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## Prop 47 empties prisons but opens a can of worms

By Alexandra Natapoff  
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[California is doubling down on decriminalization.](#) Three weeks ago, the passage of Prop. 47 converted a half-dozen felonies to misdemeanors. In 2011, marijuana possession was reclassified from a misdemeanor to an infraction without jail time. If Rip Van Winkle fell asleep a decade ago at the height of California's prison boom and woke up this morning, he'd quickly recognize this as a scramble to undo decades of harsh and expensive policy.

The state is not alone — we are seeing a seismic shift in how the United States handles punishment, especially with respect to misdemeanor decriminalization. Marijuana is the most famous example, but many states are eliminating jail time for other minor offenses, such as driving violations and public order crimes, and replacing them with so-called “nonjailable misdemeanors,” “nonarrestable” or “fine-only” offenses, and “civil infractions.”

There are a lot of great things about decriminalization. But it has a surprisingly punitive and racially charged dark side, and it doesn't always work the way people think it does. The “non-jailable misdemeanor” — popular in many states — is still a crime that triggers arrest, probation and fines, criminal records and other collateral consequences. Even the gold standard of decriminalization — the “non-arrestable” civil infraction — can derail a defendant's employment, education and immigration status, while the failure to pay noncriminal fines can lead to contempt citations and incarceration. And while decriminalization sounds egalitarian — after all, it's a promise not to lock up people who would usually get locked up — sometimes it might actually make things worse for the poor and people of color.

There is something quietly misleading about our decriminalization conversation. Individuals might think that racking up minor decriminalized offenses will have no impact on their records or futures, even though it very likely will. Policymakers may promote decriminalization as a class equalizer and racially healing reform, even though it can have the opposite effect. Voters and legislators might embrace decriminalization proposals in lieu of legalization in the mistaken belief that they are equivalent.

Decriminalization isn't a new reform, although the last time the United States seriously experimented with it was in the 1970s. But these days, it's not just motivated by a moral concern about over-punishment — it's also old-fashioned fiscal conservatism. When offenses don't carry jail terms, they don't trigger the constitutional right to counsel. As a result, not only does

decriminalization keep thousands of people out of jail, it saves the state millions of dollars in public defense, prosecution and jail costs.

It has other benefits, too. For overworked public defenders, decriminalization can reduce crushing misdemeanor caseloads. Many hope also that decriminalization will ease the criminal justice system's infamous racial skew because African American men are disproportionately jailed for minor offenses. For all these diverse reasons, misdemeanor decriminalization has strong support across the political spectrum: from the National Association of Criminal Defense Lawyers to the American Bar Association, the Cato Institute and former Republican presidential candidate Pat Robertson.

To understand the irony of a reform that seeks to make the system more fair but may actually make it less so, remember that decriminalization does not make conduct legal. It just changes the punishment — typically by eliminating incarceration. Only a few states have actually “legalized” marijuana under state law. Everybody else is removing jail penalties or reclassifying offenses as fine-only infractions. Likewise, traffic “decriminalization” does not authorize you to speed or drive without your license. It turns out that people are still being punished for decriminalized offenses, often heavily, in ways that slip beneath the public radar. And because such offenses do not trigger the right to counsel, thousands of individuals are getting convicted — along with fines they might not be able to pay — without legal assistance or full information.

People are often surprised to learn that they can still be arrested for a decriminalized offense. Although such offenses are often lauded as “non-arrestable,” the label is misleading. The U.S. Supreme Court says that police can constitutionally arrest for non-arrestable or fine-only offenses, even when state law explicitly tells them not to. In many jurisdictions, police can choose between issuing a summons (a ticket) or making an arrest. To be sure, decriminalization often reduces arrest rates (it has in California), but it doesn't have to (it hasn't in Nebraska or in Chicago's African American neighborhoods).

Many believe that a decriminalized offense will not trigger a criminal record or other negative consequences of conviction. But in most states, a decriminalized offense can still affect employment, housing eligibility, student loans and immigration. For example, under the U.S. Sentencing Guidelines, a civil, non-arrestable, decriminalized marijuana infraction from a local jurisdiction counts as a criminal offense triggering a longer federal sentence.

In perhaps the greatest irony, courts around the country routinely use civil contempt to jail individuals for nonpayment even though decriminalized offenses are technically “nonjailable.” As the New York Times recently complained, “minor offenders who cannot pay a fine or fee often find themselves in jail cells.” The Washington Post recently profiled Nicole Bolden, a single mother in now-infamous St. Louis County, who was incarcerated for two weeks for failure to pay traffic tickets.

These kinds of fines create another danger for a cash-strapped judiciary. As courts turn increasingly to fines and fees to fund their own operations, decriminalization threatens to become a kind of regressive tax, turning the poorest populations into funding fodder. Thomas Edsall

recently excoriated this phenomenon as “poverty capitalism,” in which fines and fees are extracted from poor defendants to pay for their own criminalization.

Because it eliminates lawyers and other forms of due process, decriminalization can barrel ahead without much resistance. Summonses are easy to issue; without lawyers most cases go uncontested. In effect, decriminalization makes it easier to sweep people into the criminal system — especially if you are poor. Decriminalization is a relatively good deal for defendants who can pay fines immediately or comply easily with supervisory conditions. But for poor, underemployed, drug-dependent and other disadvantaged defendants, fines and supervision are big trouble. Failure to pay or to show up for supervision can lead to more fines and even jail.

This makes decriminalization racially complicated. On the one hand, because African Americans are disproportionately arrested and punished for minor offenses — especially marijuana — any rollback of the misdemeanor machine helps. This fact drove marijuana decriminalization in Washington, D.C., where African Americans were being arrested at eight times the rate of whites. But such racial benefits are not guaranteed. In white Chicago neighborhoods, decriminalization reduced arrest rates; in black Chicago neighborhoods, arrest rates actually went up. In five other states including California, marijuana decriminalization has reduced overall arrest rates but not the racial disparities in those arrests.

It’s often hard to tell whether criminal justice reform is real progress or a shell game. Is California actually reducing incarceration, or is it quietly shifting prisoners around or repackaging punishment so as to avoid appointing lawyers for poor people? Decriminalization offers great promise, but it needs to be carefully monitored to make sure it lives up to its tantalizing name.