, WRAL (Jan. 28, 2011), <http://www.wral.com/news/local/story/9015971/> [https://perma.cc/J427-3K2N].

22. *An Act to Create the Status Offense of Habitual Misdemeanor Larceny: Hearing on H.B. 54 Before the H. Judiciary Subcomm. B*, 2011 Gen. Assemb., 2011–2012 Sess. (N.C. Feb. 23, 2011) [hereinafter *Feb. 23 H. Judiciary Subcomm. Hearing*] (agenda and minutes of the Feb. 23, 2011, hearing).

23. *An Act to Create the Status Offense of Habitual Misdemeanor Larceny: Hearing on H.B. 54 Before the S. Judiciary II Comm.*, 2012 Gen. Assemb., 2011–2012 Sess. (N.C. May 22, 2012) [hereinafter *May 22 S. Judiciary Comm. Hearing*] (minutes and notes of the May 22, 2012, hearing).

24. Act of Dec. 1, 2012, ch. 90, § 1, 2012 N.C. Sess. Laws 737, 738 (codified at N.C. GEN. STAT. § 14-72(b)(6) (2017)).

25. See *Feb. 23 H. Judiciary Subcomm. Hearing*, *supra* note 22.

26. See *id.*

27. See *id.*

substitute was reported favorably out of the House Judiciary Subcommittee B at the next meeting on March 9, 2011;<sup>28</sup> the version reported out of committee originally required seven prior misdemeanor larceny convictions before felon status could be charged.<sup>29</sup>

Following approval in the House, the Senate Judiciary II Committee took up discussion of the proposed law.<sup>30</sup> Legislative research staff attended the hearing to answer questions posed by senators, but no opposition to the bill was recorded in the committee minutes.<sup>31</sup> Other than legislative research staff, the only other outside representative to speak was the general counsel for the North Carolina Chiefs of Police.<sup>32</sup> As he put it, “the police have wanted something like this [law] for a long time.”<sup>33</sup> Though there were representatives from both the North Carolina Advocates for Justice and the North Carolina Administrative Office of the Courts present during the hearing, the minutes recorded no comments from the general public.<sup>34</sup> With apparently limited opposition raised against the Bill, the Senate Judiciary II Committee recommended the law be amended to reduce the number of predicate offenses to four, meaning the fifth offense would bring a defendant under the statute’s habitual provision.<sup>35</sup>

Thus, a new class of felons was born with only the barest of consideration for the costs and virtually no opposition to the law. Though the legislature considered financial costs, those costs were never expressly justified on any grounds. North Carolina decided it needed the squeeze without ever considering what juice it would receive.

#### *B. Financial Costs to the State*

Reading through committee minutes, it does not appear that North Carolina’s incipient habitual misdemeanor larceny statute

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28. *An Act to Create the Status Offense of Habitual Misdemeanor Larceny: Hearing on H.B. 54 Before the H. Judiciary Subcomm. B*, 2011 Gen. Assemb., 2011–2012 Sess. (N.C. Mar. 9, 2011) [hereinafter *Mar. 11 H. Judiciary Subcomm. Hearing*] (agenda and minutes of the Mar. 9, 2011, hearing).

29. H.B. 54, 2011 Gen. Assemb., 2011 Sess. (N.C. 2011) (as proposed by H. Judiciary Subcomm. B, Feb. 9, 2011).

30. See *May 22 S. Judiciary Comm. Hearing*, *supra* note 23.

31. *Id.*

32. *Id.*

33. *Id.*; see also Minnick, *supra* note 21.

34. *May 22 S. Judiciary Comm. Hearing*, *supra* note 23.

35. *Id.*

received significant challenges on either policy or empirical grounds. There was, however, ample concern about the financial realities of such a law,<sup>36</sup> especially given the fiscal attitudes dominating the North Carolina General Assembly during the 2011–2012 session.<sup>37</sup>

Before a defendant becomes a convicted felon, who must be housed by the Department of Public Safety, he or she is a criminal defendant entitled to legal representation and a fair trial. With the passing of the new recidivist statute, the North Carolina Administrative Office of the Courts (“AOC”) predicted a significant increase in costs to the court system.<sup>38</sup> In 2011, the calendar year immediately preceding the Bill’s passage, there were 42,160 Class 1 misdemeanor larceny charges statewide.<sup>39</sup> The AOC estimated a full 24% of those cases (10,118) could have been charged under the new law as a Class H felony.<sup>40</sup> On average, the cost difference between a Class 1 misdemeanor and a Class H felony is \$336 per case, meaning the difference in the caseload could have cost the court system \$1,387,344 to \$3,399,648 in the first full year of implementation, depending on the rate the new law was used by the state.<sup>41</sup> In addition to these costs for the habitual misdemeanor larceny trial, it was also possible that defense attorneys would more vigorously contest the predicate fourth misdemeanor larceny charge.<sup>42</sup>

Of course, the cost of defending against habitual misdemeanor larceny charges was possibly tempered by the reluctance of prosecutors to charge individuals with relatively new crimes.<sup>43</sup> Accepting as true the proposition that this reluctance to charge under

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36. The statistics in this section are drawn almost entirely from the final version of the Incarceration Note produced by the North Carolina General Assembly Fiscal Research Division. See N.C. GEN. ASSEMBLY FISCAL RESEARCH DIV., LEGISLATIVE INCARCERATION FISCAL NOTE, H.B. 54, 2011 Gen. Assemb., 2011 Sess., at 5 (2011) [hereinafter INCARCERATION FISCAL NOTE], <https://www.ncleg.net/Sessions/2011/FiscalNotes/House/PDF/HIN0054v5.pdf> [https://perma.cc/WWH8-NU9L].

37. See Minnick, *supra* note 21 (“Rep. Jim Crawford, D-Granville, said he hopes to introduce a bill as early as next week, but lawmakers say funding could be an issue, especially in times of a state budget crisis.”).

38. INCARCERATION FISCAL NOTE, *supra* note 36, at 2–3 (“This estimate includes costs for those positions typically involved in felony cases – Superior Court Judge, Assistant District Attorney, Deputy Clerk, Court Reporter, and Victim Witness/Legal Assistant – as well as operating and infrastructure costs.”).

39. *Id.* at 3.

40. *Id.*

41. *Id.* at 2–3. The North Carolina Sentencing and Policy Advisory Commission noted “that there were 17,197 misdemeanor larceny convictions in FY 2010–11.” Of these, “they estimated that 4,129 (24%) have seven or more prior convictions.” *Id.* at 2.

42. *Id.* at 3.

43. See Welty, *supra* note 20, at 1950–51.

new laws renders those laws “dead letters”<sup>44</sup> from the beginning, it is still true that the threat of such a law hung over every defendant eligible to be charged. In the context of misdemeanor recidivist statutes such as this one, people charged with minor misdemeanors suddenly found themselves facing felony convictions. Such a drastic increase in the potential punishment meant defense attorneys, even if they did not end up defending against the enhanced charges outright, still needed to do extra work to ensure prosecutors did not bring those charges. This added workload includes longer, more difficult negotiations between defense attorneys and prosecutors as well as a more vigorous defense of prior misdemeanor larceny charges as a defendant approaches the requisite fifth conviction. Therefore, even though prosecutors might not have used the new law as frequently as the AOC estimated, it undoubtedly increased the cost of defending people in court.

Any law that increases the number of incarcerated persons adds to an already expensive system. The estimated cost for North Carolina to operate its prison system for 2018–2019 is around \$1.2 billion,<sup>45</sup> or almost 5% of the state’s roughly \$23 billion total operating budget.<sup>46</sup> As another representative study of New York shows, prisons are one of that state’s most burdensome expenditures.<sup>47</sup> Prison expenditures across the United States became all the more burdensome as prison populations exploded during the late twentieth century.<sup>48</sup> During the height of this prisoner boom, new prison construction cost taxpayers around the country \$6.7 billion.<sup>49</sup> One scholar concluded, “overspending on incarceration is wasteful both in terms of lost productivity of inmates and the additional

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44. *Id.*

45. See STATE OF N.C. OFFICE OF STATE BUDGET & MGMT., CURRENT OPERATIONS APPROPRIATION: PUBLIC SAFETY - ADULT CORRECTION - CANTEEN FUND 8 (2017), [https://files.nc.gov/ncosbm/documents/files/2017-19\\_Certified\\_190\\_PublicSafety.pdf](https://files.nc.gov/ncosbm/documents/files/2017-19_Certified_190_PublicSafety.pdf) [http://perma.cc/ZYK8-ZKYV]. This sum was derived by adding prison-management related costs.

46. *Highlights of Final Budget by North Carolina Legislature*, U.S. NEWS & WORLD REP. (June 21, 2017, 5:43 PM), <https://www.usnews.com/news/best-states/north-carolina/articles/2017-06-21/highlights-of-final-budget-by-north-carolina-legislature> [https://perma.cc/C3W7-FBV5 (staff-uploaded archive)].

47. David C. Leven, *Curing America’s Addiction to Prisons*, 20 FORDHAM URB. L.J. 641, 643 (1993) (“In New York, there has been a 13% annual rate of increase since 1986, absorbing much of the growth in state revenues.”).

48. See AUSTIN ET AL., *supra* note 18, at 3. The past decades saw a plateauing, if not a very minor decline, in prison populations. *Id.* at 11 fig.3.

49. Leven, *supra* note 47, at 643. The figure is from prison construction around the country in 1989. *Id.*

burden on taxpayers.”<sup>50</sup> A surprisingly high number of nonviolent and property crime offenders fill these prisons around the country.<sup>51</sup>

Incarceration follows a guilty verdict, meaning the state must house, feed, and care for the convicted. The North Carolina Department of Public Safety (“DPS”)-Prison Section was less certain about the impact the law would have on prison populations.<sup>52</sup> Using the Sentencing and Policy Advisory Commission’s estimated number of 4,129 likely new convictions, the DPS-Prison Section provided a range of estimates at 5%, 50%, and 100% conviction rates within the eligible population.<sup>53</sup> At a 5% conviction rate, the state would have to provide sixty additional prison beds; at 50%, it would have to provide 603 additional beds; and at 100%, it would have to provide 1,205 additional beds.<sup>54</sup> Assuming all these beds were in “[m]inimum [c]ustody,” the total cost increase to prison expenditures in the lowest scenario would be \$1,865,460 per year, and at the upper end, it would be \$37,464,655.<sup>55</sup>

Finally, all Class H felons who receive an active prison sentence are required to undergo nine months of post-release supervision by the Department of Safety’s Community Corrections Section (“CCS”).<sup>56</sup> Offenders may also receive probation in lieu of active sentences spent behind bars. During fiscal year 2010–2011, 62% of all

50. David S. Abrams, *The Prisoner’s Dilemma: A Cost-Benefit Approach to Incarceration*, 98 IOWA L. REV. 905, 969 (2013).

51. See, e.g., Leven, *supra* note 47, at 646 (noting that in the early 1990s, two-thirds of New York’s prison population was made up of “property, drug or other nonviolent crimes”). More recent studies support the proposition that this trend has not changed very much in the new millennium. See AUSTIN ET AL., *supra* note 18, at 9 fig.2. But see INCARCERATION FISCAL NOTE, *supra* note 36, at 5 (noting that a large percentage of Class H felons receive “intermediate sentences,” meaning they will spend no time in prison). Even though judges can give sentences other than active prison time, the costs for those supervised periods of release will not be insignificant. See INCARCERATION FISCAL NOTE, *supra* note 36, at 5.

52. See INCARCERATION FISCAL NOTE, *supra* note 36, at 4 (citing, among other reasons, an inability to determine if there were more convictions in each case from multiple counties and an inability to accurately determine how many people charged with Class 1 misdemeanors actually had more than seven prior convictions). The DPS used seven predicate convictions rather than four; the early drafts of the bill originally required seven previous misdemeanor larceny convictions. See, e.g., H.B. 54, 2011 Gen. Assemb., 2011 Sess. (N.C. 2011) (as reported by H. Judiciary Subcomm. B, Feb. 9, 2011).

53. INCARCERATION FISCAL NOTE, *supra* note 36, at 4.

54. *Id.*

55. See *Cost of Corrections*, N.C. DEP’T PUB. SAFETY, <https://www.ncdps.gov/adult-corrections/cost-of-corrections> [<http://perma.cc/DMQ6-4KS4>] (listing the cost of “[m]inimum [c]ustody” as \$31,091 per inmate per year). The totals calculated above assume all the newly required beds would be required for the full year.

56. N.C. GEN. STAT. § 15A-1368.2(a) (2017); INCARCERATION FISCAL NOTE, *supra* note 36, at 5.

Class H felony offenders received either an intermediate sentence, such as probation,<sup>57</sup> or a community punishment, such as house arrest.<sup>58</sup> These punishments must be supervised by state personnel, which comes at a cost of \$3.57 per offender, per day.<sup>59</sup> Therefore, an additional twelve months of intermediate or community punishment costs the state \$1303 per year.<sup>60</sup> At the 5% conviction rate of the eligible population, this was estimated to cost the state \$169,421 in the first year of the law's implementation; at the 100% rate, it would have cost the state \$3,395,826.<sup>61</sup>

Combining these estimated financial costs, the new law was predicted to cost North Carolina taxpayers anywhere between \$3,422,225 and \$44,260,129 during the first year of implementation, with the line item for housing more inmates over longer periods as the most expensive variable.<sup>62</sup> Though the costs represent only a fraction of the state's \$1.2 billion prison budget, they are significant enough for taxpayers to demand that the benefits justify the costs.

### C. *The Cost to Society: Perpetuating Disparate Impacts*

Beyond direct financial costs associated with trying, incarcerating, and probating felons, there are third-order effects that also create a heavy burden for society.<sup>63</sup> One of the most insidious effects of increased incarceration is the disproportionate impact the trend has on minority populations.<sup>64</sup> At the outset, it is important to note that this Comment makes no assertion, implicit or otherwise, that the passage of North Carolina's habitual misdemeanor larceny statute was racially motivated. Still, it is a new criminal statute, and its disparate impact cannot be ignored. Indeed, so immense has the disparity in the impact of criminal law become that the United States now imprisons more of its minorities than South Africa did at the height of apartheid.<sup>65</sup> In Washington, D.C., young, poor African

57. N.C. GEN. STAT. § 15A-1340.11(6) (2017).

58. *Id.* § 15A-1343(a1); INCARCERATION FISCAL NOTE, *supra* note 36, at 5.

59. INCARCERATION FISCAL NOTE, *supra* note 36, at 5.

60. *Id.*

61. *Id.*

62. *See supra* text accompanying notes 41, 55, 61.

63. *But see* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 397 n.14 (1997) (“One study concluded that the cost to society of not incarcerating a career criminal is approximately \$430,000 per year—based on annual cost of \$25,000 per year for incarceration of a convicted felon, the study surmised that society pays \$405,000 more than the cost of imprisonment.”).

64. Leven, *supra* note 47, at 644–45.

65. MICHELE ALEXANDER, *THE NEW JIM CROW* 6 (rev. ed. 2012); *see also* Jon Greenberg, *Kristof: U.S. Imprisons Blacks at Rates Higher than South Africa During*

American males have a three-in-four chance of spending some time in prison.<sup>66</sup> Nationally, one in three young African American males will spend time in prison, with the ratio as high as one in two for certain large cities.<sup>67</sup> Compare this to the fact that, nationally, only one in thirty-four adults had some form of criminal record, many without any accompanying jail time, at the end of 2011.<sup>68</sup> Despite policy initiatives and countless studies attempting to remedy the problem, “race remains stitched into each and every stage of the criminal justice system, so much so that one in three African American males and one in six Latino males, compared to one in seventeen white males, are expected to spend time in prison at some point in their lives.”<sup>69</sup> The disparate racial impacts of the criminal justice system extend beyond imprisonment. For example, one study explored the challenges that African Americans with criminal records face in applying for jobs, whether or not employers run a background check.<sup>70</sup> In another study, researchers found when two “tester” job applicants, one African American and one white, applied to jobs with identical qualifications and criminal records, the African American applicants had a significantly lower success rate.<sup>71</sup>

Race is not, however, the only basis upon which one can find disparities in the effect of felony convictions.<sup>72</sup> Any law comes with some level of discretion; when that discretion can err on the side of

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*Apartheid*, PUNDITFACT (Dec. 11, 2014, 5:10 PM), <http://www.politifact.com/punditfact/statements/2014/dec/11/nicholas-kristof/kristof-us-imprisons-blacks-rates-higher-south-afr/> [<http://perma.cc/CMW7-2WQB>] (“The U.S. Bureau of Justice Statistics reported that, in 2010, the incarceration rate for black men in all of the country’s jails and prisons was 4,347 people per 100,000. . . . The incarceration rate in South Africa in 1984 -- the midst of apartheid -- was 440 persons imprisoned per 100,000 population. Blacks comprised around 94 percent of those incarcerated.”).

66. ALEXANDER, *supra* note 65, at 6–7.

67. *Id.* at 9.

68. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 964 (2013).

69. *Id.* at 968 (footnote omitted); *see also* PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 33 (2009) (noting that going to prison has become a “rite of passage” for many young, poor people).

70. HARRY J. HOLZER, STEVEN RAPHAEL & MICHAEL A. STOLL, INST. FOR RESEARCH ON POVERTY, WILL EMPLOYERS HIRE FORMER OFFENDERS?: EMPLOYER PREFERENCES, BACKGROUND CHECKS, AND THEIR DETERMINANTS 29–31 (2002), <http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf> [<https://perma.cc/Q4GN-JTXY>].

71. *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 59, 68–70, 102 (2007).

72. *See* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 31–32 (2012) (noting that the common denominator is almost always “low-income” among the African American neighborhoods affected by the criminal justice system).

discrimination, it has traditionally discriminated along both racial and economic lines.<sup>73</sup> Crime and poverty have become so intertwined that “[p]ublic defenders and other criminal justice actors are morphing into service providers in response to the tight connection between criminalization and their clients’ poverty.”<sup>74</sup> It is for this reason that some have started to decry the “criminalization of poverty” as the state continues to “knit” poverty and criminality even closer together.<sup>75</sup>

Though no statistics exist for convictions of minorities under North Carolina’s habitual misdemeanor larceny statute, it is likely that punishment will fall most heavily on minorities and the poor, in terms of both the rate of conviction and collateral consequences. More felons in society also means more people who are either unemployable or only employable at inadequate wages.<sup>76</sup> These individuals create a strain on society that governments must ultimately address through more welfare programs—or more prison time.

#### D. *Felon Status: The Highest Cost, and Not Just to the Individual*

It is the felon status, which follows an offender off prison grounds, that comes with the greatest cost.<sup>77</sup> Some may find the

73. See T. Markus Funk, *Gun Control in America: A History of Discrimination Against the Poor and Minorities*, in GUNS IN AMERICA: A READER 390, 390 (Jan E. Dizard et al. eds., 1999) (“One undeniable aspect of the history of gun control in the United States has been the conception that the poor, especially the non-white poor, cannot be trusted with firearms.”); Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173, 2194 n.118 (2016) (discussing variations in the application of gun control laws); Thomas B. McAfee, *Setting Us Up for Disaster: The Supreme Court’s Decision in Terry v. Ohio*, 12 NEV. L.J. 609, 612, 625 (2012) (discussing *Terry*’s impact on the ability of the police to discriminate on the basis of race and poverty).

74. Norrinda Brown Hayat, *Section 8 Is the New N-Word: Policing Integration in the Age of Black Mobility*, 51 WASH. U. J.L. & POL’Y 61, 79 n.82 (2016) (quoting Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 446 (2015)).

75. *Id.*

76. Pinard, *supra* note 68, at 974; see BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 119 (2007) (“[M]en who have been incarcerated have significantly lower wages, employment rates, and annual earnings than those who have never been incarcerated.”); see also *infra* Section I.D.

77. Felon status has become such a discriminating burden that some have suggested ex-felons should become a suspect class. See Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1191–92 (2006). This is because

[e]x-offenders are not just marginalized, they are also a clear example of repeat losers in pluralist politics. Ex-offenders are often legally disenfranchised. In addition, legislatures impose collateral consequences of conviction on ex-offenders. Collateral consequences are statutes and regulations that inhibit ex-

difficulties individuals face as felons unmoving, since it was the individual who committed the felony crime in the first place. It is reasonable to argue that those convicted of committing larceny five times deserve the harsh penalties that come with felon status. But it is hard to argue that someone who commits five petty crimes is deserving of a lifelong sentence as a second-class citizen. The punishment, in this case, would not appear to fit the crime.

Felons face many well-documented disadvantages as they try to reintegrate into society. In fact, some have argued that it is the “prison label” following a former offender that does more harm than the actual time spent in prison.<sup>78</sup> Criminal records can have long-term impacts and follow offenders for years.<sup>79</sup> Offenders “constantly confront questions about their criminal records on every application—from applications for welfare or for a job at a fast food restaurant, to a volunteer position at the SPCA, and even a box on the application to join a PTA.”<sup>80</sup> Finding housing and employment become immense challenges.<sup>81</sup> The rights to vote, serve on a jury, obtain student loans, and receive welfare benefits are also precluded by a felony conviction.<sup>82</sup>

### 1. Housing Problems

Finding housing is a serious obstacle for a convicted felon. Moreover, if an offender is unable to secure housing due to a felony record, he is less likely to “move past” his interactions with the criminal justice system.<sup>83</sup> Indeed, one public housing advocate painfully observed that, when it comes to housing, “[n]o one’s in more need than ex-offenders.”<sup>84</sup> Under current federal law, public housing authorities have broad discretion to exclude felons from public

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offenders’ productive re-entry into society. These statutes testify to ex-offenders’ lack of political organization. Furthermore, both ex-offenders’ legal disenfranchisement and their de facto political powerlessness are systemic problems. Under current equal protection doctrine, however, ex-offenders receive judicial protection from government prejudice in name only.

*Id.* at 1191.

78. ALEXANDER, *supra* note 65, at 14.

79. Pinard, *supra* note 68, at 964–67.

80. Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 552 (2005) (discussing the discretion public housing authorities have in judging the criminal records of tenants).

81. Pinard, *supra* note 68, at 966–67.

82. Forman, *supra* note 72, at 28–29.

83. Pinard, *supra* note 68, at 967.

84. Carey, *supra* note 80, at 552.

housing.<sup>85</sup> North Carolina housing law allows housing authorities to summarily evict tenants for “criminal activity that threatens the health and safety of others or the peaceful enjoyment of the premises by others.”<sup>86</sup> Though landlords may evict tenants for any criminal activity, a felony conviction is far more likely to yield negative results than a misdemeanor conviction. As an example of a felony conviction’s potency, one website advising individuals seeking public housing assistance lists the following caveat in its guide to obtaining public housing: “[A] person with an arrest record, but no conviction, has a greater chance of qualifying over someone who has been convicted of their offense. Furthermore, *felons face much greater difficulty in qualifying*, especially if it was a violence or drug related sentence.”<sup>87</sup> Without access to such housing, it is very unlikely a felony offender will be able to find other affordable housing.

## 2. Employment Problems

The housing obstacle is exacerbated by the fact that felons also have a more difficult time finding employment. The effect of a criminal record on employment opportunities “cannot be overstated.”<sup>88</sup> It is widely believed that stable employment is the primary factor in preventing an offender from recidivating.<sup>89</sup> Even if an offender does find a job, research indicates that his earnings will be 15% to 25% lower than they would have otherwise been.<sup>90</sup> Felon status is often an obstacle to obtaining a professional license.<sup>91</sup> For

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85. See 42 U.S.C. § 13661(c) (2012); 24 C.F.R. § 982.553(a)(2)(ii) (2018). Public housing agencies may deny applications for public housing if the

applicant or any member of the applicant’s household is or was, during a reasonable time preceding the date when the applicant household would otherwise be selected for admission, engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises.

§ 13661(c).

86. N.C. GEN. STAT. § 157-29(e) (2017).

87. *How Do I Know if I’m Eligible for the Public Housing Program?*, AFFORDABLE HOUSING ONLINE, <https://affordablehousingonline.com/guide/public-housing/am-i-eligible#qualify> [<https://perma.cc/UR4T-34RN>] (emphasis added).

88. Pinard, *supra* note 68, at 972.

89. Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons’ Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1611 (2004).

90. Kelly Lyn Mitchell, *Reining in Collateral Consequences by Restoring the Effect of Judicial Discretion in Sentencing*, 27 HAMLINE J. PUB. L. & POL’Y 1, 5 (2005).

91. See Bruce E. May, *Real World Reflection: The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities*, 71 NOTRE DAME L. REV. 187, 190–91 (1995).

example, ex-felons face the challenge of satisfying the “good character” requirements in many jurisdictions.<sup>92</sup> Since a surprising number of jobs now require licensing, inability to obtain a license is yet another significant employment barrier.<sup>93</sup>

In 2013, the American Bar Association (“ABA”) estimated that over 38,000 statutes attach “collateral consequences” to criminal offenses; of these statutes, almost 80% of them relate to employment.<sup>94</sup> In North Carolina alone, the ABA’s website identifies 963 provisions attaching civil consequences to criminal offenses, with many of the provisions applying only to felony convictions.<sup>95</sup> As noted above, the difficulty ex-felons face in finding well-paying jobs inevitably leads many back to offending yet again.<sup>96</sup>

Felons also have a harder time clearing their criminal records under clemency and expunction provisions. Some states offer “certificate of relief” programs; these programs allow offenders to apply for a certificate of rehabilitation, issued by the state, that removes many of the statutory barriers standing between offenders and benefits and employment.<sup>97</sup> The earlier an offender can apply for a certificate, the sooner he can obtain it and, hopefully, move past his crime.<sup>98</sup> Multiple felony convictions have a far more negative impact on when an offender can apply for the certificate than do misdemeanor convictions.<sup>99</sup> These types of remedies can restore rights to vote, hold public office, and prevent the loss of licensure.<sup>100</sup> North Carolina allows ex-felons to apply for a “certificate of relief” that can alleviate many of the collateral consequences following felon status.<sup>101</sup> This certificate of relief, however, cannot be granted to a person with

92. *See id.* at 200–01.

93. Sara Sternberg Greene, *A Theory of Poverty: Legal Immobility*, WASH. U. L. REV. (forthcoming 2019) (noting that the number of occupations requiring a license has increased from 4.5% to about 29% since the 1950s).

94. Pinard, *supra* note 68, at 974.

95. Search Results from JUSTICE CENTER-THE COUNCIL OF STATE GOVERNMENTS, <https://niccc.csgjusticecenter.org/> [<https://perma.cc/C6VL-9JYU> (staff-uploaded archive)] (listing collateral consequences compiled from the General Statutes of North Carolina, the North Carolina Administrative Code, and other state sources).

96. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 259 (2004) (“The ex-offender population has tended to recidivate due in part to an unavailability of economic and social supports. The majority of ex-offenders released from prison reoffend.”).

97. Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 721–24 (2012).

98. *Id.* at 728.

99. *Id.* at 727.

100. *Id.* at 728, 755.

101. N.C. GEN. STAT. § 15A-173.2(a) (2017).

prior misdemeanor convictions in addition to the felony from which the petitioner seeks relief.<sup>102</sup>

### 3. Voting Problems

Finally, felon disenfranchisement affects the outcomes of elections, causing a significant impact to society at large and ex-felons in particular. Felon disenfranchisement changes electoral outcomes by denying a voice to many of its citizens.<sup>103</sup> Felon status, as a percentage of the voting-age population, has risen from about 1% to 2.3% as of 2002.<sup>104</sup> These are the very people who might have valid reasons to vote for politicians who favor creating fewer felons; their disenfranchisement presents the possibility of a self-building electoral cycle where criminal justice reforms are often ignored.<sup>105</sup>

In North Carolina, a person is not allowed to vote if he is “adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state . . . unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.”<sup>106</sup> By statute, all citizenship rights *should* be automatically returned immediately upon the offender’s discharge from prison, though clerical errors and voter confusion undoubtedly hinder the statute’s automatic restoration of rights.<sup>107</sup> As has been seen in recent electoral cycles, errors in transmission occur and sometimes erroneously bar past felony offenders from voting.<sup>108</sup> Recently, a North Carolina district attorney brought indictments against ex-felons who voted before clearing probation and parole.<sup>109</sup> Though it remains

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102. *Id.*

103. Christopher Uggen & Jeff Manza, *Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 792 (2002).

104. *Id.* at 782 fig.1.

105. *See id.* at 783 fig.2.

106. N.C. GEN. STAT. § 163A-841(a)(2) (2017).

107. *Id.* § 13-1(1).

108. The author volunteered during the 2016 election by answering phones for a voting rights hotline. Several of the questions fielded that day involved ex-felons being told by polling officials that they were unable to vote, even though the voters had completed their sentences and probations. As an example of the types of clerical errors that can occur, see *On Election Day, Stay Away*, ECONOMIST, Aug. 11, 2018, at 31–32.

109. Lynn Bonner, *Felony Charges of Illegal Voting Dismissed for Five NC Residents*, NEWS & OBSERVER (Raleigh Aug. 14, 2018), <https://www.newsobserver.com/news/politics-government/article216584335.html> [<https://perma.cc/VR3K-QWEP>] (noting that the charges were dismissed pursuant to Alford pleas to lesser charges). For another example of the legally fraught environment facing ex-felon voters, see Travis Fain, *Federal Subpoenas Demand ‘Tsunami’ of NC Voter Records*, WRAL (Sept. 5, 2018), <https://www.wral.com/federal-subpoenas-demand-tsunami-of-nc-voter-records/17821061/> [<https://perma.cc/GB6R-DWCX>] (stating that the U.S. Attorney for the Eastern District

to be seen if these acts were honest misunderstandings or intentional acts, what is certain is that such news will make ex-felons think twice before heading to the polls.

*E. The Sum Total of Creating More Felons*

The creation of more felons costs North Carolina a lot of money, a lot of time, and a lot of societal progress. It must be acknowledged that *any* criminal record, whether a dropped charge, misdemeanor, or felony, poses problems for offenders.<sup>110</sup> These problems are compounded by the fact that employers, landlords, and others are increasingly able to access all criminal records.<sup>111</sup> Although a misdemeanor record undoubtedly poses problems, a felony record creates still greater obstacles. More felons mean more people who cannot find work, cannot find housing, and cannot fully participate in society. Though North Carolina's habitual misdemeanor larceny statute will only add a percentage to the staggering total, any addition to such a burden should come with justifying benefits.

## II. THE "JUICE": THE VALUE THE LAW PROVIDES

One would hope that the costs associated with North Carolina's habitual misdemeanor larceny statute are justified by some proportional benefit. Opponents often raise incapacitation arguments in support of longer sentences, but these assertions carry less weight when discussing lower-level felonies with shorter prison terms. One of the primary benefits proponents claim is that such a recidivist statute deters future crimes.<sup>112</sup>

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of North Carolina sought a large quantity of voting records to investigate possible illegal voting).

110. Pinard, *supra* note 68, at 969. *See generally* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) (examining the disproportionate and unexpected high costs that come with misdemeanor convictions). Though misdemeanor convictions come with baggage, that baggage is heavier with a felony conviction. *See supra* Section I.D.

111. Pinard, *supra* note 68, at 970; *see also* Natapoff, *supra* note 110, at 1325 (“[C]riminal records are easily accessible to employers . . .”).

112. Indeed, most policymakers focus on deterrence and incapacitation when they craft criminal laws. *See* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law & Justice Policy*, 81 S. CAL. L. REV. 1, 42 (2007) (“Perhaps more importantly, the engine driving American crime politics is not people’s intuitions of justice. On the contrary, it is antidesert crime control theories—most notably deterrence and incapacitation—that have had the greatest influence in recent criminal justice reforms.”). This Comment will not explore any retributivist arguments for harsher sentencing in recidivist crimes. These arguments do exist and are valid points within the debate, but they are also difficult to quantify as factors in the balance between cost and benefit. For a brief discussion of the retributivist motivations behind longer prison sentences for recidivists in the Three Strikes context, *see* Vitiello, *supra* note 63, at 425–27

There are two categories of deterrence that are important when discussing longer prison sentences: general and specific. “General deterrence is the reduction in crime that occurs due to the expectation of punishment; longer sentences yield lower crime rates.”<sup>113</sup> Specific deterrence, on the other hand, applies only to an individual who has already been caught, punished, and released—“[s]pecific deterrence is the impact that the experience of incarceration has on subsequent offending.”<sup>114</sup> Extensive scholarship has focused on the deterrent effect of longer prison sentences. After so much research, it appears the deterrent effect of longer prison sentences is minimal at best, perhaps even nonexistent, and possibly counterproductive.<sup>115</sup>

Policies seeking to use harsher punishment to deter crime are widespread; one of the best-known, studied, and challenged examples is California’s experiment with its “Three Strikes” law. This part will begin by examining Three Strikes before taking a closer look at the possible general and specific deterrence of longer sentences in the larceny context.<sup>116</sup> After concluding that the general and specific deterrent effects are both minimal when dealing with petty property crimes, it will then examine the possible counterproductive effects of longer prison sentences, effects commonly classified as “criminogenic.” After acknowledging the “benefits” other than the

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(concluding, ultimately, that punishments under Three Strikes do not qualify as retributivist at all).

113. Abrams, *supra* note 50, at 916.

114. *Id.* at 917.

115. See Shawn D. Bushway & Emily G. Owens, *Framing Punishment: Incarceration, Recommended Sentences, & Recidivism*, 56 J.L. & ECON. 301, 305 (2013) (noting that there was no “clear consensus” on the measuring of specific deterrence despite the large body of academic work on the issue).

116. Incapacitation, the removal of a repeat offender from the community, is another possible benefit with recidivist statutes. In the context of habitual misdemeanor larceny, however, the incapacitation argument is less persuasive since the actual sentence length may vary. See Welty, *supra* note 20, at 1950 (discussing prosecutors’ reluctance to use new laws to their full extent); see also *State v. Brice*, 247 N.C. App. 766, 768, 786 S.E.2d 812, 814 (2016) (discussing the sentence for a habitual misdemeanor larceny offender that was suspended for all but seventy-five days), *rev’d on other grounds*, 370 N.C. 244, 806 S.E.2d 32 (2017). The result in *Brice* is not an uncommon outcome for those charged with habitual misdemeanor larceny. With such relatively short prison sentences, incapacitation can only bring so much benefit. See, e.g., *State v. Robinson*, No. COA17-971, 2018 N.C. App. LEXIS 272, at \*1–2 (N.C. Ct. App. Mar. 20, 2018) (discussing a 100-day active sentence). But see *State v. Glidewell*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 804 S.E.2d 228, 231 (2017) (affirming the trial court’s imposition of an eleven to twenty-three months active sentence). As *Glidewell* indicates, some trial courts are willing to impose felony-length prison sentences. Still, even if the defendant in *Glidewell* served the maximum amount of time (an unlikely prospect), the amount of time he would be removed from the community would still not be that great when compared to other, more serious felonies.

deterrence of future crime, this part ultimately concludes that longer prison sentences come with few benefits at best; at worst, more prison time actually creates more problems.

A. *Did Three Strikes Deter Crime?*

North Carolina's habitual misdemeanor larceny statute came into existence without a clear underlying basis for the increase in punishment for repeat larcenists.<sup>117</sup> Nonetheless, a possible justification for the law is a general notion that harsher punishment for repeated offenses deters crime. A famous example is California's recidivist Three Strikes law. Though politically popular when enacted, the law's effectiveness in deterring crime is questionable.<sup>118</sup> More importantly, Three Strikes was not crime-specific, and, therefore, it should have little bearing on the potential of North Carolina's habitual misdemeanor larceny statute. In short, proponents of North Carolina's statute should not look to California's Three Strikes statute for its justification.

In March of 1994, California passed its Three Strikes law,<sup>119</sup> which required "25-years-to-life sentences for offenders with two prior serious or violent felony convictions who are convicted of a third felony, whether or not the third felony is serious or violent."<sup>120</sup> In the first year under Three Strikes, California's crime rate fell 4.9%, while the national average dropped only 2%; in the first six months of the second year under Three Strikes, the crime rate in California fell even faster at 7% as compared to 1% for the rest of the nation.<sup>121</sup> At a quick glance, it appears that Three Strikes was effective in reducing crime.

Notably, however, California's crime rates had started to fall several years before the enactment of Three Strikes.<sup>122</sup> Even though California's crime rates fell faster than many other states, this decline was consistent with the broader national decline in violent crime

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117. See *supra* Section I.A.

118. See Vitiello, *supra* note 63, at 409–12.

119. Act of Mar. 7, 1994, ch. 12, § 1(a)(1), 1994 Cal. Stat. 71, 72 (codified as amended at CAL. PENAL CODE § 667 (West 2018)) (“[A]ny person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately.”).

120. Linda S. Beres & Thomas D. Griffith, *Did “Three Strikes” Cause the Recent Drop in California Crime? An Analysis of the California Attorney General’s Report*, 32 LOY. L.A. L. REV. 101, 101 (1998).

121. Vitiello, *supra* note 63, at 441.

122. Beres & Griffith, *supra* note 120, at 107.

among urban youth populations, who were not likely to be implicated by Three Strikes due to their youth and relatively limited criminal record.<sup>123</sup> Indeed, cities where this demographic was heavily concentrated dropped at rates similar to those in other large cities, which was possibly attributable to a good economy rather than harsher criminal sentencing laws.<sup>124</sup> This makes sense because California's economy started to boom around the same time as the enactment of Three Strikes, with crime rates falling and rising in unison with unemployment.<sup>125</sup> Thus, it would be misleading to rely on Three Strikes for support of North Carolina's habitual misdemeanor larceny statute without considering economic trends.

Reliance on Three Strikes becomes increasingly problematic when examining its effect on property crime rates. Like violent felonies, crime rates for theft fell by greater percentages among young groups than it did among older groups.<sup>126</sup> However, violent crime rates decreased more than nonviolent crime rates.<sup>127</sup> This statistic is particularly suspect considering Three Strikes punishment should deter crimes that originally imposed shorter prison sentences. Other studies praising Three Strikes in some contexts still found that second and third strike deterrence of larceny was not only nonexistent but larceny rates actually "significantly" increased by 17,700 cases.<sup>128</sup> One possible explanation for this increase in larceny is its attractiveness as a "nonstrikeable offense,"<sup>129</sup> but such an explanation imputes a level of rationality to criminal acts that other research does not support.<sup>130</sup> Whatever the reason, it seems clear that larceny was not deterred under California's Three Strikes law.<sup>131</sup>

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123. *Id.* at 127.

124. *Id.* at 118, 127–29. The three most violent cities were located in states with two- or three-strike laws. *See* Vitiello, *supra* note 63, at 441 n.263.

125. Beres & Griffith, *supra* note 120, at 127–29.

126. *Id.* at 121–22. Though theft did not qualify as a "strikeable" offense, the penalty for subsequent theft can still be greatly enhanced by the Three Strikes law. Still, theft rates among younger offenders also declined at rates higher than those of older offenders. *Id.*

127. *Id.* at 122.

128. Joanna M. Shepherd, *Fear of the First Strike: The Full Deterrent Effect of California's Two- and Three-Strikes Legislation*, 31 J. LEGAL STUD. 159, 159 (2002). "For rape, larceny, and auto theft, the coefficients on the two-strikes sentencing variable are positive but insignificant. The impact of three-strikes sentences on murder, robbery, and burglary is negative and significant. In contrast, the impact of three-strikes sentences on larceny is positive and significant." *Id.* at 185.

129. *Id.* at 175.

130. AUSTIN ET AL., *supra* note 18, at 36–37 (discussing whether knowledge of possible prison sentences deters crime).

131. *See* Shepherd, *supra* note 128, at 190.

California's Three Strikes is limited, at best, in predicting the effectiveness of North Carolina's habitual misdemeanor larceny statute. First, crime rates among younger persons declined at the greatest rates. Unemployment was also falling during Three Strikes' initial years, something that likely affected, if it did not in fact cause, the drop in crime rates. Second, as California's crime rates fell, so did the rest of the nation's, though at generally lower rates. Finally, Three Strikes did not appear to deter larceny and other "nonstrikeable" offenses, that is offenses that did not qualify as "strikes." This fact alone makes the study of Three Strikes admittedly limited in its assessment of longer prison sentences' effect on larceny.

*B. The Deterrent Effect of Felony Punishment on Misdemeanor and Property Crimes*

One of the most interesting findings of Three Strikes research is the law's limited effect on property crimes. As one author hypothesized, this might have been due to the appeal of crimes that did not fall within the law's purview.<sup>132</sup> But it is also possible that property crimes and misdemeanors are different, and that the deterrent effect of a longer punishment varies among different crimes.<sup>133</sup> Not all crimes are created equal; what deters a murderer may not deter a shoplifter.<sup>134</sup> Perhaps because of these differences, laws that seek to deter larceny have faced sharp skepticism from legal scholars.<sup>135</sup>

132. *See id.*

133. *See* George Antunes & A. Lee Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URB. L. 145, 153 n.23 (1973). Antunes and Hunt compared their findings to an earlier study. The research sought to examine the effect of the severity of punishment with the certainty of punishment. Antunes and Hunt found that larceny was negatively impacted (that is, there was a reduction in crime rates) by certainty of punishment, but the severity of punishment had such a slight effect as to not merit classification as "negative." Of all the variables researched, the severity of the punishment was found to be the weakest predictor of crime reduction. *Id.* at 154.

134. Xiaogang Deng, *The Deterrent Effects of Initial Sanction on First-Time Apprehended Shoplifters*, 41 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 284, 285 (1997). *But see* Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 173-74 (2004) (arguing that changes to existing criminal laws to allocate greater criminal liability have no deterrence effect whatsoever).

135. *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 431 (1974) ("[The Fourth Amendment exclusionary rule] is not supposed to 'deter' in the fashion of the law of larceny, for example, by threatening punishment to him who steals a television set—a theory of deterrence, by the way, whose lack of empirical justification makes the exclusionary rule look as solid by comparison as the law of gravity.").

North Carolina passed its habitual misdemeanor larceny statute in 2011, and the law took effect in 2012. A review of larceny rates in the state shows steady declines in the rate of larceny from 2013 to 2016.<sup>136</sup> Larceny rates had already been falling, however, at comparable rates prior to the law's passage, with the largest drop in the past ten years coming in the period between 2008 and 2009.<sup>137</sup> Moreover, the deterrent effect on the specific types of larceny covered by the misdemeanor recidivist statute is questionable. Shoplifting, a crime that often involves amounts below \$1000, is a good example. In the year immediately after passage of the law, 2012 to 2013, the rate of shoplifting actually increased, as did the value of goods stolen through shoplifting.<sup>138</sup> From 2013 to 2014, the number of shoplifting cases then decreased slightly.<sup>139</sup> Though statistics can be interpreted in many ways, one conclusion is inescapable: larceny statistics do not support a causal connection between the passage of a habitual misdemeanor larceny statute and a decrease in larceny rates.

The ineffectiveness of longer sentences for petty crimes of larceny is not a surprising result given the probable ineffectiveness of longer sentences as a solution to property crime. Since longer sentences are both expensive and, at best, mildly effective at deterring petty property crime, a cost-benefit analysis reveals that incarceration for minor property crimes is inefficient. As one researcher explained, “[s]imply put, incarcerating someone for stealing a \$1000 laptop is not very cost-effective.”<sup>140</sup> The same researcher thus recommended policy changes that use other means to attempt to punish and deter such crimes.<sup>141</sup> Such an approach comports with other findings that indicate the almost total absence of deterrent effect from tweaking criminal sanctions within existing laws.<sup>142</sup>

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136. N.C. STATE BUREAU OF INVESTIGATION, CRIME IN NORTH CAROLINA - 2016, tbl.9 (2017), <http://crimereporting.ncsbi.gov/Reports.aspx> [<https://perma.cc/5UK2-9MHZ> (staff-uploaded archive)].

137. *Id.*

138. N.C. STATE BUREAU OF INVESTIGATION, LARCENY BY STOLEN VALUE AND DISTRIBUTION: 2012–2013 (2014), <http://crimereporting.ncsbi.gov/Reports.aspx> [<https://perma.cc/C2CV-HT5Q> (staff-uploaded archive)].

139. N.C. STATE BUREAU OF INVESTIGATION, LARCENY BY STOLEN VALUE AND DISTRIBUTION: 2013–2014 (2015), <http://crimereporting.ncsbi.gov/Reports.aspx> [<https://perma.cc/9NFY-WVDY> (staff-uploaded archive)].

140. Abrams, *supra* note 50, at 966.

141. *See id.* (exploring the idea of reclassifying crimes and noting that California has already made such changes with positive initial results).

142. *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) (“The general existence of the system may well deter prohibited conduct, but the formulation of criminal law rules within the system, according to a deterrence-

Maybe what matters more in the context of misdemeanors (and probably felonies too) is the likelihood of getting caught, not the length of the punishment.<sup>143</sup> Larger police forces and misdemeanor arrests likely deter larceny not because of incapacitation, since jail time in such situations is negligible,<sup>144</sup> but because the chance of apprehension is all the more likely. Though deterrence is difficult to analyze, research does tend to promote the idea that certainty of punishment is more important than its severity.<sup>145</sup> For example, one study focused on the punishment of probationers who violated the terms of their probation.<sup>146</sup> The research compared two enforcement practices. The first was the practice of allowing the probationer to commit multiple violations before sending the offender back to prison. The second was the use of “swift and certain” punishment by probation officers, even if the punishment did not include immediate revocation of the offender’s probation.<sup>147</sup> Researchers found that the use of “swift and certain” enforcement was far more effective than “the threat of more severe punishment occurring at some point in the future.”<sup>148</sup> Similarly, another important component that is often overlooked is the length of time it takes for the punishment to arrive.<sup>149</sup> Because felony trials take longer than misdemeanor trials and include juries, delaying punishment may serve to dilute the threat of an increased sentence.

Since it is likely that certainty matters more than the severity, larceny is a crime where the use of longer sentences is even less likely to matter. Larceny’s close counterpart, shoplifting, is notoriously underreported and difficult to enforce, meaning the greater certainty

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optimizing analysis, may have a limited effect or even no effect beyond what the system’s broad deterrent warning has already achieved.”).

143. See Hope Corman & Naci Mocan, *Carrots, Sticks, and Broken Windows*, 48 J.L. & ECON. 235, 262 (2005) (noting that the size of the police force had an effect only on the crimes of motor vehicle theft and grand larceny and that misdemeanor arrests also had a deterrent effect on grand larceny); see also Deng, *supra* note 134, at 285 (noting that the embarrassing, public nature of an arrest following a shoplifter’s first time getting caught is one of the best ways to prevent shoplifting recidivism).

144. Corman & Mocan, *supra* note 143, at 251.

145. Vitiello, *supra* note 63, at 441. This argument was made 200 years ago by early criminal scholar Cesare Beccaria. CESARE BECCARIA, ON CRIMES AND PUNISHMENT 58 (Henry Paolucci trans., Bobbs-Merrill 1963) (1764).

146. AUSTIN ET AL., *supra* note 18, at 35 (examining “inmates ‘scores’ that determined parole eligibility based on risk of recidivism”).

147. *Id.* at 37.

148. *Id.*; see also Robinson & Darley, *supra* note 134, at 174.

149. Robinson & Darley, *supra* note 134, at 193 (“[F]inding that the effects of punishment in deterring behaviour drop off rapidly as the delay increases between the transgressive response and the administration of punishment for that response.”).

is that punishment will not occur.<sup>150</sup> As for larceny itself, in one Department of Justice study from the mid-1980s, larceny was listed as one of the most underreported crimes.<sup>151</sup> If a crime is not reported, it is not likely to be punished. If it is not likely to be punished, mandating a longer prison sentence for when it is occasionally punished cannot do much good.

Not only is punishment less certain because the crime is underreported, it is also less certain because offenders may not have adequate notice about the new law. The offender who consistently commits misdemeanor larceny knows his behavior is illegal, but that does not mean he knows his behavior becomes “more illegal” on the fifth conviction.<sup>152</sup> This raises another important question: how can the law deter if the offender does not know his behavior faces more severe sanction? Whatever advantages a larceny “frequent flyer” may have in the realm of notice, “the most that can be said is that many North Carolina residents may be ignorant of much of the state’s criminal law, and that a simpler and more compact criminal code might be easier to remember and to follow.”<sup>153</sup> A study by North Carolina economist David Anderson would seem to confirm this sentiment. After conducting interviews with inmates, Anderson found

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150. See Michael Corkery, *They’re Falsely Accused of Shoplifting, but Retailers Demand Penalties*, N.Y. TIMES (Aug. 17, 2018), <https://www.nytimes.com/2018/08/17/business/falsely-accused-of-shoplifting-but-retailers-demand-they-pay.html> [<https://perma.cc/77YJ-MRAN> (dark archive)] (“Shoplifting is an intractable problem for retailers, costing stores more than \$17 billion a year, according to an industry estimate.”). Though a distinct crime, acts of shoplifting can usually be charged as acts of larceny, meaning the pervasive nature of shoplifting is, in actuality, the pervasive nature of larceny. Compare N.C. GEN. STAT. § 14-72 (2017) (“Larceny of property; receiving stolen goods or possessing stolen goods.”), with *id.* § 14-72.1 (“Concealment of merchandise in mercantile establishments.”). One of the cases with which the author assisted involved an act of “larceny” from a major retailer, a crime that could have easily been punished as shoplifting.

151. CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, REPORTING CRIMES TO THE POLICE 1 (1985), <https://www.bjs.gov/content/pub/pdf/rcp.pdf> [<https://perma.cc/X9PS-MNSJ>] (noting that larceny was one of the most underreported crimes in 1983).

152. See Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1553 (2005) (“Universal ignorance of the law, however, appears to be almost complete, except for the most rudimentary notions of what is illegal and hazy ideas about what some of the details might be. In a recent study of educated citizens in four different states, the results confirmed the hypothesis that ‘people do not have a clue about what the laws of their states hold on . . . important legal issues.’”). Of course, a repeat larceny offender would have the added advantage of being warned by counsel or the judge at his previous trials that a more severe charge awaited him after his fifth offense, but there is nothing to say that a judge or lawyer *must* so inform a defendant.

153. Welty, *supra* note 20, at 1959; see also Robinson & Darley, *supra* note 134, at 176–77 (noting that even those who offend, and thus have the greatest motive to know the law, rarely understand or comprehend the law’s consequences).

“that only 22 percent knew beforehand what the punishment would be for their crime while more than half did not know or even consider the punishment.”<sup>154</sup> As Anderson’s findings suggest, even knowledge that greater penalties await future offense does not mean the offenders will change their behavior.<sup>155</sup> Ignorance of the law is, of course, no excuse, but policymakers would do well to consider this ignorance when adjusting the criminal code.

*C. The Possible Backlash of Longer Sentences*

As the previous section shows, even if severe punishment does eventually arrive, it is not clear whether it does a very good job of deterring future criminal behavior. One Justice Department study found that prison stays between six and thirty months had no effect on recidivism.<sup>156</sup> Another study found that, among juveniles, prison sentences ranging from three to thirteen months did not affect re-arrest rates.<sup>157</sup> In addition to these ambiguous results, longer prison sentences for relatively low-level offenders can actually increase criminality.

A long stay in prison for misdemeanor property crimes may have no deterrent effect on the prisoner at all. As it turns out, prison may actually increase the likelihood that larceny offenders recidivate upon release.<sup>158</sup> While short prison sentences have been shown to provide specific deterrence, prison sentences over twelve months have been shown to increase the likelihood of recidivism.<sup>159</sup> Another study found that each additional month of time up to twenty months deterred future criminal conduct, but beyond twenty months the effect was negligible.<sup>160</sup>

A possible part of the explanation for this increased recidivism rate is an inmate’s “criminal capital formation.”<sup>161</sup> This is the development of criminal skills that makes an inmate a more effective criminal upon release.<sup>162</sup> Since this potential “criminogenic” effect is more potent for lower-level offenders, the larceny offender may do

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154. AUSTIN ET AL., *supra* note 18, at 36–37.

155. *Id.* at 37 (citing a study that found minor offenders who were about to turn eighteen still planned on committing the same number and type of crimes after they became legal adults and would be subject to harsher sanctions).

156. *Id.* at 36.

157. *Id.*

158. *Id.*

159. *Id.* at 35.

160. *Id.*

161. Abrams, *supra* note 50, at 917.

162. *Id.*

more than steal when he leaves prison: he may move on to more serious, violent offenses.<sup>163</sup>

*D. Are There Benefits Other than Deterrence?*

Though this Comment weighs deterrence as a justification for longer prison sentences, there are other arguments to be made in support of North Carolina's habitual misdemeanor larceny statute. Retributivists may argue that someone who steals five times, no matter the value of the property stolen, simply deserves punishment as a felon. While this sentiment is a politically acceptable reason to implement a new law, it seems that whatever societal catharsis is gained through the law still comes at too high a cost.

Others may argue that incapacitation of recidivists also makes the law worthwhile. But an incapacitation argument falters on three grounds. First, habitual misdemeanor larceny is unlikely to result in lengthy prison sentences.<sup>164</sup> This means that those charged with habitual misdemeanor larceny will not be off the streets for very long. Second, the incapacitation still comes at a great cost to the state,<sup>165</sup> one that should be required to show results in the form of reduced property crime commensurate or greater than the amount of money spent incapacitating repeat offenders. Given the cost of implementing the law, these justifying benefits seem unlikely to materialize. Third, locking up older, more experienced offenders may not be the best use of the state's prison resources.<sup>166</sup> It is younger offenders who pose the greatest risk to society.<sup>167</sup> But it is the older, more experienced offender who gets the longer sentence, taking up jail resources long after he has "aged out of crime."<sup>168</sup> Both retributivist and incapacitation arguments in favor of North Carolina's habitual misdemeanor larceny statute are valid, but they are not persuasive when the meager benefits are weighed against the substantial costs.

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163. See AUSTIN ET AL., *supra* note 18, at 21–22 (“Once individuals enter prison, they are surrounded by other prisoners who have often committed more serious or violent offenses.”).

164. See *supra* note 6 and accompanying text.

165. See INCARCERATION FISCAL NOTE, *supra* note 36, at 5; *Cost of Corrections*, *supra* note 55.

166. See Vitiello, *supra* note 63, at 443.

167. *Id.* at 442–43.

168. *Id.* at 443; see also AUSTIN ET AL., *supra* note 18, at 35 (pointing out that as criminals get older, they become less likely to commit new offenses); Abrams, *supra* note 50, at 916 (“[C]rime is a young-man’s game.”).

*E. Little, if Any, Juice from a Felony Sentence for Misdemeanor Larceny*

Definitive studies on the effect of harsher punishment and deterrence are hard to find.<sup>169</sup> By examining the broad field of literature, however, it is possible to draw a few conclusions. First, the deterrent effect, if any, is small,<sup>170</sup> especially as it relates to misdemeanor larceny. Second, exogenous factors other than sentence length play an important role in crime rates and recidivism,<sup>171</sup> though that role is not perfectly understood. Third, it is very possible that longer sentences may increase both the likelihood of recidivism and the violence of the subsequent acts committed by misdemeanor larceny offenders.<sup>172</sup> Finally, any additional “benefits” beyond deterrence are also unlikely to justify the cost of creating more felons from those accused of misdemeanor property crimes.<sup>173</sup> There may be some juice, but there is not much. Quite simply, any benefit is likely negated by the criminogenic effects of longer sentences.

### III. ALTERNATIVES TO FELON STATUS FOR MISDEMEANOR LARCENY OFFENDERS

Given the dim prospects for deterrence of misdemeanor larceny through the use of felony convictions and sentences, it is worth exploring other options that could both prevent future offenses and make victims of larceny whole. Not only are these options potentially more effective but they are also cheaper in terms of dollars and societal costs.

One positive aspect of North Carolina’s habitual misdemeanor larceny statute is that judges have some discretion in determining the offender’s sentence, though there may still be mandatory minimums

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169. Vitiello, *supra* note 63, at 441 (“Deterrence arguments are notoriously difficult to assess, in large part because society is not set up to allow carefully controlled experiments.”).

170. The most sanguine assessment the author found concluded the following:

[A]nalyzes generally agree that increased incarceration rates have some effect on reducing crime, but the scope of that impact is limited: a 10 percent increase in incarceration is associated with a 2 to 4 percent drop in crime. Moreover, analysts are nearly unanimous in their conclusion that continued growth in incarceration will prevent considerably fewer, if any, crimes . . . .

Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime*, 19 FED. SENT’G REP. 221, 221 (2007).

171. See Beres & Griffith, *supra* note 120, at 128.

172. See AUSTIN ET AL., *supra* note 18, at 35–36.

173. See *supra* Section II.D.

based on the offender's previous criminal record.<sup>174</sup> For example, assume an offender being tried under the habitual misdemeanor larceny statute has only his four prior larceny convictions. Each of these convictions is a Class 1 misdemeanor,<sup>175</sup> each worth one point. With four points, this offender is a "level II" offender.<sup>176</sup> A level II offender charged with a Class H felony has a presumptive minimum sentence of six to eight months, a sentence that can be served as an intermediate sentence or wholly active.<sup>177</sup> "Intermediate punishment is supervised probation plus at least one of six specific conditions of probation (special probation, residential program, electronic house arrest, intensive supervision, day reporting center, and drug treatment court)."<sup>178</sup> As of 2011, 44% of all felony sentences were intermediate, with intensive supervision and special probation serving as the preferred conditions.<sup>179</sup> For some reason, however, habitual misdemeanor larceny offenders appear to be given active sentences far more often than intermediate sentences.<sup>180</sup>

The sentence length can also be reduced to four to six months if mitigating factors can be shown.<sup>181</sup> To get into this mitigated range, however, the offender must prove by a preponderance of the evidence that a mitigating factor exists; ultimately, the decision to move a sentence into a mitigated range is at the discretion of the court. In 2016, it only happened a quarter of the time.<sup>182</sup> Though some discretion does exist, there is still a good chance that a defendant is going to spend some amount of time behind bars. More important than the existence or length of the prison sentence, however, is the

174. See N.C. GEN. STAT. § 14-72(a) (2017); *id.* § 15A-1340.14(b)(5) (requiring that each previous Class 1 misdemeanor count as one point towards criminal history points); *id.* § 15A-1340.17(c); Leven, *supra* note 47, at 656 (noting the often "irrational" way that mandatory minimum sentences punish offenders).

175. § 14-72(a).

176. *Id.* § 15A-1340.17(c).

177. *Id.*; see also Jamie Markham, *Community Punishment and Intermediate Punishment*, N.C. CRIM. L. (Oct. 12, 2011, 7:45 AM), <https://nccriminallaw.sog.unc.edu/community-punishment-and-intermediate-punishment/> [<https://perma.cc/76TS-6BKK>].

178. Markham, *supra* note 177.

179. *Id.*

180. REBECCA DIAL, JOHN KING & JENNIFER WESOLOSKI, N.C. SENTENCING & POLICY ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS: FISCAL YEAR 2017, app. D tbl.1 (2018), [https://www.nccourts.gov/assets/documents/publications/statisticalrpt\\_fy16-17.pdf?JF1SijgQJ6lX7N9ZTOuG.ztHfioBwrrV](https://www.nccourts.gov/assets/documents/publications/statisticalrpt_fy16-17.pdf?JF1SijgQJ6lX7N9ZTOuG.ztHfioBwrrV) [<https://perma.cc/N2DF-3FXA>].

181. § 15A-1340.17(c).

182. *Id.* § 15A-1340.16(a); DIAL ET AL., *supra* note 180, at app. D tbl.2.

“felon” label that follows the offender after they leave prison; the judge has no power over that label.<sup>183</sup>

If a punishment must be enforced, it might be better to use probation and community service alternatives to prison.<sup>184</sup> A study found that such measures were more effective than prison in preventing recidivism, especially for property crimes.<sup>185</sup> Probation supervision costs the state \$3.57 per day per offender, as opposed to the minimum incarceration cost of \$85.18 per inmate per day, meaning the more effective remedy is also the more cost-friendly option.<sup>186</sup> These programs are especially effective if used early in an offender’s career; at that age, the “dollar-for-dollar” return is much higher than longer incarceration periods.<sup>187</sup> Indeed, one study found that a “Shoplifter School” helped dramatically reduce the chance first-time shoplifters would recidivate.<sup>188</sup>

Paying restitution directly to the harmed party is another effective way to remedy wrongs and prevent recidivism.<sup>189</sup> Such an approach helps to shift “the paradigm” of criminal punishment from one of the offender against the state to one of the offender against the victim.<sup>190</sup> Such a paradigm shift “would emphasize the future” rather than focus on the past, giving victims a greater voice and a chance to come to terms with an uncomfortable past experience.<sup>191</sup> These programs have taken the form of a mediation exercise between the offender and the victim and reached success rates as high as 95%

183. *See supra* Section I.D.

184. Of course, probation is not without its critics and problems. *See, e.g.*, Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 296 (2016) (discussing the broad-reaching conditions of probation and the need for their examination). Despite these valid concerns, however, such programs seem preferable to longer prison sentences and certainly preferable to felon status.

185. AUSTIN ET AL., *supra* note 18, at 22.

186. INCARCERATION FISCAL NOTE, *supra* note 36, at 5; *Cost of Corrections*, *supra* note 55.

187. Vitiello, *supra* note 63, at 449 n.317 (citing a study that found “dollar for dollar, programs that encourage young people to stay in school and out of trouble prevent five times as many crimes as stiff penalties imposed on repeat offenders using three-strikes-and-out laws”); *see also* Beres & Griffith, *supra* note 120, at 119–20 (citing a study, the authors noted that the programs “offered modest cash and scholarship incentives to encourage disadvantaged youth to graduate from high school” and that these “incentives were several times more effective than Three Strikes, per dollar spent, in preventing serious crime”).

188. Deng, *supra* note 134, at 289.

189. *See* AUSTIN ET AL., *supra* note 18, at 23 (noting that restitution may be especially appropriate for property crimes).

190. Leven, *supra* note 47, at 651–52.

191. *Id.* at 652 (emphasis omitted).

resolution, a success rate that includes the resolution of non-violent crimes.<sup>192</sup>

A final option includes the expansion of expungement for ex-felons. Expunction is not a perfect solution; though a person's record may be cleared, it is also never perfectly cleared.<sup>193</sup> The North Carolina Justice Center describes expunctions this way:

In North Carolina, an expunction is the destruction of a criminal record by court order. An expunction (also called an “expungement”) of a criminal record restores the individual, in the view of the law, to the status he or she occupied before the criminal record existed. With rare exception, when an individual is granted an expunction, he or she may truthfully and without committing perjury or false statement deny or refuse to acknowledge that the criminal incident occurred.<sup>194</sup>

North Carolina's expunction laws allow the expunction of a Class H felony conviction; however, each relevant provision requires that the petitioner not have any prior misdemeanor or felony charges.<sup>195</sup> Since habitual misdemeanor larceny requires all four previous misdemeanors, the expunction laws are no help to convicted habitual offenders. Even if these laws could be applied to habitual misdemeanor larceny, the waiting period of ten years under section 15A-145.5(c)<sup>196</sup> would still leave the offender exposed to the hardships of ex-felon status as it pertains to housing, employment, and other recidivism-preventing factors. Unless the expunction law were to be changed to permit expunction of recidivist statutes (a scenario that seems highly unlikely),<sup>197</sup> however, this point is moot.

192. *Id.* at 652–53.

193. See Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1520–21 (“In sum, expunction is an example of ‘legislative and judicial bodies finding compelling policy reasons for ignoring in law what has occurred in fact . . . .’” (quoting *Doe v. Webster*, 606 F.2d 1226, 1243 (1976))).

194. C. DANIEL BOWES, N.C. JUSTICE CTR., SUMMARY OF NORTH CAROLINA EXPUNCTIONS 2017 1 (2017), [https://www.ncjustice.org/sites/default/files/Summary%20of%20NC%20Expunctions%202017\\_0.pdf](https://www.ncjustice.org/sites/default/files/Summary%20of%20NC%20Expunctions%202017_0.pdf) [<https://perma.cc/87BD-N9PJ>].

195. N.C. GEN. STAT. §§ 15A-145.4(c), -145.5(c) (2017).

196. *Id.* § 15A-145.5(a)–(c).

197. See Resnik, *supra* note 193, at 1520 (“At other times, expunction is predicated on a desire to protect an individual from suffering the consequences of government misconduct. Expunction is sometimes an artifact of commitment to rehabilitation, and when interest in that goal of the criminal justice system wanes, so does legislative authorization of expunction.”). Since a recidivist is viewed as a recurring problem by the legislature, it is unlikely there would be much motivation to expand expunction laws for their benefit.

For those charged with habitual misdemeanor larceny, it is the felon label that poses the greatest threat to their long-term recovery and well-being.<sup>198</sup> Since prison sentences are light compared to other felonies, especially in practice, solutions that avoid the greatest costs will include removing the felon label at the outset or providing for its removal through expunction or certificate of relief programs.

#### CONCLUSION

In its habitual misdemeanor larceny statute, North Carolina's legislature created a law with a lot of squeeze and little juice. Because of the high costs to both the state and defendants, it is reasonable to demand that the law yield notable, positive results. Longer sentences have, at best, a negligible impact on misdemeanor larceny rates; at worst, a longer sentence may actually increase the likelihood of recidivism. These results come with a high price tag in terms of dollars, societal burdens, and individual prosperity. Alternatives such as the use of probation and community education programs, mediation and restitution options, and broadened expungement opportunities all are likely more effective, cost less, and provide more positive results. Still, the highest costs are tied to the felon label that follows repeat petty offenders. Probationary programs will not remove this felon label, meaning the state should seriously consider whether such a punishment is appropriate for those guilty of minor crimes. With such high costs related to imposing longer sentences and creating more felons, North Carolina should seriously consider replacing its habitual misdemeanor larceny statute with one or more of these alternative measures. If North Carolina does, then it may be able to get a lot more juice with a lot less squeeze.

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198. See *supra* Section I.D.

\*\* Special thanks are due to: the board and staff of the *North Carolina Law Review*, especially Thomas Zamadics, without whom this piece would have been less than it became; to the world-class professors at UNC Law, especially Professor Jain, whose writing seminar provided invaluable insight for this Comment; to the selfless public defenders at the Wake County and Federal Public Defender (E.D.N.C.) offices whose examples have inspired me; and, most importantly, to my wife, Claire, for her love, support, and constant reassurance. The Comment's deficiencies are, of course, my own.