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Misdemeanor Decriminalization

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Misdemeanor Decriminalization

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As the United States reconsiders its stance on mass incarceration, misdemeanor decriminalization has emerged as an increasingly popular reform. Seen as a potential cure for crowded jails and an overburdened defense bar, many states are eliminating jailtime for minor offenses such as marijuana possession and driving violations, replacing those crimes with so-called "nonjailable" or "fine-only" offenses. This form of reclassification is widely perceived as a way of saving millions of state dollars—nonjailable offenses do not trigger the right to counsel—while easing the punitive impact on defendants, and it has strong support from progressives and conservatives alike.

But decriminalization has a little-known dark side. Unlike full legalization, decriminalization preserves many of the punitive features and collateral consequences of the criminal misdemeanor experience, even as it strips defendants of counsel and other procedural protections. It actually expands the reach of the criminal apparatus by making it easier—both logistically and normatively—to impose fines and supervision on an ever-widening population, a population that ironically often ends up incarcerated anyway when they cannot afford fines or comply with supervisory conditions. The turn to fine-only offenses and supervision, moreover, has distributive implications. It captures poor, underemployed, drug-dependent, and otherwise disadvantaged defendants for whom fines and supervision are especially burdensome, while permitting well-resourced offenders to exit the process quickly and relatively unscathed. Finally, 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 for the judiciary and other government budgets. In sum, while decriminalization appears to offer relief from the punitive legacy of overcriminalization and mass incarceration, upon closer inspection it turns out to be a highly conflicted regulatory strategy that preserves and even strengthens some of the most problematic aspects of the massive U.S. penal system.

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I. INTRODUCTION

The U.S. criminal system is at a historical crossroads. In some ways, the behemoth is becoming kinder and gentler: many jurisdictions are shortening drug sentences and closing prisons, while crime and incarceration rates are down. At the same time, the criminal process is an increasingly intrusive system of surveillance, social stratification, and behavioral control. Even as we retract certain formal punishments—primarily incarceration—we are simultaneously expanding the system's capacity to watch, label, direct, and derail the lives of a growing population subject to arrest, conviction, and nonprison punishments. These conflicting forces suggest that we are at

an important moment of contest, a fundamental dispute over the nature and future of the penal process itself.

Misdemeanor decriminalization—the reduction of penalties for minor offenses—is central to this historical moment. At the most general level, it is central because misdemeanors themselves are so important, making up the vast bulk of the U.S. system and fueling some of its most pressing problems. Most Americans experience criminal justice via the petty offense process; the ten million misdemeanor cases filed annually comprise around eighty percent of state dockets. Moreover, the petty offense process drives some large and troubling dynamics. The misdemeanor machinery is a major source of overcriminalization; it produces much of the racial skew of the U.S. criminal population; and it exacerbates the dysfunction of our public-defense bar, overwhelming public defenders with hundreds, sometimes thousands, of minor cases.[1] For all these reasons, large-scale changes in misdemeanor policy, such as decriminalization, have ripple effects throughout the criminal system.

More specifically, misdemeanor decriminalization is a profoundly conflicted, sophisticated regulatory practice with far-reaching penal and social implications. To start with, in the misdemeanor context "decriminalization" does not mean "legalization," although many people do not realize the significance of the difference.[2] Decriminalization does not render conduct legal. Instead, it typically reduces penalties, mainly incarceration, for conduct that remains illegal and forbidden. Accordingly, while misdemeanor decriminalization eases the immediate punitive impact of the penal system, it leaves in place the vast web of forbidden conduct and its accompanying law enforcement apparatus.

Decriminalization takes a wide array of forms that carry different labels and punishments—from the creation of fine-only "civil infractions" to "nonjailable misdemeanors." Although widely misunderstood, the distinctions between these policy choices are enormous. The reclassification of crime into a civil infraction—or "full" decriminalization—removes an offense from the criminal system entirely. Although the conduct remains punishable, full decriminalization can spare offenders many of the collateral consequences of the criminal process such as arrest or a criminal record. By contrast, under the more common practice of "partial" decriminalization, offenses retain their criminal character and attendant burdens. Typically, partial decriminalization means that

1. *See infra* Part II.
2. *Infra* Part III.A.

defendants cannot be incarcerated for the underlying offense, but it can take other forms as well, from shortened or deferred sentences to supervision and treatment. This variety of regulatory options makes decriminalization a flexible and sophisticated policy tool in ways that the public conversation often misses.

Decriminalization is now squarely on the agenda as an increasingly favored response to the American criminal justice challenge. Commentators on the left and right, the American Bar Association ("ABA"), the National Association of Criminal Defense Lawyers ("NACDL"), and numerous scholars have called for decriminalizing minor offenses as a solution to a wide array of systemic problems. This consensus is fueled in part by a special legal feature of misdemeanors: minor offenses that carry no possibility of jailtime do not trigger the Sixth Amendment right to counsel.[3] Accordingly, eliminating incarceration for misdemeanors looks like a kind of win-win: it relieves defendants of the threat of imprisonment while saving the state millions of dollars in defense, prosecution, and jail costs. Motivated by persistent fiscal crises, many states have accordingly been experimenting with the decriminalization of various crimes, most prominently marijuana possession but also driving on a suspended license, traffic and other regulatory offenses.

In many ways, this "win-win" story is accurate. As explored below, decriminalization is an obvious countermeasure to three decades of criminal law expansion. It reduces incarceration and sometimes arrest rates. It can ease many of the collateral burdens that formal criminal conviction imposes. It is an especially promising way of slowing the criminal branding of so many young men of color who tend to get swept up for petty crimes such as marijuana possession, loitering, and other order maintenance offenses. It could eliminate the need for counsel in hundreds of thousands of cases and thus give a much-needed reprieve to the struggling public-defense bar.[4] It is for these reasons that decriminalization is fairly viewed as a progressive silver bullet for many of the system's most pressing ills.

But the full story is more conflicted. While misdemeanor decriminalization is in some ways less punitive, in some ways it is more so, simultaneously preserving, or even expanding, how the criminal system generates and then punishes offenders. First, decriminalization maintains many of the collateral, even direct, criminal consequences of a conviction. Nonjailable misdemeanors are still crimes that trigger the usual panoply of burdens including arrest, probation and fines, criminal

3. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

4. *See infra* Part IV.

records, and collateral consequences. Even so-called "nonarrestable" civil infractions can still derail a defendant's employment, education, and immigration status, while the failure to pay fines can lead to contempt citations and incarceration.[5] These burdens, moreover, can be imposed on offenders quickly, informally, and without counsel, so that the standard procedural safeguards against wrongful conviction and overpunishment are lessened, if not eliminated altogether.

Second, decriminalization represents the next generation of the "net-widening" phenomenon. Net-widening refers to reforms that make it easier to sweep individuals into the criminal process, and decriminalization does so in sophisticated ways. Primarily, it makes it possible to reach more offenders by simplifying the charging process and eliminating counsel, along with other forms of due process. But it also heightens the impact of the net by turning to supervision and fines as indirect, long-term constraints on defendant behavior, and by extending the informal consequences of a citation or conviction deep into offenders' social and economic lives. The widening net, moreover, is not colorblind: decriminalization risks further racializing the selection process as police are empowered to stop and cite young black men more freely without the constraints of criminal adjudication or the threat of defense counsel.

Third, and perhaps most covertly, decriminalization functions as a kind of regressive tax, creating perverse incentives for low-level courts that increasingly rely on fines and fees to fund their own operations. Without the protections of defense counsel and the other resource constraints of the criminal process, courts and law enforcement are free to mete out decriminalized infractions to an ever-widening population in order to generate revenue for their own operations. This is no idle threat. As the *New York Times* has complained, "minor offenders who cannot pay a fine or fee often find themselves in jail cells,"[6] and the millions of dollars that lower courts currently collect from defendants constitute a large and growing percentage of judicial operating budgets.[7] In other words, by decriminalizing minor offenses, we risk turning the most vulnerable population into funding fodder for the very institution from which we are trying to protect them.[8] That,

5. *See infra* Part V.

6. Editorial, *Return of Debtors' Prisons*, N.Y. TIMES, July 13, 2012, at A16 (calling the practice "indefensible").

7. *Infra* Part V.A.2.

8. A *New York Times* columnist recently referred to this phenomenon as "poverty capitalism." Thomas B. Edsall, Op-Ed, *The Expanding World of Poverty Capitalism*, N.Y. TIMES, Aug. 26, 2014. Or as Stephen Bright put it, "[W]e end up balancing the budget on the backs of the

paradoxically, makes decriminalization a kind of regressive economic policy masquerading as progressive penal reform.

The long-term benefits of decriminalization are thus unequally distributed throughout the criminal justice population. Decriminalization permits minor offenders to avoid heavier punishments, typically through paying a fine or submitting to a brief period of supervision. It allows wealthy and otherwise socially secure defendants to exit the system relatively easily by paying the fine or complying with various other conditions. But for defendants who cannot quickly pay or who cannot easily conform to the soft behavioral demands of supervision, decriminalization is not really an authentic exit strategy. Eventually, soft demands convert to hard measures that look exactly like traditional retributive punishment: onerous financial debt, long-term intrusive supervision, and even incarceration.

For such reasons, there is something quietly misleading about the current decriminalization conversation. Individuals may believe 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 an egalitarian and racially healing reform, even though it can have the opposite effect. Voters and legislators may embrace decriminalization proposals in lieu of legalization in the mistaken belief that they are equivalent.

In sum, decriminalization is best understood as a highly conflicted regulatory strategy. It jettisons some punishments while retaining others, expands the reach of the criminal process into new arenas, and alters its economic significance for courts and offenders alike. While many people understand decriminalization centrally as a form of leniency—a rollback of the punitive criminal apparatus and a strike against mass incarceration—the impact on some offenders may be the same or even more punishing in the long run. This dynamic, moreover, is largely veiled because many of the detrimental consequences of decriminalized offenses do not technically qualify as "punishment" at all and so they fly beneath the legal radar even as they extend the influence of criminalization to more individuals, families and communities. This makes decriminalization a double-edged sword. Even as it rejects the overtly punitive, debilitating quality of prison, decriminalization offers ways of maintaining, even expanding, the

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poorest people in society." Ethan Bronner, *Poor Land in Jail as Companies Add Huge Fees for Probation*, N.Y. TIMES, July 2, 2012, at A1.

criminal system as a governance mechanism for a wide range of social behaviors and environments.[9]

Decriminalization is not a stand-alone phenomenon. It exemplifies a larger institutional and social compromise: the embrace of more diffuse and less formal modes of punishment as a way of adapting America's massive criminal apparatus to a new age of resource scarcity and unease about mass incarceration.[10] All kinds of offenders are increasingly subject to a wide array of what I'll call "microcontrols": small-scale penal intrusions, formal and informal, that shape offenders' lives.[11] These microcontrols range from the constant intrusions and anxieties of supervision to the financial pressures exerted by fines and fees to the informal but influential ways that a citation, arrest, or conviction alters an offender's relationship to police, employers, schools, hospitals, social services, and other institutions.[12] Decriminalization relies on precisely such microcontrols to displace some of the regulatory work currently performed by mass incarceration. It thus epitomizes the historical crossroads at which our criminal system currently stands.

This Article provides a theoretical and empirical overview of the misdemeanor decriminalization phenomenon. It exposes the complex machinery of decriminalization, its conflicted commitments and contradictory effects, and its deep significance for our criminal justice culture. It is the fourth in a series of articles analyzing the influence of the misdemeanor process over the U.S. criminal system as a whole.[13] It proceeds as follows. Part II briefly surveys the crucial role played by misdemeanors in the U.S. criminal system and the concomitant

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9. *Compare* Jonathan Simon, *The Return of the Medical Model: Disease and the Meaning of Imprisonment from John Howard to* Brown v. Plata, 48 HARV. C.R.-C.L. L. REV. 217, 245 (2013) (forecasting a possible resurgence of the "medical" or rehabilitative model of corrections), *with* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2179 (1996) (describing how "preservation through transformation" and "status regime modernization" occur when seemingly progressive reforms actually modernize and strengthen the status quo).

10. *See* Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, DAEDALUS, Summer 2010, at 132.

11. *See infra* Part VI.

12. Wayne Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013) (documenting "the gamut of negative social, economic, medical, and psychological consequences of conviction").

13. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) [hereinafter Natapoff, *Misdemeanors*]; Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043 (2013) [hereinafter Natapoff, *Aggregation and Urban Misdemeanors*]; Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) [hereinafter Natapoff, Gideon *Skepticism*]; *see also* Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. (forthcoming 2015); Alexandra Natapoff, *The Penal Pyramid*, *in* AMERICAN CRIMINAL JUSTICE: MAKING SENSE OF WHAT'S REALLY GOING ON (Sharon Dolovich & Alexandra Natapoff eds., forthcoming 2015).

significance of decriminalization. Part III clarifies the distinction between decriminalization and legalization, and then examines the wide array of forms that decriminalization can and currently does take. Importantly, it distinguishes between "full" decriminalization, in which an offense is removed from the criminal apparatus and rendered entirely civil, and the more common "partial" decriminalization, in which minor offenses retain various punitive features.

Part IV surveys the substantial benefits that decriminalization offers defendants, state criminal systems, and the integrity of the criminal process more generally. Part V supplies the other, heretofore unexamined half of the picture by examining the burdens that decriminalization continues to impose on offenders, including persistent punishments, collateral consequences, net-widening, and the threat that courts will expand the infraction machinery in order to fund their own operations.

In Part VI, I take a step back and ask what decriminalization reveals about the evolving purposes and significance of our criminal process. Although the U.S. criminal system appears to be relinquishing some of its most punitive commitments, decriminalization is not antithetical to the "culture of control." Instead, it is part of the growth of a vast net of formal and informal burdens, intrusions, and stigmatic labels imposed on offenders, even those who never spend a day in jail. These microcontrols include criminal records, collateral consequences and employment stigma, long-term legal debt, and a variety of social exclusions, all of which extend the consequences of a minor brush with the criminal system deep into a person's future. Insofar as decriminalization strengthens this net, it represents not so much the devolution of the penal state as an upgrade to a more modern, diffuse approach to crime-based governance.

The Article concludes on a pragmatic note, emphasizing that while decriminalization may be a political compromise with the penal behemoth, it nevertheless offers a valuable—albeit imperfect and partial—antidote for some of the worst aspects of the misdemeanor process and the system as a whole. Under "full" rather than "partial" decriminalization, offenders get their best chance to avoid arrest, jailtime, and permanent records. This is the state's best option to reduce incarceration and potentially keep millions of people from being marked and burdened as criminals. Whether decriminalization more profoundly alters the underlying balance between penal and democratic governance remains to be seen.

II. THE MISDEMEANOR FRAMEWORK

Although it sounds counterintuitive, our criminal system is mostly about misdemeanors. Every year in the U.S., approximately 2.3 million felony cases are filed compared to ten million misdemeanors.[14] Comprising around eighty percent of most state dockets, petty offenders make up the majority of prosecutorial and defenders caseloads, half of government probation office cases, and fuel a growing private probation industry.[15] Rarely recognized as such, the misdemeanor is in fact the paradigmatic U.S. criminal case: most cases are misdemeanors, most of what the system does is generate minor convictions, and most Americans who experience the criminal system do so via the petty offense process.

The misdemeanor process is the gateway to the criminal system, the primary door through which Americans encounter the penal process and acquire a criminal record.[16] But this massive, influential apparatus does not obey the standard rules of criminal law and procedure. Unlike its felony counterpart, the misdemeanor arena is severely

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14 *Compare* COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2003 38 (Brian Ostrom et al. eds., 2003) (counting 2.3 million felony filings in the forty-six states for which data was available), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/606, *with* R. LAFOUNTAIN ET AL., COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 13 (2014) (counting approximately 1.9 felony filings in thirty-four states), *available at* http:// www.courtstatistics.org/~/media/microsites/files/csp/ncsc_ewsc_web_nov_25_14.ashx, *archived at* http://perma.cc/YN9V-4PXX; *see also* NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (Apr. 2009) (extrapolating national misdemeanor filings from 2006 data from 16 states), *available at* https://www.nacdl.org/reports/misdemeanor/, *archived at* https://perma.cc/AC5A-KSAX.

15. *See* NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (Apr. 2009), *available at* https://www.nacdl.org/reports/misdemeanor/, *archived at* https://perma.cc/AC5A-KSAX; HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY, 1, 16 (Feb. 2014), *available at* http://www.hrw.org/reports/2014/02/05/profiting-probation-0, *archived at* http://perma.cc/85V5-FLLQ ("[H]undreds of thousands of Americans[, with over 250,000 in Georgia alone,] are sentenced to probation with private companies every year by well over 1,000 courts across the U.S."); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2012 (Dec. 2013), *available at* http://www.bjs.gov/content/pub/pdf/ppus12.pdf, *archived at* http://perma.cc/ES78-CN3Z.

16. Approximately thirty percent of adult Americans have some form of criminal record. OFFICE OF THE ATT'Y GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 51 (June 2006), *available at* http://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf, *archived at* http://perma.cc/G7WT-P9KD; MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT, 3, 27 n.2 (Mar. 2011), *available at* http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1, *archived at* http://perma.cc/LHD7-9PEZ (sixty-five million American adults have a criminal record); *see also id.* at 27 n.2 (noting that this total is underinclusive because some of the fingerprint databases surveyed did not include misdemeanors).

underregulated, informal, and sloppy.[17] Arrests for minor crimes are easily made with little or no evidentiary support. This is especially true for urban quality-of-life offenses, which often take place in bulk as police strive to control high-crime neighborhoods.[18] Once arrested, defendants may speak with an overworked public defender for mere minutes before pleading guilty; many plead guilty without talking to a lawyer at all.[19] At the same time, the lower courts that handle minor offenses have become infamous for their indiscriminate speed. Widely derided as "assembly line," "cattle-herding," and "McJustice," lower courts rush hundreds of cases through en mass, validating hastily made plea agreements without scrutiny.[20]

In sum, each stage of the misdemeanor process is characterized by speed, lack of individuated evidence or adversarial contest, and the pervasive assumption that offenders are guilty. The resulting ninety-five percent plea rate generates millions of convictions without the kinds of procedural or evidentiary checks on which we typically rely to ensure accuracy and fairness.

This quick-and-dirty process has deep substantive consequences. Because the petty offense process rarely scrutinizes cases and because nearly everyone pleads guilty, arrests convert easily—in some places automatically—into convictions. In other words, getting arrested, particularly for a minor urban disorder offense, can be tantamount to sustaining a criminal conviction.[21] Not only does this dynamic violate basic liability and proof rules,[22] it has racial

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17. Natapoff, *Misdemeanors*, *supra* note 13 (describing the inaccuracies and lack of procedural safeguards in the petty offense process).

18. Natapoff, *Aggregation and Urban Misdemeanors*, *supra* note 13.

19. NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, *supra* note 15.

20. *See, e.g.*, Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

21. This dynamic varies between jurisdictions and offenses. In some places and for some crimes, misdemeanor dismissal rates are relatively high; elsewhere, prosecutorial declination rates are on the order of two or three percent so that arrests almost always convert to convictions. *Compare* Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010) (documenting low prosecutorial declination rates of less than five percent), *and* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 21–22 (2000):

> [A]n individual's loss of freedom and the prosecutorial merit of most of those cases stand or fall solely on a police officer's judgment about the legal sufficiency of the evidence and of the rules of law applicable to the cited offense(s), and on the officer's judgment about the merit of an individual case from a public policy perspective.,

with Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 647 (2014) (documenting high misdemeanor dismissal rates that accompanied a massive increase in misdemeanor arrest rates in New York).

22. The quantum of evidence sufficient for arrest (probable cause) is by definition insufficient to establish actual guilt. *See* Illinois v. Gates, 462 U.S. 213, 235 (1983) (quoting Locke v. United

significance. Because African American men are disproportionately subject to arrest for minor disorder and possession crimes, the misdemeanor process effectively converts racially disparate arrest policies into formal criminalization.[23] This makes the petty offense process the first step in the racialization of U.S. crime and the formal stigmatization of large swaths of the black male population. [24]

It is for these reasons that decriminalization holds such structural promise. It offers a way of scaling back the petty offense machinery, stemming the flow of millions of people into the criminal system at the front end, and reducing the disparate impact that petty offense processing has on the poor and people of color. By easing the punitive burdens and stigma of misdemeanors, so the story goes, we might actually be able to shrink the entire carceral state.

III. WHAT IS DECRIMINALIZATION?

A. Decriminalization Versus Legalization

In some fields, the term "decriminalization" is synonymous with "legalization." When same-sex rights advocates call for the decriminalization of gay sex, they mean that the state should get out of the business of regulating that intimate conduct altogether.[25] Similarly, when Darryl Brown describes the array of conduct that courts and legislatures have "decriminalized," he includes conduct that has been fully legalized—for example, the use of contraception, interracial marriage, and political speech.[26] In these contexts, decriminalization and legalization synonymously refer to complete deregulation; the state no longer has grounds for punishing that behavior in any way.

States, 11 U.S. (7 Cranch) 339, 348 (1813)) (noting that probable cause "means less than evidence which would justify condemnation").

23. *See, e.g.*, AM. CIVIL LIBERTIES UNION, THE WAR ON MARIJUANA IN BLACK AND WHITE 40 (June 2013), *available at* https://www.aclu.org/files/assets/090613-mj-report-rfs-rel1.pdf, *archived at* http://perma.cc/A3VK-AERF (finding marijuana possession arrest rates for African Americans to be ten, twenty, even thirty times higher than white arrest rates in various jurisdictions).

24. While formal conviction is the most severe form of criminalization, the criminal process also imposes a wide array of marks, records, detentions, and other collateral consequences short of actual conviction that can alter an individual's life trajectory. *See* Part V.A.4.

25. *See, e.g.*, Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 992 (2011) (referring to the elimination of antisodomy statutes as "decriminalization").

26. Darryl Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (describing legislative decriminalization broadly as including "repealing or narrowing criminal statutes, reducing offense severity, and converting low-level crimes to civil infractions"); *see also* DOUGLAS N. HUSAK, LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS 11–12 (2002) ("The question I believe should be asked—should drug use be criminalized?—and the question that is generally asked—should drug use be decriminalized?—are different, and the difference is important. The right question demands a justification for existing policy.").

By contrast, in the misdemeanor realm decriminalization does not mean legalization.[27] Rather, it signifies the reduction or elimination of traditional criminal penalties for conduct that remains prohibited.[28] Only four states, for example, have actually legalized marijuana under state law.[29] By contrast, dozens of states have decriminalized the possession of small amounts of marijuana for personal use by eliminating jail penalties or by reclassifying the offense as a fine-only civil infraction. But marijuana possession in those states remains illegal and forbidden, even under a civil infraction regime. Similarly, traffic decriminalization does not authorize people to speed or drive without a license. It merely reduces or alters the penalties for engaging in that impermissible behavior.

The difference between legalization and misdemeanor decriminalization is profound. Legalization represents a roll-back of the state's regulatory authority, the elimination of state power to punish certain individual choices, and the concomitant expansion of liberty and privacy zones. By contrast, decriminalization maintains the full scope of the state's intrusive powers, softening the consequences of violations even while validating the underlying prohibition. To be sure, decriminalization addresses an important proportionality concern about how we punish, rejecting incarceration in favor of other, less immediately punitive tools. It does not, however, answer underlying questions about whether we should punish at all, how big the criminal system should be, or how large a role it should play in democratic governance.

To put it in perspective, imagine how we would feel about *Lawrence v. Texas*[30] if it had held that same-sex couples could not be incarcerated for their intimacies, but police could still issue them fine-

27. *See* State v. Menditto, 80 A.3d 923, 926–30 (Conn. App. Ct. 2013) (holding that Connecticut reform reclassifying marijuana misdemeanor into noncriminal infraction did not constitute "legalization" for the purposes of records destruction statute).

28. What Wayne Logan calls "depenalization." Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J.L. & PUB. POL'Y (forthcoming 2015). For a national survey of decriminalization practices commissioned by the American Bar Association, see THE SPANGENBERG PROJECT, AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING (Sept. 2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_tsp_reclassification_report.authcheckdam.pdf, *archived at* http://perma.cc/J9BN-6VLU.

29. Josh Barro, *D.C., Oregon and Alaska Vote to Legalize Marijuana*, N.Y. TIMES, Nov. 3, 2014, http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html?_r=0&abt=0002&abg=0, *archived at* http://perma.cc/GFC3-KKSG. Marijuana remains illegal under federal law.

30. 539 U.S. 558 (2003) (striking down the constitutionality of antisodomy laws).

only tickets.[31] We would not be appeased by the obvious benefit—"at least you won't go to prison"—because the rule change would have preserved the underlying normative regime. Similarly, misdemeanor decriminalization reaffirms the basic validity of criminalization as a tool of governance over the most minor forms of conduct and the most disadvantaged populations.

B. "Full" Versus "Partial" Decriminalization

Misdemeanor decriminalization takes two main forms. "Full" decriminalization occurs when an offense is taken out of the criminal realm and reclassified as a civil offense. The conduct remains prohibited, thereby distinguishing it from legalization, but the consequences are civil in nature, typically the imposition of a fine without the creation of a criminal record. These noncriminal, nonjailable civil offenses are often referred to as "infractions," "citations," or "violations" akin to a traffic ticket.[32]

Far more commonly, legislatures engage in "partial" decriminalization by simply eliminating jailtime as possible punishment for an offense. Such offenses remain fully criminal; they are reclassified as nonjailable misdemeanors, which retain all the collateral consequences of a criminal offense except that the defendant cannot be incarcerated for the offense itself. One of the most significant consequences of this reclassification is that offenders who do not face incarceration are not entitled to counsel.[33] For this reason, partial decriminalization is a popular option with legislatures looking to save money and advocates who see decriminalization primarily as a cure for the ills of the overburdened defense bar.[34]

"Full" and "partial" are conceptual poles at either end of a rich spectrum: in practice there is a wide range of variations, and decriminalization takes many forms.[35] Legislatures can retain or

31. I am indebted to Doug NeJaime for this insight, among many others.

32. *But see* N.Y. PENAL LAW § 240.20 (McKinney 2015) (defining disorderly conduct as a "violation"); *id.* § 10.00 (defining "violation" as an offense carrying a sentence of no more than fifteen days imprisonment).

33. Scott v. Illinois, 440 U.S. 367, 373–74 (1979).

34. *E.g.*, THE SPANGENBERG PROJECT, *supra* note 28, at i (noting that most states are reclassifying offenses into nonjailable misdemeanors while few are creating civil nonjailable infractions); Roberts, *supra* note 20, at 289, 302–03 (advocating decriminalization as a way of improving the public-defense function).

35. *Cf.* Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1983 (2004) (noting the difficulties in distinguishing between minor and serious offenses and that "the devil is in the details").

eliminate the police's power to detain a suspect;[36] encourage police to issue a citation or summons in lieu of arrest;[37] or require offenders to undergo courses, probation, or other supervisory sentences.[38] In some jurisdictions, first offenses are nonjailable, but subsequent offenses trigger incarceration.[39] Prosecutors may be given statutory discretion over so-called "wobblers"—i.e., offenses that can be charged either as an infraction or a traditional misdemeanor.[40]

Decriminalization also occurs via institutions other than the state legislature. An increasing number of American cities have passed marijuana decriminalization ordinances even though the drug remains illegal under state law.[41] State and local police can effectively decriminalize offenses by predictably failing to arrest offenders.[42] Prosecutors can decriminalize by declining to prosecute arrests.[43]

On the judicial front, court-created diversion programs permit offenders to avoid certain criminal consequences of their conduct by voluntarily submitting to supervision.[44] Specialized courts such as drug or veterans' courts also engage in partial decriminalization by siphoning offenders out of traditional criminal courts and engaging in alternative forms of supervision, sanction, and treatment.[45]

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36. *E.g.*, ALASKA STAT. §§ 04.16.050, 12.25.030 (2014) (requiring police officers who arrest minors for the nonmisdemeanor violation of alcohol possession to cite the minors and release them to their parent or guardian).

37. *E.g.*, NEB. REV. STAT. ANN. § 28-416(13) (LexisNexis 2014) (first marijuana possession offense is an infraction for which police must issue citation); MISS. CODE ANN. § 41-29-139(c)(2) (2014) (requiring police to issue summons for marijuana possession offense, provided the offender provides proof of identity and written promise to appear).

38. *E.g.*, NEB. REV. STAT. ANN. § 28-416(13)(a) (requiring a course for first-time marijuana possessors); NEV. REV. STAT. ANN. § 453.336(4)(a) (LexisNexis 2013) (making first-time marijuana possession a misdemeanor subject to a fine or a drug evaluation); TEX. CODE CRIM. PROC. ANN. art.42.12 § 15 (West 2013) (mandating suspended sentences for certain minor drug possession offenses).

39. MISS. CODE ANN. § 41-29-139(c)(2)(A) (requiring a minimum five days of incarceration for a second possession offense); NEB. REV. STAT. Ann. § 28-416(13)(b) (authorizing imprisonment up to five days for a second possession offense).

40. THE SPANGENBERG PROJECT, *supra* note 28, at 12.

41. *See* Gary Ridley, *Flint Decriminalization of Marijuana Vote Only 'Symbolic;' Arrests Will Continue, City Says*, MLIVE (Nov. 8, 2012), http://www.mlive.com/news/flint/index.ssf/2012/11/flint_police_will_still_make_m.html, *archived at* http://perma.cc/AD48-2AY2 (documenting decriminalization ordinances in Detroit, Flint, Grand Rapids, and Ypsilanti, Michigan).

42. Adam Nagourney, *Marijuana, Not Yet Legal for Californians, Might as Well Be*, N.Y. TIMES, Dec. 20, 2012, at A1 (describing how California police fail to enforce anti-marijuana laws).

43. Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 795–97 (2012).

44. THE SPANGENBERG PROJECT, *supra* note 28, at 14–16.

45. *See infra* Part V.A.3; *see also* Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1605–11 (2012) (surveying alternative courts).

In sum, full decriminalization formally moves an offense out of the criminal and into the civil realm, whereas partial decriminalization involves a complex combination of altered enforcement patterns, adjudications, punishments, classifications, and collateral consequences. In these ways, decriminalization has become a wide-ranging and flexible policy tool. Sometimes it substantially alters the workings of the criminal process and the implications for offenders, while sometimes it is used merely to fine-tune operations.

IV. DECRIMINALIZATION AS THE SOLUTION

Across the political spectrum, calls for decriminalization are growing louder. While often associated with liberal advocates, decriminalization supporters include former Texas Governor and 2012 Republican presidential candidate Rick Perry,[46] evangelical minister Pat Robertson,[47] and libertarian thinktank the Cato Institute.[48] Seen as a potential cure for an outsized incarcerated population, an unwieldy criminal code, and an overburdened defense bar, decriminalization has become popular both as a way of improving systemic fairness and as a cost-cutting measure.[49]

Many institutions are starting to take a hard look at decriminalization. In 2010, the ABA Commission on Homelessness and Poverty urged all jurisdictions "to undertake a comprehensive review of the misdemeanor provisions of their criminal laws, and, where appropriate, to allow the imposition of civil fines or nonmonetary civil remedies instead of criminal penalties."[50] That same year, an ABA-sponsored report called for widespread full decriminalization of minor

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46. *See* Tal Kopan, *Rick Perry Mulls Decriminalizing Pot*, POLITICO (Jan. 24, 2014, 6:30 AM), http://www.politico.com/story/2014/01/rick-perry-texas-pot-102559.html, *archived at* http://perma.cc/ACM2-9URA.

47. *See* Jesse McKinley, *Pat Robertson Says Marijuana Use Should Be Legal*, N.Y. TIMES, March 8, 2012, at A14.

48. *See, e.g.*, GLENN GREENWALD, THE CATO INSTITUTE, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR AND SUCCESSFUL DRUG POLICIES (2009), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/greenwald_whitepaper.pdf, *archived at* http://perma.cc/X7Q8-MY8V; GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004).

49. *See, e.g.*, *Miami May Decriminalize 18 Minor Offenses; Timoney Dubious*, CRIME REP. (Oct. 9, 2009, 11:40 AM), http://www.thecrimereport.org/news/crime-and-justice-news/miami-may-decriminalize-18-minor-offenses-timoney-dubious, *archived at* http://perma.cc/AJE3-PRWH ("We're being forced to operate almost like a factory . . . . We are handling cases that have no business being in a criminal courthouse." (quoting Miami-Dade Chief County Judge Samuel Slom)).

50. COMM'N ON HOMELESSNESS & POVERTY, AM. BAR ASSOC., REPORT TO THE HOUSE OF DELEGATES (Feb. 2010).

offenses as a cost-saving measure that would ease "problems with overcrowding, over-burdened prosecutors and public defenders with unfeasible caseloads and understaffing."[51] Surveying national trends, the report noted that numerous states are contemplating decriminalization, although most states resist full decriminalization and instead reduce or eliminate incarceration for certain offenses while still classifying them as criminal.[52] In a 2012 joint report, the ABA and the NACDL summed it up as follows:

> Current policing strategy floods the criminal justice system with arrests and contributes to countless prosecutions for myriad petty, non-violent infractions. Reclassification and diversion are front-end reforms that save significant money for police, courts, corrections systems, prosecutors, defenders, and ultimately the county or state budget by moving minor infractions out of the criminal justice system.[53]

Marijuana has become something of a poster child. At least eighteen states have decriminalized the recreational possession of small amounts of marijuana in one way or another, ranging from actual legalization in Alaska, Colorado, Oregon, and Washington, to full decriminalization in Massachusetts and Connecticut, to partial decriminalization in states such as Minnesota and Nevada.[54] Sixteen more states are expected to consider decriminalization in the next two years.[55]

Other state experiments in decriminalization include traffic offenses, regulatory offenses, and urban order maintenance.[56] King County, Washington, has a diversionary Relicensing Court for

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51. THE SPANGENBERG PROJECT, *supra* note 28, at 1.

52. *Id.* at i. This reluctance reflects a longstanding tradition of giving law enforcement the power to leverage minor offenses. In a paradigmatic example, as part of his famous zero-tolerance policing policy, then-New York Mayor Rudolph Giuliani persuaded the state legislature to recriminalize forty minor offenses that had been treated as civil offenses. Clifford Krauss, *State Legislators Agree to Restore Arrests for Minor Offenses*, N.Y. TIMES, Nov. 11, 1995, http://www.nytimes.com/1995/11/11/nyregion/state-legislators-agree-to-restore-arrests-for-minor-offenses.html, *archived at* http://perma.cc/5MNU-7GDT.

53. COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASSOC., NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 9 (2012), *available at* http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf, *archived at* http:// perma.cc/SG85-Z87V.

54. Josh Harkinson, *Map: The United States of Legal Weed*, MOTHER JONES, (Nov. 5, 2014, 6:38 PM), http://www.motherjones.com/politics/2014/11/map-united-states-legal-marijuana-2014-2016, *archived at* http://perma.cc/U4TZ-28XF.

55. *Id.*

56. *See* Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672 (2015) ("Since 1970, twenty-two states have decriminalized the bulk of minor traffic offenses . . . .").

individuals charged with driving on a suspended license.[57] Hawaii undertook a thorough examination of its noncriminal codes in order to decriminalize regulatory offenses that once carried the potential for incarceration.[58] In addition to marijuana possession, Massachusetts decriminalized the first-time offenses of disturbing the peace and operating a vehicle while uninsured or with a suspended license.[59] In California, disturbing the peace and petty theft are wobblers that prosecutors can charge either as misdemeanors or infractions.[60]

Decriminalization offers substantial benefits to defendants as well as the state, with potential salutary effects for the entire criminal system.

A. For Defendants

For defendants, the most obvious benefit is the elimination of incarceration, a punishment that the Supreme Court has consistently recognized to be "different in kind" from any other.[61] The harms of incarceration are in many ways unique: not only are incarcerated defendants deprived of their liberty but they may also experience severe collateral burdens including the threat of violence, rape, and disease.[62] Incarceration also has well-known psychological and stigmatizing effects, and many conclude that incarceration is itself criminogenic.[63]

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57. Austin Jenkins, *Nearly 300,000 Wash. Drivers Suspended for Failure to Pay Tickets*, NPR (July 22, 2011, 8:18 PM), http://www.npr.org/templates/story/story.php?storyId=138627811, *archived at* http://perma.cc/3YG7-QT6D.

58. THE SPANGENBERG PROJECT, *supra* note 28, at 5 (including reclassifications of agricultural, animal, conservation, and transportation offenses).

59. MASS. GEN. LAWS ANN. ch. 272, § 53(b) (West 2014); COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 53, at 15–16.

60. CAL. PENAL CODE § 17 (West 2014) (defining prosecutorial discretion); *id.* § 415 (disturbing the peace); *id.* § 490.1(a) (petty theft).

61. Scott v. Illinois, 440 U.S. 367, 373 (1979); *see also* Glover v. United States, 531 U.S. 198, 203 (2001) ("[A]ny amount of actual jail time has [constitutional] significance.").

62. Sharon Dolovich, *Foreword: Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237, 241 (2009) (charting the numerous ways that the American predilection for incarceration "create[s] a class of permanently marginalized and degraded noncitizens, marked out by the fact of their incarceration for perpetual social exclusion and ongoing social control"); *see also* COMM'N ON SAFETY AND ABUSE IN AMERICA'S PRISONS, VERA INST. OF JUSTICE, CONFRONTING CONFINEMENT 11–14, (2006) *available at* http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf, *archived at* http://perma.cc/5CRX-4JRX (documenting physical dangers of jails and prisons).

63. *See* Brown v. Plata, 131 S. Ct. 1910, 1954 (2011) (referring to California's "criminogenic" prison system); *see also Statement of Principles*, RIGHT ON CRIME http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/, *archived at* http://perma.cc/YV5W-M4GV ("[I]n some instances, [prisons] have the unintended consequence of hardening nonviolent, low-risk offenders—making them a greater risk to the public than when they entered.").

In sum, the simple move of reducing incarceration offers numerous, deep, and important benefits.

Defendants also gain from other aspects of decriminalization, although as described below, these benefits sometimes evaporate in practice and over time. Where offenses have been reclassified as civil, defendants can avoid accruing a criminal record and its attendant social stigma, particularly for employment purposes.[64] For fine-only offenses, defendants who can afford it can terminate their contact with the criminal process simply by paying the fine.[65] Where police are constrained from arresting offenders, defendants avoid the intrusions and fear associated with being arrested and having an arrest record. In addition, the very decision to decriminalize an offense signals that society deems the underlying conduct to be less culpable, thereby relieving the defendant of the stigma associated with traditional criminal conduct.[66]

B. For the State

For the state, decriminalization offers immense savings in the costs of prosecution, incarceration, and defense counsel. In Oregon, the average cost of processing a single jailable misdemeanor—including prosecution, defense, and court costs, but not actual incarceration costs—is $1,697.[67] In Chicago, estimates of the costs of a single marijuana arrest range from $1,600 to $7,200.[68] One report estimates potential savings of over $1 billion if states were to decriminalize half of their marijuana possession and disorderly conduct-type offenses.[69] The decriminalization of "driving with a suspended license"—an offense

64. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 94C, § 32L (West 2014) (prohibiting the creation of a criminal record for the infraction of marijuana possession).

65. *But see infra* Part V (general poverty of the defendant population makes fines more onerous than they appear at first blush).

66. *See generally* HUSAK, *supra* note 26 (discussing the consequences of recreational drug use criminalization).

67. HEIDI BLAINE ET AL., DEP'T OF PLANNING, PUB. POL'Y & MGMT., THE COSTS ASSOCIATED WITH PROSECUTING CRIME IN OREGON 12 (2010), http://library.state.or.us/repository/2010/201007161627305/index.pdf, *archived at* http://perma.cc/6WR6-4BSL; *see also* ROBERT C. BORUCHOWITZ, AM. CONSTITUTION SOC'Y, DIVERTING AND RECLASSIFYING MISDEMEANORS COULD SAVE $1 BILLION PER YEAR: REDUCING THE NEED FOR AND COST OF APPOINTED COUNSEL 4, (2010), *available at* http://www.acslaw.org/sites/default/files/Boruchowitz_-_Misdemeanors.pdf, *archived at* http://perma.cc/JC6R-BPY8 (finding similar costs associated with the prosecution of minor marijuana offenses).

68. KATHLEEN KANE-WILLIS ET AL., PATCHWORK POLICY: AN EVALUATION OF ARRESTS AND TICKETS FOR MARIJUANA MISDEMEANORS IN ILLINOIS 17 (2014), *available at* www.roosevelt.edu/~/media/Files/pdfs/CAS/ICDP/PatchworkPolicyFullReport.ashx, *archived at* http://perma.cc/2L96-QQLY.

69. BORUCHOWITZ, *supra* note 67, at 4.

that constitutes up to a third of many misdemeanor dockets—could save an additional billion dollars.[70] Decriminalization also potentially benefits the entire law enforcement apparatus, since shifting resources away from minor offenses theoretically permits police and prosecutors to devote scarce resources to more serious and violent crimes.[71]

Alarmed by the crisis in indigent defense, numerous commentators have zeroed in on the potential savings to the defense bar.[72] Misdemeanors drive much of the infamous public defender overload.[73] While the ABA recommends misdemeanor caseloads of no more than four hundred cases per year, numerous offices maintain caseloads much higher, from 650 in San Francisco to 1,200 in Dallas to 2,400 in Chicago to a mind-boggling 18,700 in Louisiana.[74] By decriminalizing minor offenses, hundreds of thousands of offenders would no longer be entitled to counsel, saving defender offices millions of dollars and permitting defense attorneys to concentrate on more serious cases.

In 2008, Massachusetts created a noncriminal civil offense specifically designed to eliminate the criminal and collateral consequences of a minor marijuana conviction. Its decriminalization statute reads in part:

> [P]ossession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender . . . to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification. . . . [N]either the Commonwealth nor any of its political subdivisions or their respective agencies, authorities or instrumentalities may impose any form of penalty, sanction or disqualification on an offender for possessing an ounce or less of marihuana. [For example] possession of one ounce or less of marihuana shall not provide a basis to deny an offender student financial aid, public housing or any form of public financial assistance including unemployment benefits, to deny the right to operate a motor vehicle or to disqualify an offender from serving as a foster parent or adoptive parent. Information concerning the offense of possession of one ounce or less of marihuana shall not be deemed

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70. *Id.* at 1 nn. 1 & 4.

71. *See* KANE-WILLIS ET AL., *supra* note 68, at 16–17 (quoting Chicago Mayor Rahm Emmanuel as supporting marijuana decriminalization based on its potential savings in police time).

72. Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2329–32 (2013); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 41 (2013); Roberts, *supra* note 20, at 331–33 (2011) (arguing that legislatures should "move minor misdemeanors out of the criminal system").

73. *See, e.g.*, Wilbur v. City of Mt. Vernon, 989 F. Supp. 2d 1122, 1131–32 (W.D. Wash. 2013) (finding that immense misdemeanor caseloads and lack of resources available to appointed counsel prevented the formation of a "basic representational relationship" between defendant and counsel in violation of the Sixth Amendment).

74. NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, *supra* note 15, at 21; Dashka Slater, *Mr. Public Defender*, CAL. LAW. (May 2010), http://www.callawyer.com/Clstory.cfm?eid=909468, *archived at* http://perma.cc/33YG-FPFW.

> "criminal offender record information," "evaluative information," or "intelligence information" . . . .[75]

The decriminalization of marijuana and two other low-level offenses has saved Massachusetts over $7 million in the cost of counsel alone.[76] In an era of overcrowded dockets and jails, this type of decriminalization offers relief to public defenders, prosecutors, and courts alike.

C. For the System

Above and beyond these concrete benefits to defendants and the state, decriminalization is a powerful form of normative recalibration, an opportunity to adjust criminal rules when they violate popular understandings of what should be punished and by how much. And if ever an era was crying out for recalibration, this is it. The U.S. criminal system is widely recognized as overly broad and spectacularly harsh, even by the people who run it.[77] While long felony sentences drive much of this perception, the misdemeanor process is a significant contributor as well. As television evangelical and former Republican presidential candidate Pat Robertson recently opined:

> I just think it's shocking how many of these young people wind up in prison and they get turned into hardcore criminals because they had a possession of a very small amount of controlled substance. The whole thing is crazy. We've said, "we're conservative, we're tough on crime." That's baloney. It's costing us billions and billions of dollars.[78]

In a similar vein, the *New York Times* ran a scathing story about people sent to jail for the minor crime of putting their feet up on a subway seat, including a diabetic who had lifted his leg to inject himself with insulin.[79] The story also covered Michael Weaver, a construction

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75. MASS. GEN. LAWS ANN. ch. 94C, § 32L (West 2014).

76. COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 53, at 15 (quoting Anthony Benedetti, Massachusetts Chief Public Defender).

77. Editorial Board, *Justice Kennedy's Plea to Congress*, N.Y. TIMES, Apr. 4, 2015, http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html?_r=0, *archived at* http://perma.cc/T7DG-ULZA (quoting Justice Kennedy as telling Congress "I think it's broken," referring to the American criminal justice system); Eric Holder, U.S. Attorney Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates, San Francisco, California (Aug. 12, 2013) ("[T]oo many Americans go to too many prisons for far too long, and for no truly good law enforcement reason."); *see also* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2005).

78. Ariel Edwards-Levy, *Pat Robertson Calls for Relaxed Marijuana Possession Laws*, HUFFINGTON POST, (Mar. 6, 2012), *available at* http://www.huffingtonpost.com/2012/03/06/pat-robertson-marijuana-pot-_n_1324828.html, *archived at* http://perma.cc/GKD4-E38V.

79. Joseph Goldstein & Christine Haughney, *Relax If You Want, But Don't Put Your Feet Up*, N.Y. TIMES, Jan. 6, 2012, http://www.nytimes.com/2012/01/07/nyregion/minor-offense-on-ny-subway-can-bring-ticket-or-handcuffs.html?pagewanted=all&_r=0, *archived at* http://perma.cc/6VV4-XWNZ.

worker who went to jail for falling asleep on the subway early in the morning after Thanksgiving dinner. His crime: leaning against the empty seat next to him in violation of the prohibition against taking up two seats. As his Legal Aid lawyer pointed out, such cases can "make people lose faith in our criminal justice system."[80]

Scholars have long noted that the moral authority of the justice system suffers when it criminalizes behaviors in which many people nevertheless engage.[81] "On one hand, the law as written sends a serious message about the wrongfulness of prohibited conduct. On the other hand, the law as understood sends a wildly different message: that the moral authority of the criminal law is not all that weighty after all . . . ."[82] Procedural justice scholarship similarly emphasizes that aggressive enforcement of minor offenses can undermine public respect for and obedience to criminal laws where enforcement is perceived as unfair or disrespectful.[83] For minor offenses—which are routinely disobeyed, perceived as overly punitive, or enforced in a disrespectful or discriminatory manner—decriminalization offers a way of healing these normative erosions.

Finally, decriminalization holds special promise as a way to ease the racial imbalance that plagues the U.S. criminal system, improving its relationship to communities of color and the perception that it indiscriminately sweeps up young black men. This promise is particularly attractive given the growing public consensus that racism remains a primary blot on the system's moral and democratic legitimacy.[84] Minor offenses are prone to racialized enforcement; order-

80. *Id.*

81. William Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1874–75, 1879 (2000) (discussing Prohibition and the War on Drugs).

82. Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1425 (2002).

83. Stephen J. Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 343, 347 (2011) (discussing public responses to police crackdowns on minor offenses); *see also* K. Babe Howell, *Broken Lives From Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009) (arguing that because the misdemeanor process so lacks procedural regularity, it imposes additional legitimacy costs when it is overused by order maintenance policing).

84. Holder, *supra* note 77 (acknowledging that "young black and Latino men are disproportionately likely to become involved in our criminal justice system" and that "people of color often face harsher punishments than their peers"); *see also Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 10 (2013) (statement of Sen. Rand Paul of Kentucky) ("[T]he majority of illegal drug users and dealers nationwide are white, three-fourths of all people in prison for drug offenses have been African American or Latino."); THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM (Aug. 2013) (concluding that "the United States is in

maintenance crimes like loitering, trespassing, and marijuana possession have become infamous as police tools for controlling and criminalizing black men.[85] Similarly, police often use misdemeanors such as disorderly conduct and resisting arrest to discipline men of color.[86] These arrests translate easily and often into convictions, with attendant stigma and social burdens that can last a lifetime.

It is precisely because misdemeanors produce so much racialization that the decision to decriminalize them can reduce the racial skew of petty-offense law enforcement. When minor offenses stop generating arrests, arrest records, searches, jailtime, or a criminal conviction, hundreds of thousands of African American men could avoid the harshest consequences of criminalization.[87]

The connection between racial justice and decriminalization has not been lost on the political sphere. Three 2014 mayoral candidates in the District of Columbia voted for marijuana decriminalization citing the need for "social justice"—although all D.C. citizens use marijuana at the same rates, African Americans were eight times as likely to be arrested for it as were whites.[88] In 2012, Governor Andrew Cuomo floated a marijuana decriminalization proposal in response to the furor over New York's racially biased stop-and-frisk policies.[89] When the proposal failed legislatively, Brooklyn District Attorney Ken Thompson—the borough's first African American D.A.—pledged to implement it anyway.[90]

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violation of its obligations under . . . the International Covenant on Civil and Political Rights to ensure that all its citizens—regardless of race—are treated equally under the law.").

85. PETER MOSKOS, COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT (2009) (describing how Baltimore police use loitering arrests as a way of controlling and sending messages to young black men in high-crime neighborhoods); Chris Fabricant, *Rousting the Cops: One Man Stands Up to the NYPD's Apartheid-like Trespassing Crackdown*, VILLAGE VOICE, Oct. 20, 2007, http://www.villagevoice.com/2007-10-30/news/rousting-the-cops/, *archived at* http://perma.cc/UH3Q-9YCM (describing similar use of trespassing in New York).

86. *E.g.*, Eric Nalder, *"Obstructing" Justice: Blacks Are Arrested on "Contempt of Cop" Charge at Higher Rate*, SEATTLE POST INTELLIGENCER, Feb. 28, 2008, at A1 ("African-Americans are arrested for the sole crime of obstructing eight times as often as whites.").

87. Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2191 (2013) ("What poor people, and black people, need from criminal justice is to be stopped less, arrested less, prosecuted less, incarcerated less.").

88. David Weigel, *You Have the Right to Toke*, SLATE.COM (Jan. 15, 2014), http://www.slate.com/articles/news_and_politics/politics/2014/01/marijuana_decriminalization_will_congress_stop_d_c_from_reducing_pot_smoking.html, *archived at* http://perma.cc/7DC8-QYTM.

89. Thomas Kaplan, *Cuomo Seeks Cut in Frisk Arrests*, N.Y. TIMES, June 3, 2012, http://www.nytimes.com/2012/06/04/nyregion/cuomo-seeks-cut-in-stop-and-frisk-arrests.html?pagewanted=all&_r=0, *archived at* http://perma.cc/7W3W-XS2Z.

90. Christopher Robbins, *Brooklyn DA Vows to Decriminalize Small Amounts of Marijuana, Despite Cuomo's Reversal*, GOTHAMIST, (Jan. 8, 2014), http://gothamist.com/2014/01/08/brooklyn_da_vows_to_decriminalize_s.php, *archived at* http://perma.cc/WEB5-66M5.

To be sure, the United States is far from a full embrace of decriminalization.[91] Outside the marijuana context, only a few states have engaged in substantial reform beyond traffic offenses, and even that remains partial: most jurisdictions retain police and prosecutorial power to arrest and incarcerate for minor conduct.[92] Even marijuana decriminalization still has opponents.[93] But as the country grapples with the thirty-year legacies of zero-tolerance policing and mass incarceration, decriminalization is increasingly seen as an attractive response. It offers relief from the crushing burdens imposed on defendants, the enormous financial costs to the state, and may even shore up the waning legitimacy of a bloated and harsh system infamous for its racial imbalance.

V. THE DARK SIDE OF DECRIMINALIZATION

Despite its many benefits, decriminalization can pose significant threats to the very values it seems to support. This paradox arises in several ways. First, the most common forms of partial decriminalization retain many punitive features while stripping defendants of counsel and other procedural protections. Although decriminalization scales back certain aspects of the criminal process, its net-widening effects ironically can expand the overall reach of the penal state. Finally, because the fines and fees associated with infractions and minor offenses are a major funding source for lower courts and struggling municipalities, decriminalization makes it easier and more attractive

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91. *See, e.g.*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRUEL, INHUMAN, AND DEGRADING: HOMELESSNESS IN THE UNITED STATES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 6–9 (2013), http://www.nlchp.org/Cruel_Inhuman_and_Degrading *archived at* http://perma.cc/XE34-SFWK (documenting numerous minor offenses including loitering and disorderly conduct that effectively criminalize the homeless).

92. THE SPANGENBERG PROJECT, *supra* note 28 (finding that few states have been successful at full decriminalization).

93. *E.g.*, Luke Broadwater, *Mayor Says She Won't Wave the 'Schmoke Flag of Legalization' for Marijuana*, BALT. SUN (Jan. 15, 2014), http://articles.baltimoresun.com/2014-01-15/news/bal-mayor-says-she-wont-wave-schmoke-flag-of-legalization-for-marijuana-20140115_1_marijuana-legalization-flag-maryland, *archived at* http://perma.cc/5MLC-KZD8 (documenting Baltimore Mayor Stephanie Rawlings-Blake's opposition to decriminalization); Lisa Provence, *Disorderly Solution? Deaton Proposes New Pot Possession Charge*, HOOK (Charlottesville, VA), Feb. 27, 2013, https://www.readthehook.com/109175/disorderly-conduct-deaton-proposes-new-pot-possession-charge, *archived at* http://perma.cc/HGM5-AJLQ (reporting that during City Council vote in which Council declined to decriminalize marijuana, prosecutorial candidate argued that "if a person makes a mistake, they should be punished"); *see also* Kristen Gwynne, *Legalization's Biggest Enemies: Meet the Drug Warriors Working to Roll Back Hard-Won Advances in Marijuana Policy*, ROLLING STONE, Jan. 13, 2013, http://www.rollingstone.com/politics/news/ legalizations-biggest-enemies-20130117, *archived at* http://perma.cc/VDX5-LEC2 (surveying influential policymakers and organizations opposed to decriminalization).

to extract revenue from low-income, socially vulnerable populations. In effect, decriminalization represents the expansion of a different model of criminal justice: a less retributive, more informal, heavily class- and race-inflected mode of light-handed punishment, indirect social stratification, and control.

A. They Never Called It Punishment

The implicit deal behind decriminalization is essentially to promise lesser punishments in exchange for reduced procedural protections. Or to put it another way, when punishments are sufficiently minor, we make it easier to label people as criminals in the first instance. The most important feature of this deal is the trade-off between incarceration and the right to counsel because a defendant who cannot be incarcerated for the underlying offense is not entitled to representation.[94] But there are other procedural trade-offs. For example, when Connecticut decriminalized marijuana possession, it reduced the burden of proof at trial to a preponderance of the evidence.[95] Likewise, some infraction courts run on a more informal model than traditional courts.[96] The underlying justification is that defendants who face minor punishments can fairly be required to fend for themselves against the state without counsel or the stringent procedural protections triggered by the threat of incarceration.[97]

When offenses are fully decriminalized—reclassified as civil with no possibility of arrest, incarceration, or criminal stigma—defendants do indeed face lesser formal punishments. But much of decriminalization is only partial, leaving uncounseled defendants unprotected against the significant punitive effects of decriminalized offenses. And in fact, even where offenses have been fully decriminalized and reclassified as civil, the consequences of being labeled an "offender" do not disappear, and defendants may be further punished in informal and unauthorized ways due to the sloppy, punitive nature of the misdemeanor system more generally.

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94. Alabama v. Shelton, 535 U.S. 654 (2002) (holding defendants are not entitled to counsel if they cannot be incarcerated for the underlying offense); Scott v. Illinois, 440 U.S. 367 (1979) (same).

95. CONN. GEN. STAT. ANN. § 51-164n(h)–(i) (West 2015).

96. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (Oct. 2010), *available at* http://www.aclu.org/files/assets/InForAPenny_web.pdf, *archived at* http://perma.cc/ 76QP-BLH9 (discussing the operations of Mayor's Courts).

97. Argersinger v. Hamlin, 407 U.S. 25, 33 (1972) (holding the right to counsel necessary to protect even misdemeanor defendant "in a case that actually leads to imprisonment").

1. Arrest

In a few jurisdictions, decriminalized civil infractions do not provide a basis for arrest or detention under state law. The Massachusetts Supreme Court recently held that, because marijuana possession is no longer a crime in that state, it cannot serve as the basis for an arrest or search incident to arrest.[98] But not all states operationalize decriminalization in this way. California permits arrests for marijuana possession even though the offense is a fine-only infraction.[99] Similarly, in Nebraska, although some drug infractions do not trigger arrest authority, police can nevertheless arrest if they have "reasonable grounds to believe that . . . such action is necessary in order to carry out legitimate investigative functions."[100]

These state law developments dovetail with the Supreme Court's holdings that full custodial arrests are permissible under the Fourth Amendment for nonjailable civil offenses,[101] even when state law expressly prohibits it.[102] Indeed, just last year in *Florence v. Board of Chosen Freeholders*, the Supreme Court upheld the strip search and six-day incarceration of a man arrested for civil contempt for failure to pay a fine, a noncriminal, nonjailable offense under New Jersey law.[103]

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98. Commonwealth v. Jackson, 985 N.E.2d 853, 855 (Mass. 2013); *see also* Commonwealth v. Keefner, 961 N.E.2d 1083 (Mass. 2012) (deciding that evidence defendant was sharing marijuana with others and had a prior record of distribution was insufficient to establish probable cause for his arrest for the crime of possession with intent to distribute); Doe v. Metro. Police Dep't, 445 F.3d 460, 461 (D.C. Cir. 2006) (holding that a state statute that is unambiguously civil in nature cannot constitute a proper basis for arrest).

99. In several unpublished opinions, California courts have upheld arrests for marijuana possession notwithstanding decriminalization. *See, e.g.*, People v. Bester, A137728, 2014 WL 710961 (Cal. App. Feb. 25, 2014); People v. Delery, B240204, 2013 WL 5209821 (Cal. App. Sept. 17, 2013). CAL. PENAL CODE § 19.6 (West 2014) defines infraction in a way that appears to contemplate arrest:

> An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him or her unless he or she is arrested and not released on his or her written promise to appear, his or her own recognizance, or a deposit of bail.

See also CAL. PENAL CODE § 840 (authorizing arrests for infractions); People v. McKay, 41 P.3d 59 (Cal. 2002) (full custodial arrest permissible for nonjailable infraction); People v. Waxler, 168 Cal. Rptr. 3d 822, 828–30 (Ct. App. 2014) (smell of burnt marijuana furnished probable cause to search vehicle notwithstanding California's decision to "reduce the penalty associated with possession of up to one ounce of marijuana").

100. State v. Petersen, 676 N.W.2d 65, 71 (Neb. Ct. App. 2004) (citing State v. Sassen, 484 N.W.2d 469, 472–473 (Neb. 1992)); *see also* United States v. Perdoma, 621 F.3d 745, 749 (8th Cir. 2010) (upholding constitutionality of arrest for possession of less than one ounce of marijuana, a civil infraction under Nebraska law).

101. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

102. Virginia. v. Moore, 553 U.S. 164 (2008).

103. 132 S. Ct. 1510 (2012).

As a result, numerous federal courts have upheld the constitutionality of arrests for fine-only civil offenses.[104] In those jurisdictions where offenses have only been partially decriminalized into nonjailable misdemeanors, arrest remains fully available.[105]

This legal reality conflicts with the popular perception that infractions are nonarrestable.[106] That perception is not baseless: many decriminalized offenses do instruct police to issue summonses in lieu of arrest, and as a practical matter, decriminalization often leads to reductions in arrest rates.[107] But the loopholes described above mean that, legally speaking, the reclassification of an offense into a summons-only infraction does not necessarily take arrest and its concomitant burdens off the table.[108]

Just as importantly, decriminalization may not cure racially disproportionate arrest practices. A five-state study concluded that marijuana decriminalization reduced arrest rates but not racial

104. Wayne Logan, Florence v. Board of Chosen Freeholders*: Police Power Takes a More Intrusive Turn*, 46 AKRON L. REV. 413, 423 (2013) (describing unresolved debate over "the basic question of what can qualify as an 'offense' sufficient to permit arrest.").

105. Although police may arrest, there are other potential constitutional restrictions on police authority when it comes to enforcing infractions. *E.g.*, Illinois v. McArthur, 531 U.S. 326 (2001) (reserving the question of whether police could detain an individual outside his home while procuring a warrant if the underlying suspected offense was nonjailable); Wisconsin v. Welsh, 466 U.S. 740 (1984) (deciding that police lacked authority to search home without a warrant where the destruction of evidence—the basis for the warrant exception—pertained merely to a noncriminal civil offense).

106. *See, e.g.*, Kristen Mack, *City Council OKs Pot Tickets*, CHI. TRIB., June 28, 2012, http://articles.chicagotribune.com/2012-06-28/news/ct-met-chicago-city-council-0628-20120628_1_pot-possession-possession-of-small-amounts-pot-tickets, *archived at* http://perma.cc/JEM9-YS84 (describing the "wave of states and big cities that have opted for fines instead of arrests for small amounts of [marijuana]").

107. *See* MIKE MALES, CTR. ON JUVENILE & CRIMINAL JUSTICE, CALIFORNIA YOUTH CRIME PLUNGES TO ALL-TIME LOW 2, (2012) (juvenile drug arrests fell forty-seven percent after marijuana decriminalization), *available at* http://www.cjcj.org/uploads/cjcj/documents/CA_Youth_Crime_2011.pdf, *archived at* http://perma.cc/4PQX-TZHA; *see also* BORUCHOWITZ, *supra* note 67, at 6 (describing Sarasota, Florida decriminalization program that reduced the jail populations and cut arrest rates in half). *But see* AM. CIVIL LIBERTIES UNION, *supra* note 23, at 40 (seventy-two percent of all Nebraska drug arrests were for marijuana in 2010 despite decriminalization).

108. The legal collateral burdens of arrest include being searched, booked, fingerprinted, detained, and even placed in the general jail population. *See Florence*, 132 S. Ct. 1510; Atwater v. City of Lago Vista, 532 U.S. 318 (2001). Informal collateral burdens include loss of employment, public benefits, or housing, as well as immigration and child-welfare consequences. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); *infra* Part V.A.4; *see also* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007) (arrest records easily available on the internet); RODRIGUEZ & EMSELLEM, *supra* note 16 (arrest records readily available to prospective employers and other institutions).

disparities in arrest rates.[109] In Chicago, marijuana decriminalization led to reduced arrest rates in white, but not African American, neighborhoods. In fact, after the ticketing ordinance was passed, disparities in neighborhood arrest rates actually increased.[110]

This is because decriminalization alone does not necessarily alter police arrest authority or policies. In New York, for example, after marijuana possession was decriminalized, police continued to arrest young men of color in disproportionate numbers for the offense of displaying marijuana in public. That crime was generated, perversely, by the police practice of stopping individuals and ordering them to empty their pockets.[111] The District of Columbia recently, to great fanfare, decriminalized the possession of small amounts of marijuana, but the city council amended the bill to include a similar "public consumption" misdemeanor. One former police captain opined that this "watering down" of the bill would leave the door open to racially disparate arrests in D.C. in the same way that it did in New York.[112]

2. Incarceration for Failure to Pay

The raison d'etre of decriminalization is to reduce incarceration. But when offenders cannot pay their fines, they may end up in jail anyway, even when they could not legally face incarceration for the underlying offense as a matter of law. This can occur through contempt proceedings or simply through the sloppy operation of the lower courts. It often occurs without defense counsel.

A series of recent studies document the widespread practice of incarcerating indigent defendants for failure to pay fines and fees.[113] In

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109. Mike Males & Lizzie Buchen, *Reforming Marijuana Laws: Which Approach Best Reduces the Harms of Criminalization?*, CTR. ON JUVENILE & CRIMINAL JUSTICE (Sept. 24, 2014), http://www.cjcj.org/news/8200, *archived at* http://perma.cc/N3AX-PA35.

110. KANE-WILLIS ET AL., *supra* note 68.

111. *See* Kaplan, *supra* note 89 (reporting that, although marijuana possession is an infraction, young black and Latino men are routinely arrested for having marijuana in "public view" after police order them to empty their pockets).

112. Jaisal Noor, *DC Close to Decriminalizing Marijuana, Maintains Public Consumption as a Criminal Offense,* TRUTHOUT (Feb. 5, 2014, 11:17 AM), http://truth-out.org/news/item/21677-dc-decriminalizes-marijuana-maintains-public-consumption-as-a-criminal-offense, *archived at* http://perma.cc/9LU5-XVF6 (expressing concern about the disproportionate impact that public consumption laws have on African American youth).

113. AM. CIVIL LIBERTIES UNION, *supra* note 96, at 18; ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 2 (2010) ("Although 'debtors' prison' is illegal in all states, reincarcerating individuals for failure to pay debt is, in fact, common in some[—]and in all states new paths back to prison are emerging for those who owe criminal justice debt."); Bridget McCormack, *Economic Incarceration*, 25 WINDSOR Y.B. ACCESS TO JUST. 223, 234–37 (2007) (describing the wide arrays of fines and fees imposed on misdemeanor defendants that lead to their incarceration).

New Orleans, for example, defendants who cannot pay their fines, courts costs, or other fees are routinely held in contempt for nonpayment and incarcerated, regardless of the basis on which they were originally charged.[114] In Michigan, a mother was held in contempt and jailed, not for any offense she committed, but for failure to pay jail costs for her sixteen-year-old son.[115] In Ohio, clear statutory language prohibits the incarceration of defendants for failing to pay court costs or restitution. Nevertheless, Ohio courts routinely employ three mechanisms to incarcerate defendants who fail to pay:

> (1) holding defendants in contempt for failing to pay, without due process, counsel, or notice; (2) ordering defendants to "pay or appear" and then incarcerating individuals for the "failure to appear;" and (3) jailing defendants who are too poor to pay court costs or restitution, which are clearly civil judgments.[116]

In sum, the fact that defendants are being sentenced to fines rather than jail does not necessarily inoculate them against incarceration.

a. Constitutional Constraints

To be sure, much of this incarceration is illegal. It is, for a number of reasons, unconstitutional to incarcerate defendants sentenced to nonjailable infractions, even when they fail to pay. Fundamentally, a defendant cannot be jailed for an offense if the authorized sentence for the infraction does not include incarceration.[117] Incarcerating defendants who cannot afford to pay also may violate the Equal Protection Clause.[118] The state may not incarcerate a person—even if the original offense authorizes incarceration—solely because he cannot pay a criminal fine.[119]

The equal protection case is even clearer when the statute does not authorize incarceration. In *Tate v. Short*, the defendant owed $425 in fines for nonjailable traffic offenses. Because he couldn't pay, he was sent to the municipal prison farm to "pay off" his fines at a rate of $5 a

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114. AM. CIVIL LIBERTIES UNION, *supra* note 96, at 18 (describing incarceration for contempt as the most common way that New Orleans nonpaying defendants end up in jail; "it happens every day").

115. *Id.* at 35.

116. *Id.* at 43.

117. *See* Alabama v. Shelton, 535 U.S. 654 (2002) (voiding defendant's suspended sentence because he was not represented by counsel and therefore could not be incarcerated for that offense); Pulliam v. Allen, 466 U.S. 522 (1984) (discussing magistrate's unconstitutional policy of incarcerating defendants unable to post bond for nonjailable offenses).

118. Bearden v. Georgia, 461 U.S. 660 (1983).

119. Williams v. Illinois, 399 U.S. 235 (1970) (holding state could not subject defendant to term of incarceration that exceeded the statutory maximum based solely on his inability to pay fine).

day, or eighty-five days. The Supreme Court concluded that this practice violated the Equal Protection Clause:

> [T]he statutory ceiling placed on imprisonment for any substantive offense [must] be the same for all defendants irrespective of their economic status. Since Texas has legislated a "fines only" policy for traffic offenses, that statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine.[120]

In *Bearden v. Georgia*, the Supreme Court affirmed courts' general authority to incarcerate defendants who fail to pay their fines. Observing that "[a] defendant's poverty in no way immunizes him from punishment,"[121] the Court held that, while the defendant's probation could not "automatically" be revoked for failure to pay, the door was still open to incarceration if the defendant's failure was willful or if he failed to make bona fide efforts to come up with the fine.[122] But even the *Bearden* Court assumed that the sentencing court's ultimate authority would remain limited by the underlying statute.[123] If the statutory ceiling is zero, it must stay zero for everyone.[124] As a matter of law, therefore, a defendant convicted of a decriminalized fine-only offense should theoretically be protected from incarceration.[125]

120. Tate v. Short, 401 U.S. 395, 398–99 (1971) (internal quotations and citations omitted).

121. *Bearden*, 461 U.S. at 670.

122. *Id.* at 668.

123. *Id.* at 670 ("[N]othing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law."); *id.* at 672 ("If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority.").

124. Similarly, California's statute that permits a defendant to "work off" fines by sitting in jail is limited by the statutory maximum. CAL. PENAL CODE § 1205 (West 2014) (a term of imprisonment in lieu of fines cannot "exceed the term for which the defendant may be sentenced to imprisonment for the offense of which he or she has been convicted"). But the California Supreme Court has also held that this limitation does not affect courts' authority to fine and incarcerate under their civil contempt powers. *Ex parte* Karlson, 117 P. 447, 448 (Cal. 1911); *see also infra* Part V.A.2 (discussing contempt as a way around the limitations of criminal punishment).

125. Some states order indigent defendants to "work off" fines and fees through community service. At least one court has deemed this practice a violation of the Thirteenth Amendment's prohibition on involuntary servitude when applied to a civil fine but considered it a valid condition of criminal probation. Opinion of the Justices, 431 A.2d 144, 151–52 (N.H. 1981). Where jurisdictions treat decriminalized offenses as civil, this might constrain the authority to impose community service on defendants who cannot pay fines.

b. Getting Around the Bar on Incarceration

Notwithstanding these legal constraints, states have found ways around the prohibition.[126] Civil contempt proceedings are not technically considered punishment but rather enforcement mechanisms that ensure orders are obeyed. "Civil contempt differs from criminal contempt in that it seeks only to 'coerc[e] the defendant to do' what a court had previously ordered him to do."[127] Courts can therefore incarcerate defendants who are held in contempt regardless of whether the underlying statute authorizes incarceration.[128]

Moreover, incarceration can occur without the appointment of defense counsel. "[W]here civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case" and "does not always require the provision of counsel in civil proceedings where incarceration is threatened."[129] Many courts routinely incarcerate civil contemnors for failing to pay fines without giving them a lawyer, even though they could not incarcerate them for the underlying offense at all.[130]

The practice of using civil contempt to enforce criminal fines is widespread. As the *New York Times* recently complained, "[M]inor offenders who cannot pay a fine or fee often find themselves in jail cells."[131] In Alabama, for example, the contempt statute provides that "[i]n cases of willful nonpayment of the fine and costs, the defendant

126. Tate v. Short, 401 U.S. 395, 399–400 (1971) ("There are, however, other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines."). For example in Connecticut, if a defendant fails to respond to a decriminalized marijuana infraction:

> [T]he defendant's failure to act constitutes the misdemeanor of Failure to Pay or Plead to an Infraction, in violation of C.G.S. § 51-164r(a). A defendant can be arrested and required to appear in court, where that person will face a maximum penalty of imprisonment for up to three months and a fine of up to five hundred dollars in addition to the penalties imposed pursuant to the original infractions matter.

CONN. SUPERIOR COURT CHART A: MAIL-IN VIOLATIONS AND INFRACTIONS SCHEDULE PENALTIES TO BE ACCEPTED BY THE CENTRALIZED INFRACTIONS BUREAU EFFECTIVE OCTOBER 1, 2013 (UNLESS OTHERWISE NOTED) 2 (2013), http://www.jud.ct.gov/Publications/Infractions/CR003B_chartAB.pdf *archived at* http://perma.cc/6F5Y-BCPN.

127. Turner v. Rogers, 131 S. Ct. 2507, 2516 (2011) (holding that the state need not automatically provide counsel to an indigent defendant in a civil contempt proceeding that may lead to his incarceration).

128. *Id.* at 2512–13 (holding defendant in civil contempt and incarcerating him for failure to pay child support pursuant to civil law requirements); *Ex parte Karlson*, 117 P. at 448 (explaining that the CAL. PENAL CODE § 1205 limitation on incarceration does not affect courts' authority to fine and incarcerate under their civil contempt powers).

129. *Turner*, 131 S. Ct. at 2517–18; *see also id.* at 2520 (describing the disadvantages of a categorical right to counsel in such proceedings).

130. AM. CIVIL LIBERTIES UNION, *supra* note 96, at 52.

131. Editorial, *supra* note 6.

shall either be imprisoned in the county jail or, at the discretion of the court, sentenced to hard labor for the county,"[132] and incarceration under the statute is common.[133] A 2010 Brennan Center report discovered at least eleven states that "have statutes or practices that authorize incarceration . . . for a willful failure to pay criminal justice debt, often under the guise of civil contempt."[134]

Legal constraints aside, the reality of the misdemeanor system is that courts routinely incarcerate offenders for failure to pay with little meaningful oversight or adversarial check.[135] As the ACLU report reveals in detail, Michigan, Ohio, Georgia, and Washington all incarcerate defendants for failure to pay fines, often in violation of their respective state laws or the U.S. Constitution.[136] In Dayton, Ohio, for example, even after numerous Ohio courts declared the practice of incarcerating defendants for failure to pay unconstitutional, and even after the county Public Defender informed every local judge of the rulings in writing, the practice continued.[137] Human Rights Watch has documented the widespread abuses in and lack of judicial oversight over the massive private probation industry, a cadre of for-profit companies that act as debt collectors for defendants who cannot immediately afford to pay their fines and fees.[138] Such defendants are commonly incarcerated, in violation of *Bearden*, for failure to pay fines and supervision fees they cannot afford.

These practices offer a cautionary tale: the key compromise at the heart of decriminalization—trading away punishment for weaker process—potentially opens the door to incarceration despite the common belief that decriminalization precludes imprisonment. This is not to suggest that decriminalization is ineffectual. As a practical

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132. ALA. CODE § 15-18-62 (2015); *see also* FLA. STAT. ANN. § 938.30(11), (14) (West 2014):

> Any person failing to appear or willfully failing to comply with an order under this section, including an order to comply with a payment schedule established by the clerk of court, may be held in civil contempt," and "[t]he provisions of this section may be used in addition to, or in lieu of, other provisions of law for enforcing payment of court-imposed financial obligations in criminal cases.

133. BANNON ET AL., *supra* note 113, at 49 n. 131 (citing Telephone Interview with Veronica Harris, Macon County Circuit Court (Dec. 8, 2009)).

134. *Id.* at 20.

135. *E.g.*, McCormack, *supra* note 113, at 234–37 (describing the wide array of fines and fees imposed on misdemeanor defendants that lead to their incarceration); *see also* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323 (2009) (surveying ways that states unconstitutionally extract counsel fees from indigent defendants).

136. AM. CIVIL LIBERTIES UNION, *supra* note 96.

137. *Id.* at 49.

138. HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA'S "OFFENDER-FUNDED" PROBATION INDUSTRY (FEB. 2014), *available at* http://www.hrw.org/reports/2014/02/05/profiting-probation-0, *archived at* http://perma.cc/85V5-FLLQ.

matter, we should expect states that decriminalize marijuana and other minor offenses to cut back significantly on incarceration, as they do arrests.[139] Indeed, it would be puzzling if they didn't, since that's largely the point of the exercise. But as evidence from around the country attests, defendants routinely face incarceration down the road as a matter of practice and sometimes law if they cannot pay their fines. As dozens of states embrace the fine-only model for the possession of small amounts of marijuana and other minor offenses, the counterintuitive reality is that these fines may translate into jailtime for the poorest offenders.

3. Supervisory Sentences

Decriminalization does not always shrink the reach of the penal state. Even where incarceration is unavailable, states increasingly attach supervisory, educational, or treatment requirements, even to very minor decriminalized offenses. Popular forms of partial decriminalization include diversion and the creation of specialized courts—for drug abusers, veterans, or suspended license violators—that temporarily suspend the threat of incarceration as a way of inducing defendants to change their behavior.[140] These dynamics extend the state's control over defendants beyond the determination of guilt and punitive fines and open the door to new sanctions if defendants do not comply with supervisory conditions.

Numerous states that have decriminalized marijuana possession have retained a supervisory component. Nebraska's marijuana possession statute creates a nonjailable infraction for a first offense and requires defendants to attend a drug course "if the judge determines that attending such course is in the best interest of the individual defendant."[141] Minnesota's statute creates a petty misdemeanor that requires a drug awareness course.[142] Nevada makes

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139. *See, e.g.*, AM. CIVIL LIBERTIES UNION, SMART REFORM IS POSSIBLE: STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES 22 (2011), *available at* https://www.aclu.org/criminal-law-reform/smart-reform-possible-states-reducing-incarceration-rates-and-costs-while, *archived at* http://perma.cc/RD2X-SPZW (Texas drug reform mandating probation instead of prison for low-level possession resulted in four thousand fewer incarcerations); BORUCHOWITZ, *supra* note 67, at 6 (describing Sarasota, Florida decriminalization program that reduced the jail populations and cut arrest rates in half).

140. *See, e.g.*, Victoria Malkin, *Community Courts and the Process of Accountability: Consensus and Conflict at the Red Hook Community Justice Center*, 40 AM. CRIM. L. REV. 1573 (2003); McLeod, *supra* note 45.

141. NEB. REV. STAT. ANN. § 28-416(13)(a) (LexisNexis 2014) ("Any person knowingly or intentionally possessing marijuana . . . shall: [f]or the first offense, be guilty of an infraction, receive a citation, be fined three hundred dollars, and be assigned to attend a course . . . .").

142. MINN. STAT. ANN. § 152.027(4) (West 2015).

possession a nonjailable misdemeanor; first-time offenders are required to undergo a drug evaluation.[143] Similarly, jurisdictions that have decriminalized the possession of alcohol by a minor often require offenders to attend an alcohol awareness course.[144]

Because defendants are often required to pay for these services, the fees associated with supervision and drug testing can become onerous burdens in their own right.[145] In states that outsource these services to private companies, those companies may charge additional fees for which nonpayment can trigger the threat of incarceration.[146]

Pretrial diversion or prejudgment probation is another common form of partial decriminalization in which a defendant's case is suspended pending a probationary period of supervision. Under some schemes, if the defendant successfully completes the supervision, charges are dismissed. Under others, the defendant receives no criminal conviction, but the record still has criminal consequences.[147]

The ABA and NACDL both strongly advocate such diversionary forms of decriminalization.[148] But the burdens of diversion on defendants remain significant. For example, in New York, a defendant who gets a "diversionary adjournment in contemplation of dismissal" ("ACD")[149] will have his or her rap sheet marked for up to a year until the diversionary period ends—a criminal record that can trigger the loss of jobs, housing, and other collateral consequences.[150] The federal government requires divertees to "acknowledge responsibility for [their] behavior," an admission that may preclude future litigation over guilt.[151] In Maryland and Delaware, in order to get "probation before

143. NEV. REV. STAT. ANN. § 453.336(4) (LexisNexis 2013).

144. *E.g.*, D.C. CODE § 25-1002 (2015); N.Y. ALCO. BEV. CONT. LAW § 65-b (McKinney 2015).

145. AM. CIVIL LIBERTIES UNION, *supra* note 96, at 59.

146. RODRIGUEZ & EMSELLEM, supra note 16, at 32–37.

147. *E.g.*, DEL. CODE ANN. tit. 11, § 4218 (2015); MD. CODE ANN., CRIM. PROC. § 6-220 (2014).

148. COMM'N ON HOMELESSNESS & POVERTY, *supra* note 50; COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 53, at 14–15; NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, *supra* note 15, at 7–8; THE SPANGENBERG PROJECT, *supra* note 28; *see also* BORUCHOWITZ, *supra* note 67 (explaining the benefits of such decriminalization).

149. N.Y. CRIM. PROC. LAW § 160.50.

150. BORUCHOWITZ, *supra* note 67, at 5 (noting that "depending on how the diversion agreements are fashioned, non-citizens could face adverse immigration consequences"); Kohler-Hausmann, *supra* note 21, at 648 (describing how an ACD "mark[s] the defendant's rap sheet for up to one year"); *see also id.* at 660 (describing how a public defender advised his potentially innocent client to accept the ACD instead of contesting his guilt even though the client had lost his job due to the initial arrest).

151. U.S. ATTORNEY'S MANUAL, TITLE 9, CRIMINAL RESOURCES MANUAL, PRETRIAL DIVERSION, SECTION 712(F), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00712.htm, *archived at* http://perma.cc/8PVZ-JP3T.

judgment" ("PBJ"), defendants must plead guilty.[152] While the successful completion of PBJ prevents the entry of a conviction, the presence of a PBJ on a defendant's record can affect the disposition of future cases.[153] Moreover, these diversionary and probation periods—while typically less intrusive than a standard criminal probation—nevertheless may subject defendants to drug testing, education, therapy, community service, and other substantial requirements.[154]

Various jurisdictions partially decriminalize offenses by substituting intensive supervision and treatment for incarceration through specialized courts. Often referred to as "problem-solving courts," these increasingly popular tribunals carve out areas such as drugs, veterans, teens, prostitution, homelessness, gambling, and mental health.[155] This version of decriminalization can help defendants not only avoid incarceration but also obtain much-needed treatment or social services, with support and monitoring from judges, social workers, therapists, and medical personnel. Many such courts also appear to improve recidivism, although there are wild differences between jurisdictions and hot disputes over the data.[156]

Notwithstanding the many benefits, critics have pointed out that this form of supervisory decriminalization may actually burden defendants more than the traditional criminal process. Supervisory sentences typically range from a year to eighteen months.[157] As the *Boston Globe* remarked, "[F]or many low-level offenders, the choice to participate in a problem-solving court instead of going through the regular system can mean spending a year or more being closely monitored by the court instead of serving 30 days in jail. Which option affords the individual more freedom isn't self-evident."[158]

In these various ways, decriminalization substitutes supervision and treatment for imprisonment. While this reduces the immediate punitive impact of the process, defendants may nevertheless remain engaged in a protracted dance with the penal apparatus even for minor

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152. DEL. CODE ANN. tit. 11, § 4218 (probation before judgment can be entered upon defendant's plea of guilty or nolo contendere); MD. CODE ANN., CRIM. PROC. § 6-220 (same).

153. MD. CODE ANN., CRIM. PROC. § 6-220.

154. U.S. ATTORNEY'S MANUAL, *supra* note 151.

155. McLeod, *supra* note 45 (describing treatment courts); Leon Neyfakh, *The Custom Justice of 'Problem-Solving Courts,'* BOS. GLOBE, Mar. 23, 2014, http://www.bostonglobe.com/ideas/2014/03/22/the-custom-justice-problem-solving-courts/PQJLC758Sgw7qQhiefT6MM/story.html, *archived at* http://perma.cc/Z8X7-4XUV.

156. Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792 (2008); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1561 (2004).

157. Miller, *supra* note 156, at 1556.

158. Neyfakh, *supra* note 155.

crimes that the state has decided to deemphasize, or—in the case of drug and mental health courts—for defendants with medical conditions that could be treated outside the criminal process. The persistence of these supervisory sentences reveals a deep struggle within modern American penal culture: between the urge to move away from mass incarceration on the one hand and the system's reluctance to relinquish criminal control over even the most minor offenders on the other.

4. Future and Collateral Consequences

One of the promises of decriminalization is the reduction or elimination of future and collateral consequences, the idea being that offenders should not be burdened for life by their minor transgressions. And while decriminalization can certainly reduce the impact of conviction, it does not eliminate it. Indeed, uncounseled offenders are unlikely to understand the wide range of potential consequences that attach to a conviction for a putatively decriminalized offense for which they cannot be immediately jailed.

One set of consequences flows from the informal ways that an arrest, citation, or conviction can change an offender's relationship to the civil world of employers, schools, social services, and other institutions.[159] For example, records of arrest and minor convictions can be devastating to an offender's employment and financial future. Criminal background checks have become ubiquitous in the U.S. hiring market: in one survey over ninety percent of companies reported relying on them for hiring decisions.[160] According to a recent report by the National Employment Law Project, a conviction is often dispositive: numerous employers refused to consider applicants with any criminal record, even misdemeanors. Firms routinely advertise jobs that included "no arrest" or "clean record" or "spotless background" requirements, even though such practices often violate state and federal antidiscrimination law.[161]

Even in states that fully decriminalize various offenses, the record of a civil infraction can still have adverse consequences. In Maryland, for example, anyone—including employers—can access a person's civil and traffic, as well as criminal, records online, although

159. Logan, *supra* note 12, at 1104 (documenting "the gamut of negative social, economic, medical, and psychological consequences of conviction"); *see also* Jain, *supra* note 108 (documenting similar effects of arrest alone).

160. RODRIGUEZ & EMSELLEM, *supra* note 16, at 1 & n.1 (reporting results from the Society of Human Resource Management).

161. *Id.* at 13–18.

marijuana infractions are not included.[162] In states that prohibit the reporting and use of criminal records or civil infractions (or both) for employment purposes, the private sector market for criminal background checks often moots that policy. For example, in 1996 Victor Guevares was convicted of disorderly conduct, an offense which New York deems a noncriminal violation and expressly prohibits criminal database companies from reporting to employers. Nevertheless, eight years later the database company Acxiom reported the infraction to Mr. Guevares's soon-to-be new employer, who withdrew his job offer.[163] In 2009, then–New York Attorney General Andrew Cuomo launched investigations into the background check practices of some of New York's largest employers. Companies like RadioShack and ABM used ChoicePoint, a background check company that accounts for an estimated twenty percent of the U.S. background check industry. In violation of New York law, ChoicePoint's practices included reporting sealed and dismissed convictions, as well as infractions. In light of this market reality, offenders may not realize that accepting a conviction for a decriminalized offense may still harm their future job prospects.

A second type of consequence is formal and legal. In *Padilla v. Kentucky*, the Supreme Court recognized that immigration consequences can be one of the most significant effects of a criminal conviction.[164] So too for decriminalized offenses. Nonjailable misdemeanors are still criminal convictions with immigration consequences.[165] And while a fully decriminalized offense may not technically generate a criminal record, the underlying conduct can still trigger deportation.[166] Indeed, a recent *New York Times* investigation found that "two-thirds of the nearly two million deportation cases [since

162. MD. CODE ANN., CRIM. LAW § 5-601.1(g) (2014) (excluding marijuana infractions from the database); MARYLAND JUDICIARY CASE SEARCH, http://casesearch.courts.state.md.us/inquiry/processDisclaimer.jis, *archived at* http://perma.cc/L86V-TPD6.

163. Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, http://www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all&_r=0, *archived at* http://perma.cc/VGE5-ULMS.

164. 559 U.S. 356, 369 (2010).

165. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1759 (2013); Roberts, *supra* note 20, at 297–303.

166. *See* Pazcoguin v. Radcliffe, 292 F.3d 1209, 1215 (9th Cir. 2002) (finding noncitizen inadmissible for admitting drug possession to a physician, i.e., merely admitting to underlying conduct of drug possession was enough); *see also* Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(ii) (2012) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

2008] involve people who had committed minor infractions, including traffic violations, or had no criminal record at all."[167]

Convictions also impact licenses, loans, and other public benefits.[168] Misdemeanors and minor offenses can cause a person to lose their driver's or occupational license. A drug-related offense can eliminate an individual's eligibility for student loans[169] and public housing.[170] In Baltimore, a misdemeanor renders a person ineligible for public housing for eighteen months.[171] In New York, a noncriminal violation makes a person presumptively ineligible for public housing for two years.[172]

In addition to these consequences, a decriminalized offense can alter the ways that an offender will subsequently be treated by the criminal system itself. Police are more likely to arrest an individual who has been arrested or charged before.[173] In New York, prosecutors often withhold diversionary dispositions from second-time offenders, even for minor violations.[174]

More formally, minor convictions can lengthen subsequent sentences.[175] Although decriminalized offenses are often crafted to avoid such future effects,[176] they can nevertheless have significant consequences. Many states offer infractions only to first-time offenders; subsequent offenses are treated more harshly with higher fines and as

167. Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Records Show*, N.Y. TIMES, Apr. 6, 2014, http://www.nytimes.com/2014/04/07/us/more-deportations-follow-minor-crimes-data-shows.html?_r=0, *archived at* http://perma.cc/L9DJ-RRJ2.

168. *See* ABA DATABASE ON COLLATERAL CONSEQUENCES, http://www.abacollateralconsequences.org/map/, *archived at* http://perma.cc/Y46Q-YGBN (collecting over forty-five thousand collateral consequences of criminal convictions and infractions).

169. 20 U.S.C. § 1091(r) (denying student loans to any "student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance").

170. 42 U.S.C. § 13661; *see* Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1218 (2010) (documenting loss of benefits triggered by misdemeanors and non-criminal violations).

171. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 491 & n.185 (2010).

172. *Id.* at 508 & n.293.

173. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 181 (1965).

174. *See generally* Kohler-Hausmann, *supra* note 21 (documenting dismissal practices in New York's lower courts).

175. Nichols v. United States, 511 U.S. 738, 748 (1994) (previously uncounseled conviction could be used to enhance subsequent sentence for different crime).

176. *E.g.*, MASS. GEN. LAWS ANN. ch. 94C, § 32L (West 2014) (infraction creates no criminal record); VT. STAT. ANN. tit. 18, § 4230a (2014) (marijuana civil infraction creates no "criminal history record of any kind").

jailable misdemeanors.[177] Under the U.S. Sentencing Guidelines, even fully decriminalized marijuana infractions are counted in the calculation of an offender's criminal history, leading to higher sentences and ineligibility for safety-valve reductions.[178] In states that only partially decriminalize, nonjailable misdemeanors are counted in future state and federal sentencings.[179]

It is even possible that offenders could be punished twice for decriminalized offenses. The Double Jeopardy Clause prohibits multiple criminal prosecutions for the same conduct, but since some forms of decriminalization impose only civil penalties, the possibility arises that an offender who receives a civil infraction (e.g., for marijuana possession) could subsequently be prosecuted based on the same conduct (e.g., for possession with intent to distribute).[180] Numerous courts have held that civil traffic infractions do not trigger double jeopardy and therefore do not preclude criminal prosecution for the same conduct.[181]

Finally, the entire decriminalization edifice—with its ability to impose fines widely and without contest—threatens to exacerbate the poverty of the criminal justice population. This is ironic, since one of the great selling points of decriminalization is that it substitutes fines for incarceration. But for the low-income or impoverished individuals who constitute the vast majority of the criminal justice population, fines may be insurmountable. In the District of Columbia, for example, the marijuana decriminalization ordinance originally imposed a fine of $100; it was lowered to $25 upon recognition that many offenders might

177. MISS. CODE ANN. § 41-29-139(c)(2) (2014) (second possession offense requires minimum five days incarceration); NEB. REV. STAT. ANN. § 28-416(13) (LexisNexis 2014) (second possession authorized imprisonment up to five days).

178. U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c) (2012); *see also* United States v. Foote, 705 F.3d 305, 309 (8th Cir. 2013) (counting noncriminal marijuana offense as a prior conviction); United States v. Jenkins, 989 F.2d 979, 979 (8th Cir. 1993) (counting marijuana infraction as prior conviction, noting that "[h]ow a state views an offense does not determine how the United States Sentencing Guidelines view that offense").

179. THE SPANGENBERG PROJECT, *supra* note 28, at 11 (voicing concern over future consequences of uncounseled nonjailable misdemeanors).

180. United States v. Ursery, 518 U.S. 267, 275 (1996) (holding civil forfeiture not "punishment" and therefore did not preclude criminal prosecution for same conduct); *see also* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 778–79 (1997) (describing the accelerated erosion of the distinction between criminal and civil penalties); *cf.* United States v. Swafford, 512 F.3d 833, 846 (6th Cir. 2008) (prosecution for both possession of iodine and distribution of iodine violated double jeopardy).

181. Purcell v. United States, 594 A.2d 527, 529 (D.C. 1991); Idris v. City of Chicago, No. 06 C 6085, 2008 WL 182248, at *6 (N.D. Ill. Jan. 16, 2008), *aff'd*, 553 F.3d 564 (7th Cir. 2009); State v. Wyatt, No. 42944–6–II, 2013 WL 4500784, at *1 (Wash. Ct. App. Aug. 20, 2013).

well be incapable of paying $100.[182] But most states have not made such adjustments and impose significant fines in the hundreds or—for second or third offenses—up to one thousand dollars for decriminalized offenses.[183] In Rhode Island, for example, first time marijuana offenders receive a civil violation and must pay a $150 fine. The fine doubles if it is not paid within thirty days; after three months it quadruples to $600.[184]

The burden of a criminal fine does not end with the fine itself. Failure to pay can generate late fees, interest, and additional collection fees.[185] As described above, nonpayment routinely leads to incarceration.[186] Failure to pay can also harm a person's credit rating and their ability to rent an apartment, buy a car, or get a job.[187] Failure to pay often triggers revocation of a person's driver's license, threatening jobs, access to childcare, and other necessities.[188] As legal debt consumes a larger percentage of an individual's income, it can displace food, medicine, rent, or child support. In these ways, fines and fees punish not only offenders but also families and social networks, siphoning off scarce resources from already impoverished communities.

In a revealing example of how the "process" becomes the "punishment," the mechanics of the fine process itself also impose distinct costs.[189] When courts issue failure-to-pay warrants, the threat of the warrant may cast a fearful shadow over a person's life, stopping

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182. Andrea Noble, *D.C. Council Committee Calls for $25, Rather Than $100, Pot-Possession Fine*, WASH. TIMES, Jan. 14, 2014, http://www.washingtontimes.com/news/2014/jan/14/dc-council-committee-calls-25-rather-100-pot-posse/, *archived at* http://perma.cc/4XCQ-Y299 (explaining the change reflected conclusion "that a $100 fine would impose too heavy a burden on households with a limited ability to pay"). *But see* Aaron C. Davis, *House Republicans Block Funding for D.C. Marijuana Decriminalization*, WASH. POST (June 25, 2014), http://www.washingtonpost.com/local/dc-politics/house-republicans-block-funding-for-dc-marijuana-decriminalization/2014/06/25/d6854ba8-fc6e-11e3-8176-f2c941cf35f1_story.html, *archived at* http://perma.cc/U2GR-WRK5 (describing how Republicans tried to prevent implementation of the new law based in part on the argument that the $25 fine was too low).

183. MARIJUANA POLICY PROJECT, TABLE: STATES WITH ALTERNATIVES TO INCARCERATION FOR MARIJUANA POSSESSION, http://www.mpp.org/assets/pdfs/library/State-Decrim-Chart.pdf, *archived at* http://perma.cc/447M-7ESE (last visited Mar. 22, 2015) (documenting fines ranging from $100 to $1,000); *see, e.g.*, ME REV. STAT. tit. 22, § 2383(1)(A) (2015) (authorizing fine up to $1,000 for marijuana possession).

184. R.I. GEN. LAWS § 21-28-4.01(c)(2)(iv)–(vi) (2014).

185. BANNON ET AL., *supra* note 113, at 4.

186. *Supra* Part V.A.2.

187. BANNON ET AL., *supra* note 113, at 27; Katherine Beckett & Alexes Harris, *On Cash and Conviction*, 10 CRIMINOLOGY & PUB. POL. 505, 517–18 (2011).

188. Beckett & Harris, *supra* note 187, at 517–18.

189. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 30–31 (1979) ("The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence.").

them from calling the police, going to the hospital, and otherwise interfering with their relationship to the state and other official institutions.[190] This dynamic is part of a larger phenomenon that Sarah Brayne calls "system avoidance," in which individuals who have had contact with the criminal system by being "stopped, arrested, convicted, or incarcerated are less likely to interact with institutions that keep formal records, such as hospitals, banks, employment, and schools."[191]

In all these ways, decriminalized offenses and their attendant fines can carry numerous collateral consequences and burdens that defendants may be unaware of, and that may exacerbate structural inequalities and stratification already produced by the criminal system. Given all these consequences, decriminalization's signature trade-off between punishment and process is particularly disingenuous. From the state's perspective, decriminalization is attractive precisely because it eliminates the need to appoint and pay for counsel. At the same time, there is growing appreciation that counsel may be required in new arenas precisely because collateral consequences are increasingly burdensome.[192] Decriminalization thus eliminates the right to counsel with respect to the very matters for which defendants increasingly need good legal advice.

Perhaps most ironically of all, the decriminalization discourse itself may contribute to the problem. By advertising decriminalized offenses as minor or harmless and telling defendants that they don't even need lawyers, the system conveys to offenders that pleading guilty and paying a fine will be the last they hear of the matter, even when it is isn't true. Uncounseled or uninformed individuals may be tempted to rack up numerous infractions under the misimpression that there are no future consequences. By the time they learn the truth, it will be too late.

B. Next Generation Net-Widening

Decriminalization is often lauded as a way of rolling back the well-known excesses of the American carceral state. But decriminalization is also a net-widener, enlarging the reach of the

190. Alexes Harris, Heather Evans & Katherine Beckett, *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753, 1761–62 (2010).

191. Sarah Brayne, *Surveillance and System Avoidance: Criminal Justice Contact and Institutional Attachment*, 79 AM. SOC. REV. 367, 385 (2014).

192. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 374 (2010) (holding that the Sixth Amendment requires counsel to inform a client if a criminal plea may lead to deportation); *see also* Gabriel Chin, *What Are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH. L. REV. 151, 156–61 (2012).

criminal process even as it softens its impact. Or to put it another way, decriminalization makes it easier to label people as criminals. This net-widening, moreover, can further intensify racial disparities, creating new safety valves for white, wealthy, well-educated, and other favored offender classes to exit the enlarged criminal process while poor, minority, addicted, and otherwise disadvantaged offenders remain behind, unable to extricate themselves.

Net-widening is a well-known phenomenon associated with many types of penal reform. Over thirty years ago, James Austin and Barry Krisberg pointed out that well-meaning reforms of the 1960s and '70s, including "[d]iversion, decarceration, [and] decriminalization" that were intended to shrink the criminal process, in fact functioned to expand state control over an ever-growing criminal justice population.[193]

Drug courts—a form of partial decriminalization—have received particularly critical treatment in this regard. Intended as a more humane and effective alternative to the conventional criminal process, drug courts selectively siphon offenders out of traditional courts for intensive supervision and drug treatment. The institutional effect, however, has been to increase the numbers of offenders routed into the criminal system. "The very presence of the drug court, with its significantly increased capacity for processing cases, has caused police to make arrests in, and prosecutors to file, the kinds of $10 and $20 hand-to-hand drug cases that the system simply would not have bothered with before . . . ."[194] Or as Eric Miller puts it, drug courts "work[ ] to 'widen the net' by providing the police and prosecutor with a costless alternative to dismissal for those cases that would not go to court."[195]

Drug courts not only widen the net but also make it stronger,[196] sometimes imposing harsher punishments than offenders would have received in a conventional setting for their crimes. In New York, for example, drug court participants who failed the program received sentences that "were typically two-to-five times longer than the sentences for conventionally adjudicated defendants."[197] In Nebraska, "participants who were terminated from drug court received 'the

193. James Austin & Barry Krisberg, *Wider, Stronger, and Different Nets: The Dialectics of Criminal Justice Reform*, 18 J. RES. CRIME & DELINQ. 165, 167 (1981).

194. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 42 (2009) (quoting Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1505 (2000)).

195. Miller, *supra* note 156, at 1561.

196. Austin & Krisberg, *supra* note 193, at 169.

197. Bowers, *supra* note 156, at 792.

harshest possible sentence regardless of how long [they] participated and regardless of a lesser punishment if they had been sentenced to probation and had violated or had simply been sentenced to jail originally.' "[198]

Drug courts also demonstrate how net widening can exacerbate systemic racial skew. Whites are overrepresented in drug court, while minorities and the poor disproportionately fail the programs. In California, "drug courts admitted a proportionately greater number of Caucasians offenders, even though persons of color comprise a disproportionately large percentage of the low-level drug offender population eligible for drug courts services."[199] In one Arizona county, "there were no African-Americans in drug courts and Hispanics are way under-represented."[200] Because drug court eligibility requirements and performance measures favor the well-resourced, educated, and those least likely to be rearrested, "white drug offenders are more likely to benefit from this 'pathway out' than black drug offenders."[201] As Josh Bowers concludes, "[H]istorically disadvantaged groups—for example minorities, the poor, the uneducated, and the socially disconnected—are . . . more likely to fail."[202]

This disproportion is no accident. Like other forms of decriminalization, drug courts are in part a response to the expanded reach of the criminal system into more politically powerful sectors.[203] As one judge testified, drug courts "would never have come to being had not middle class kids been arrested, because we had kids of color arrested and no one gave—you know."[204]

Drug courts aside, misdemeanor decriminalization widens the criminal justice net in systemic and influential ways. First, it reduces

198. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 194, at 29; *see also* Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 480–81 (2009) (reporting similar phenomenon in Baltimore).

199. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 194, at 42 (internal quotation marks omitted).

200. *Id.* (internal quotation marks omitted).

201. O'Hear, *supra* note 198, at 477.

202. Bowers, *supra* note 156, at 786.

203. Steven Bender, *Joint Reform?: The Interplay of State, Federal, and Hemispheric Regulation of Recreation Marijuana and the Failed War on Drugs*, 6 ALB. GOV'T L. REV. 359, 368–70 (2013) (discussing "whitening" of marijuana use); Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9, 41–42 (2003) (describing pressures for decriminalization as linked to the exposure of middle-class youth to the criminal process).

204. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 194, at 42 (internal punctuation altered); *see also* Bowers, *supra* note 156, at 796 (arguing that New York drug courts were an "ad hoc and undertheorized" political compromise that "deflated calls for more radical legislative change" to drug laws).

the externalities associated with traditional criminal processes. Part of this is financial: decriminalization reduces the costs of counsel, prosecution, court time, and incarceration. It is also institutional, as decriminalization eliminates traditional procedural hurdles that constrain law enforcement actors—the need for formal arrest, judicial hearings, and the adversarial process more generally.[205] Instead, issuing summonses or tickets is a cheap and easy way to sweep people in who are unlikely to contest the charge. This permits police and prosecutors to convict those who might otherwise never have been arrested or charged under the old regime.

Decriminalization can also affect performance metrics and thus alter police incentives in perverse ways. As one report worried:

> One reason ticketing may result in net widening is the relative ease in [sic] which citations can be measured, especially as compared to the metrics involved with more serious crimes. Police may be incentivized to issue tickets in order to demonstrate improvements in performance.[206]

Decriminalization also threatens to further racialize the criminal justice population. Wide police discretion and thin adversarial checks mean that the dangers of police profiling are at their height. Once people are charged, wealthy, well-resourced offenders can easily exit the system by paying fines or undergoing supervision. But as documented above, poor and minority offenders are less likely to be able to pay the fines, or to find time for and transportation to the meetings and treatment programs characteristic of decriminalized supervision. Like tuna nets, the decriminalized infraction machinery may release the sympathetic dolphin, but it is structured to retain a hold on its more vulnerable—and more typical—clientele.

In some ways decriminalization even widens the net expressively, precisely because it reduces the stigma associated with charge and conviction. The public dialogue around decriminalization emphasizes the minor nature of the conduct and the insignificance of the punishments. Citations are low-conflict situations, and pleading guilty is a low-cost, low-stigma event, often as easy as paying a parking ticket. By reducing the psycho-social burden of labeling people as offenders and of accepting the criminal label, decriminalization makes it socially acceptable to sweep more people in.

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205. This dynamic resembles how new technologies eliminate practical hurdles that once served to protect privacy. *See* United States v. Jones, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (stating that GPS monitoring "evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility' " (quoting Illinois v. Lidster, 540 U.S. 419, 426 (2004))).

206. KANE-WILLIS ET AL., *supra* note 68, at 11.

Decriminalization thus trades harshness for breadth in creative and pervasive ways. By reducing the upfront penalties and stigma associated with minor offenses, while retaining authority to condemn and punish the conduct, decriminalization waters down the immediate punitive impact of the criminal process while expanding its reach.

C. The Revenue Trap

> *[M]any officers appear to see some residents, especially those who live in Ferguson's predominantly African-American neighborhoods, less as constituents to be protected than as potential offenders and sources of revenue.*[207]

Decriminalization is widely lauded as a cost-saver, but no scholarship has focused on its potential as a regressive tax.[208] The threat arises from the fact that many lower courts and municipalities depend heavily on revenues from fines and fees imposed on minor offenders. In Harpersville, Alabama, for example, the small town of 1,700 residents received over $300,000 in fines and fees from its Municipal Court, money the town used to pay for fire, police, and other general municipal services.[209] In Ohio, the tiny Village of New Rome (population sixty) used its Mayor Court—with jurisdiction over local ordinances and traffic violations—to generate an average of $400,000 a year.[210] In Ferguson, Missouri, where the police killing of eighteen-year-old Michael Brown triggered protests around the country, the municipal court collected $2.46 million in fines and fees in 2013, representing over one-fifth of the city's entire revenue.[211]

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207. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (March 4, 2015), *available at* http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf *archived at* http://perma.cc/E9QY-SEKC.

208. A few authorities have noted the possibility in passing, although not specifically with regard to decriminalization. *See, e.g.*, Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1179 (noting that the role of criminal fines and fees is likely to grow "as the nation rethinks its decades-long resort to mass imprisonment"); CONFERENCE OF STATE COURT ADMR'S (COSCA), 2011-2012 POLICY PAPER: COURTS ARE NOT REVENUE CENTERS 1, *available at* http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Policy%20Papers/CourtsAreNotRevenueCenters-Final.ashx *archived at* http://perma.cc/XV68-USA4 ("In traffic infractions, whether characterized as criminal or civil, court leaders face the greatest challenge in ensuring that fines, fees, and surcharges are not simply an alternate form of taxation.").

209. HUMAN RIGHTS WATCH, *supra* note 15, at 60–61; *see also* Martin J. Reed, *Harpersville Mayor: Loss of Court Revenue Causing Budget Shortfall*, BIRMINGHAM NEWS, May 17, 2013, http://blog.al.com/spotnews/2013/05/harpersville_mayor_loss_of_cou.html, *archived at* http://perma.cc/R7QQ-6TNK.

210. AM. CIVIL LIBERTIES UNION, *supra* note 96, at 53; *see also Small Ohio Towns Use Mayor's Court for Big Revenue: Mayor's Courts bring in Big Money for Small Ohio Towns from Traffic Tickets*, THENEWSPAPER.COM, July 27, 2005, http://www.thenewspaper.com/news/05/ 558.asp, *archived at* http://perma.cc/H9QA-MEK8.

211. CIVIL RIGHTS DIV., supra note 207, at 9.

As government budgets shrink around the country, lower criminal courts are being reconceptualized and repurposed as revenue sources. "[S]ome localities expect their criminal courts to fund most or even all of their own operations with fines and fees extracted from defendants and offenders. Some local governments go further, expecting their criminal courts to earn a profit and serve as key sources of public revenue."[212] As a Brennan Center report describes it:

> Cash-strapped states have increasingly turned to user fees to fund their criminal justice systems, as well as to provide general budgetary support. States now charge defendants for everything from probation supervision, to jail stays, to the use of a constitutionally-required public defender. . . . These "user fees" differ from other kinds of court-imposed financial obligations. Unlike fines, whose purpose is to punish, and restitution, whose purpose is to compensate victims, user fees are explicitly intended to raise revenue. Sometimes deployed as an eleventh hour maneuver to close a state budget gap, the decision to raise or create new user fees is rarely made with much deliberation or thought about the consequences.[213]

The Conference of State Court Administrators ("COSCA") has called attention to "the burgeoning reliance upon courts to generate revenue to fund both the courts and other functions of government."[214] In a remonstrative report entitled "Courts Are Not Revenue Centers," COSCA bemoaned the extent to which the revenue-generating function of criminal punishment "has recast the role of the court as a collection agency for executive branch services."[215] Nowhere is this concern greater than in connection with minor offenses and infractions. As COSCA put it, "In traffic infractions, whether characterized as criminal or civil, court leaders face the greatest challenge in ensuring that fines, fees, and surcharges are not simply an alternate form of taxation."[216]

In addition to offense-related fines, defendants are increasingly required to pay fees for all aspects of their own adjudication. The most infamous is the common policy of making indigent defendants pay for their own public defenders, a practice validated by the Supreme Court in *Fuller v. Oregon* and implemented by at least twenty-five states.[217] In addition, governments often charge defendants with daily jail fees,

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212. HUMAN RIGHTS WATCH, *supra* note 15, at 13; *see also* BANNON ET AL., *supra* note 113, at 30 & n.219 (documenting numerous states that use criminal fines and fees to provide general operating revenue).

213. BANNON ET AL., *supra* note 113, at 4.

214. COSCA, *supra* note 208, at 1.

215. *Id.* at 9.

216. *Id.* at 1.

217. 417 U.S. 40, 53–54 (1974); *see* Ronald Wright & Wayne Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2052 (2006) (stating that half of all states impose a fee on indigent defendants to pay for counsel); *see also* SPANGENBERG REPORT, PUBLIC DEFENDER APPLICATION FEES: 2001 UPDATE (2001) (documenting at least fourteen states that use up-front application fees in addition to or instead of recoupment).

court administration fees, copying costs, DNA database costs, probation supervision fees, drug testing expenses, rehabilitation costs, and a wide array of other charges.[218]

Not only is revenue extraction becoming a more important goal of the criminal process, it is being privatized. Numerous states have turned to private probation companies to collect legal debt from misdemeanor defendants.[219] The vast majority of these supervisions are "pay-only probations," that is, defendants being supervised for the sole purpose of payment.[220] By its nature, this type of supervision is imposed only on the poor—defendants who can afford to pay immediately are spared supervision.

Private probation companies are "offender-funded": they earn their money directly from "supervision fees" charged to the defendants themselves. Although this makes them popular with courts, the scheme exerts additional pressure on defendants to come up with as much as $100 in monthly supervision fees in addition to the fines charged for their actual offenses. If defendants cannot pay, they are routinely arrested and incarcerated, sometimes based on orders drafted by probation companies themselves.[221]

In all these ways, lower courts have already been repurposed to extract revenue from the poorest defendant population. Decriminalization poses special dangers in this regard. First, it creates a new array of fine-only offenses, a significant temptation in the era of shrinking local budgets.[222] Second, it offers courts and municipalities a low-cost way of generating revenue without the attendant costs of counsel, jail, or due process that accompany more serious offenses. Indeed, if courts outsource fine collection to private companies, they can reduce their own costs even further, albeit while exposing defendants to additional fees. By stripping offenders of their protections against charge and conviction, decriminalization thus creates a newly vulnerable population ripe for citation and fine.

Importantly, decriminalization eliminates the usual externalities that naturally constrain penal expansion.[223] The standard

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218. Logan & Wright, *supra* note 208, at 1185–96; *see also* HUMAN RIGHTS WATCH, *supra* note 15, at 36–37 ("Our money really comes from drug testing fees.").

219. HUMAN RIGHTS WATCH, *supra* note 15, at 1 ("offender-funded" model of privatized probation prevails in over one thousand U.S. courts).

220. *Id.* at 26.

221. *Id.* at 57–58.

222. *See also* Malkin, *supra* note 140, at 1584–85 (describing how some residents of low-income neighborhoods perceived community courts and the infractions they process as a system that "allows them to be targeted in order to provide police overtime and quotas").

223. Beckett & Harris, *supra* note 187, at 506 (noting that the state's obligation to pay for expensive criminal processes constitutes an "important check on government power"); William

criminal process is resource intensive and expensive. Resource constraints prevent police departments from making too many arrests and flooding the jails, stop prosecutors from charging more cases than they can handle, and restrain courts from sentencing more offenders than probation offices and prisons can manage.[224] It even occasionally stems the flow of cases when public defender offices can no longer handle them.[225] For decriminalized offenses, by contrast, the streamlined road from citation to conviction imposes little burden on the system while promising an almost uncontested revenue stream from the resultant fines and potential fees.

If defendants don't pay, courts have the most effective debt collection mechanism at their disposal—one that could not be deployed in an authentically civil context. As chronicled above, courts now routinely use their powers of contempt to jail defendants for nonpayment, even when the Constitution forbids it.[226] As the threat of debtors' prison is surreptitiously reintroduced into the petty offense process, we should be particularly suspicious of the promise that fine-only punishments will not result in incarceration.

The dangers of the minor offense revenue trap are starting to gain attention. A lawsuit forced Harpersville to close its lucrative municipal court. The presiding judge called the court "disgraceful," a "debtors' prison," and "a judicially sanctioned extortion racket."[227] Ohio Supreme Court Justice Thomas Moyer called for the elimination of Mayor's Courts, noting "the inherent conflict in a system that permits the person responsible for the fiscal well being of a community to use judicial powers to produce income that supports that well being."[228]

As a constitutional matter, court-generated revenue may trigger conflicts of interest that rise to the level of a due process violation. In *Ward v. Monroeville*,[229] the Supreme Court invalidated a $100 fine imposed by the mayor who served as a judge over certain traffic offenses. A large portion of Monroeville's income came from fees, costs,

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Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 533 (2001) (natural limits to criminal system flow from caseloads and resources constraints of police and prosecutors).

224. *See, e.g.*, Margo Schlanger, Plata v. Brown *and Realignment: Jails, Prisons, Courts and Politics*, 48 HARV. C.R.-C.L. L. REV. 165, 185–96 (2013) (chronicling the rollback of the California prison system in response to *Brown v. Plata*, 131 S. Ct. 1910 (2011)).

225. *E.g.*, Wilbur v. City of Mt. Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (finding that immense caseload and lack of resources available to appointed counsel prevented the formation of a "basic representational relationship" between defendant and counsel in violation of the Sixth Amendment).

226. *See supra* Part V.A.2; *see also* HUMAN RIGHTS WATCH, *supra* note 15, at 49–51.

227. HUMAN RIGHTS WATCH, *supra* note 15, at 47, 60.

228. AM. CIVIL LIBERTIES UNON, *supra* note 96, at 52.

229. 409 U.S. 57, 61–62 (1972).

fines, and forfeitures imposed by the mayor in his traffic court, and the Court found that conflict of interest to deny the defendant's right to an impartial judge.[230] In that same vein, COSCA has opined that "an unconstitutional temptation may be created by the practice of earmarking revenue from costs and fees for the direct or indirect benefit of judicial officers that control the disposition of criminal cases."[231]

Of course, not every court will succumb to the "unconstitutional temptation."[232] But many jurisdictions already contemplate decriminalization precisely for its economic value. Indeed, in what Thomas Edsall recently labeled "poverty capitalism," the criminal system has displayed a predilection for imposing such costs on poor defendants in the name of making them pay their own way.[233] In a world in which courts are increasingly deployed as revenue generators, for themselves as well as for general state coffers, the creation of completely new classes of fine-only offenses poses special dangers. Decriminalization could potentially shake out as regressive economic policy posing as progressive penal reform, a source of government funding that creates perverse incentives to widen the criminal net under the aegis of rolling it back.

VI. MODERNIZING THE PENAL PROCESS

Misdemeanor decriminalization turns out to be a complex and conflicted regulatory strategy. While it promises decarceration, it may not in fact stop poor defendants from being locked up. It offers leniency, but it may actually punish and burden offenders in longer, more intrusive ways than the prior regime. In theory it promises to alleviate the class and racial skew of the criminal process, but in practice it releases the wealthy and the socially favored while exposing poor, minority, and otherwise disadvantaged defendants to financially harsh, personally intrusive, and long-term punishments.

The workings of decriminalization reveal some deep features of the U.S. penal system. First, it exposes the true scope of criminal punishment and the full significance of being criminalized in the modern era. Mass incarceration has conditioned us to measure punishment in years and to treat all other forms of punishment as lesser and lenient. But nonincarcerated offenders are penalized in numerous and often permanent ways that fly beneath this analytic

230. *Id*. at 60.

231. COSCA, *supra* note 208, at 11 (citing *Ward*, 409 U.S. 57).

232. *See, e.g.*, BANNON ET AL., *supra* note 113, at 11–12 (explaining how, instead of imposing a new jail fee, Massachusetts created a commission to study court fees more generally).

233. Edsall, *supra* note 8.

radar.[234] As described above, a minor offender who never goes to jail may nevertheless experience a wide range of formal and informal collateral consequences, as well as microcontrols with long-term significance. The fines and supervision of a decriminalized offense can derail a person's economic and personal well-being. The mark of arrest or conviction will interfere with their ability to get a job, a loan, or a lease.[235] People with outstanding failure-to-pay warrants often avoid calling the police or going to hospitals, banks, and other record-keeping institutions.[236] These smaller nudges permeate public, private, and social spheres in cumulatively damaging ways.[237] While this web of low-level criminalizing effects has been overshadowed by the dramatic destructiveness and overt controls of mass incarceration, it is central to understanding how decriminalization, community supervision, and other decarceration measures still manage to punish people in lasting and debilitating ways. As we continue to retreat from the mass incarceration model, these lower-level punishment mechanisms will become increasingly influential.

This is particularly so because the turn towards microcontrols quietly preserves the system's class and racial skew. The benefits of decriminalization redound immediately to well-resourced defendants, a fact that some use to explain its political popularity.[238] Insofar as benefits also accrue to the socially disadvantaged, they will often disappear in the crucible of persistent overpolicing, fines that

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234. As Robert Weisberg and Joan Petersilia have pointed out:

> [n]onprison sanctions are still sanctions that often involve serious restrictions on liberty and movement. . . . Some of the most promoted forms of alternative supervision, from the halfway house to the much-touted global positioning systems (GPS), involve the "carceral discipline" often decried by critics and the modern "culture of control" (to use sociologist David Garland's words) or as "governing through crime" (legal scholar Jonathan Simon's words).

Weisberg & Petersilia, *supra* note 10, at 132.

235. *See* PAGER, *supra* note 108 (documenting severely reduced employment opportunities for offenders with criminal records); Pinard, *supra* note 170.

236. ALICE GOFFMAN, ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY (2014); Brayne, *supra* note 191, at 385; Beckett & Harris, *supra* note 187; Armando Lara-Millán, *Public Emergency Room Overcrowding in an Era of Mass Imprisonment*, 79 AM. SOC. REV. 866 (2014).

237. These soft controls and collateral consequences also tend to be impervious to the interventions of counsel. *See* Natapoff, Gideon *Skepticism*, *supra* note 13, at 1070–73 (arguing that defense attorneys lack tools to combat or alter many of the institutional workings of the misdemeanor process).

238. *E.g.*, Saki Knafo, '*White Men Getting Rich from Legal Weed Won't Help Those Harmed Most By Drug War*,' HUFFINGTON POST, March 6, 2014 (citing Michelle Alexander), http://www.huffingtonpost.com/2014/03/06/michelle-alexander-drug-war_n_4913901.html, *archived at* http://perma.cc/V26W-GGAN; *see also* KANE-WILLIS ET AL., *supra* note 68, at 18–19 (finding that decriminalization reduced arrests more in white wealthy neighborhoods than in poor minority neighborhoods).

defendants cannot pay, and supervisory terms with which defendants cannot realistically comply.

To put it another way, fines and supervisory punishments exacerbate social and racial disparities because small burdens constrain the socially disadvantaged more than they do the well-off. In Michigan for example, Kawana Young, mother of two small children, was laid off from her various jobs. As a result, she was jailed five times for failure to pay traffic tickets.[239] Fines exert little or no influence over those who can easily pay them, but even small fines can be life-altering events for the poor and underemployed.[240] Similarly, a monthly meeting with a probation officer is easy for an offender with a car and a stable job, but next to impossible for an impoverished single parent with no transportation. An infraction or citation record may have little impact on the employability of a well-educated white college graduate but can make all the difference to a black candidate already stigmatized by the association between race and crime.[241]

In all these ways, decriminalization simultaneously retracts and strengthens the penal system's powers of governance and control, particularly over the disadvantaged.[242] It rolls back the expensive and increasingly politically unpalatable excesses of the carceral state without relinquishing its broad policing powers and its differential impact on the disfavored and socially vulnerable.[243] By rejecting the overtly punitive and costly policies of mass incarceration, it permits the massive underlying mechanism to survive in new forms.

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239. AM. CIVIL LIBERTIES UNION, *supra* note 96, at 29–30.

240. *Id.* at 10 (stating that fines and fees punish the poor more heavily and lastingly than the affluent); Harris, Evans & Beckett, *supra* note 190, at 1756.

241. PAGER, *supra* note 108, at 146 (finding that white job applicants with criminal records had a better chance of getting a job than African American applicants with no record).

242. For arguments that the current criminal system is itself a modernization of older institutions, see, for example MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 2 (2012) (describing the criminal system as a way of accommodating the civil rights movement while preserving the essence of Jim's Crow's race-based stratification and control); LOIC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 196 (2009) (describing the prison system as the fourth iteration of the "peculiar institution" that regulates race in the U.S., from slavery to Jim Crow to the segregated ghetto); also see Siegel, *supra* note 9, at 2119 (describing how "status regime modernization" strengthens the legal system, allowing it to accommodate modern realities and political demands and thereby survive what might have been fatal challenges to its authority).

243. *Cf.* WACQUANT, *supra* note 242, at 41 (describing "the gradual replacement of a (semi-) welfare state by a police and penal state for which the criminalization of marginality and the punitive containment of dispossessed categories serve as social policy at the lower end of the class spectrum").

Decriminalization also gives us renewed insight into the tight connection between criminal justice, punishment, and technology.[244] Many of these new forms of diffuse punishment and microcontrol are made possible by modern advances in surveillance, information, and finance. These technologies permit the criminal system to use monitoring, treatment, and economic constraints in lieu of physical restraint and incarceration.[245] In other words, mass incarceration looks less attractive in part because, in this day and age, the penal state can effectively track and influence people, their behavior, and their money without the need to lock them up at all. The move away from incarceration can thus be seen not so much as a relinquishment of penal power but an upgrade: the modernization of the socio-criminal apparatus in an age of surveillance and intrusion.

Decriminalization also sheds light on some seemingly contradictory historical developments. In important ways, the U.S. criminal process is shrinking. The national correctional population has decreased for four years in a row.[246] At least six states have closed prisons, and arrests are down for the sixth year in a row.[247] California—once a leader of the prison boom—is cutting its prison population and easing its harshest juvenile sentences.[248] At the federal level, Congress

244. *Cf.* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 25–26 (1995) (describing a "micro-physics" of power by which the state operates on and controls the body through a "diffuse" set of technologies).

245. Sarah Brayne, Stratified Surveillance: Policing in the Age of Big Data (April 2014) (unpublished Ph.D. dissertation, Princeton University).

246. BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2012 1 (2013), *available at* http://www.bjs.gov/content/pub/pdf/cpus12.pdf *archived at* http://perma.cc/UFV4-TGWL; *see also* THE SENTENCING PROJECT, ON THE CHOPPING BLOCK 2013: STATE PRISON CLOSURES (2013), *available at* http://sentencingproject.org/doc/publications/inc_On%20the%20Chopping%20Block%202013.pdf, *archived at* http://perma.cc/9LKV-YLT6. Although the national incarceration rate has been dropping since 2009, 2012 saw the smallest decline, and fully half of that was attributable solely to California's realignment. BUREAU OF JUSTICE STATISTICS, *supra*, at 2.

247. THE SENTENCING PROJECT, *supra* note 246. *Compare* FBI, *Crime in the United States 2012, Table 29: Persons Arrested* (2013), http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-29/table_29_estimated_number_of_arrests_united_states_2013.xls, *archived at* http://perma.cc/VCW7-V7L4 (estimating 11,302,102 arrests excluding traffic and suspicion) *with* FBI, *Crime in the United States 2006, Table 29: Persons Arrested* (2007), http://www2.fbi.gov/ucr/cius2006/data/table_29.html, *archived at* http://perma.cc/ 9BEG-7CRN (estimating 14,380,370 arrests excluding traffic and suspicion).

248. Jonathan Simon, Dignity and the American Prisoner: *Brown v. Plata* and Jurisprudence of Mass Incarceration 1, 4 (2013) (unpublished manuscript), *available at* http://www.law.berkeley.edu/files/csls/Simon_Introduction_Mass_Incarceration_on_Trialedit%281%29.pdf, *archived at* http://perma.cc/Q6KS-CPYK (describing California as going from "the most extreme example of mass incarceration" to "the most significant planned prison population reductions in U.S. history"); BUREAU OF JUSTICE STATISTICS, *supra* note 246, at 6 (documenting ten percent reduction in California prison population); *see also* Don Thompson, *SB 9: California Juvenile Second Chance Bill, Signed by Governor Brown*, HUFFINGTON POST (Sept. 30, 2012, 11:13

reduced the infamous crack-cocaine sentencing disparity,[249] while former Attorney General Eric Holder instructed U.S. Attorneys around the country to go easier on first-time, low-level drug offenders.[250] The conservative Right on Crime coalition advocates more rehabilitation and less incarceration.[251] There is growing agreement across the political spectrum that the war on drugs is a failed, destructive, and overly expensive policy that should be rolled back.[252] Scholars and commentators say hopeful things like "there seems good reason to hope the war on crime may soon wind down,"[253] "mass incarceration has come to an end,"[254] "the drug war is over,"[255] and the U.S. has become "a more benevolent nation."[256]

At the very same time, the penal apparatus is quietly expanding. While state prison populations declined in 2012, jail populations went up.[257] Supervisory programs like diversion, privatized probation, community supervision, and GPS monitoring are growth industries.[258]

PM), http://www.huffingtonpost.com/2012/09/30/sb-9-california_n_1927840.html, *archived at* http://perma.cc/7Q2D-6GZM (describing passage of a bill allowing judges to re-examine sentences of life without parole for juveniles after they have served twenty-five years).

249. Jasmine Tyler, *Congress Passes Historic Legislation to Reduce Crack/Powder Cocaine Sentencing Disparity*, HUFFINGTON POST (July 28, 2010, 3:15 PM), http://www.huffingtonpost.com/jasmine-tyler/congress-passes-historic_b_662625.html, *archived at* http://perma.cc/XN8N-KC4V.

250. Matt Apuzzo, *Holder Endorses Proposal to Reduce Drug Sentences in Latest Sign of Shift*, N.Y. TIMES, March 13, 2014, http://www.nytimes.com/2014/03/14/us/politics/holder-endorses-proposal-to-reduce-drug-sentences.html?_r=0, *archived at* http://perma.cc/6XZ3-SQNC.

251. *Statement of Principles*, *supra* note 63.

252. LONDON SCH. OF ECON. AND POLITICAL SCI., ENDING THE WAR ON DRUGS: REPORT OF THE LSE EXPERT GROUP ON THE ECONOMICS OF DRUG POLICY 3 (John Collins ed., 2014).

253. Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1025 (2010).

254. Michael Santos, *Mass Incarceration as a Public Policy*, HUFFINGTON POST (April 24, 2012, 11:36 AM), http://www.huffingtonpost.com/michael-santos/mass-incarceration-as-a-p_b_1447564.html, *archived at* http://perma.cc/B53G-6KR8 (citing Jonathan Simon, *Mass Incarceration: From Social Policy to Social Problem*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 23, 25 (Joan Petersilia & Kevin R. Reitz eds., 2012)).

255. Nick Gillespie, *The War on Drugs is Over (If Obama Wants It)*, DAILY BEAST (Oct. 30, 2013), http://www.thedailybeast.com/articles/2013/10/30/the-drug-war-is-over-if-obama-wants-it.html, *archived at* http://perma.cc/XC5A-TGKR.

256. E.J. Dionne, *A More Benevolent Nation?*, WASH. POST, (Nov. 17, 2013), http://www.washingtonpost.com/opinions/ej-dionne-a-more-benevolent-nation/2013/11/17/36fc99aa-4e46-11e3-9890-a1e0997fb0c0_story.html, *archived at* http://perma.cc/BUF4-E8U3.

257. BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 3.

258. HUMAN RIGHTS WATCH, *supra* note 138, at 12; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 194; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 148; George B. Drake, Cmty. Corr. Program Mgr., Nat'l Law Enforcement and Corr. Tech. Ctr., Rocky Mountain Region, Remarks: Offender Monitoring in the United States 3, *available at* http://www.cepprobation.org/uploaded_files/Pres%20EM09%20Dra.pdf, *archived at* http://perma.cc/3K99-B5VU ("The offender tracking market . . . is expanding at a quick pace."); *see also* Weisberg & Petersilia, *supra* note 10, at 132.

Public cameras, COMPSTAT, gang and DNA databases, and easy access to personal information have created a surveillance state of heretofore unimaginable proportions.[259] Defendants are on the hook for an increasing array of fines and fees that can require years to pay.[260] The collateral consequences of even a minor conviction—from employment restrictions to housing, education, and immigration—have become a new and burdensome form of restraint and stigma.[261]

Misdemeanor decriminalization epitomizes this tectonic shift away from mass incarceration towards other expansive forms of intrusion and criminalized disadvantage. Decriminalization may reject the fiscal and human costs of incarceration, but it has not relinquished the notion that the criminal process should track, label, and control risky and disfavored populations over the long-term. And its technologies represent the cutting edge of the shift: fines and supervision, data collection and monitoring, and collateral consequences that haunt offenders indefinitely. Moreover, because decriminalization eliminates counsel and other procedural protections for defendants, it actually expands the penal process's ability to touch, mark, and burden an ever-growing population—the very same socially disadvantaged population historically subject to the excesses of mass incarceration.

Politically, decriminalization is a compromise that siphons energy away from the possibilities for full legalization. This is clearest in the marijuana context, in which legalization legislation must now often compete with more moderate decriminalization proposals.[262] But more broadly, insofar as the mass incarceration debacle is generating political pressure to shrink the penal state in fundamental ways, decriminalization offers a middle way to reduce costs and punishment while preserving the essential scope of law enforcement and penal authority.

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259. Brayne, *supra* note 245; *see also* Kimberly Bailey, *Watching Me: The War on Crime, Privacy, and the State*, 47 U.C. DAVIS L. REV. 1539, 1542 (2014) (arguing that privacy deprivations are a form of racial subordination exercised by the penal state); Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1 (2008) (discussing aspects of the surveillance state); I. Bennett Capers, *Crime, Surveillance, and Communities*, 40 FORDHAM URB. L.J. 959, 960 (2012) (arguing that we can use aspects of the surveillance state to constrain police abuses).

260. Harris, Evans & Beckett, *supra* note 190.

261. Pinard, *supra* note 171, at 464–69. The ABA's collateral consequence database has identified forty-five thousand such laws to date. Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME (Apr. 24, 2014), http://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/, *archived at* http://perma.cc/XRL3-B3L9.

262. *Compare* S.B. 365, 2014 Sess. (Md. 2014) (decriminalization bill that eventually passed), *with* S.B. 658, 2014 Sess. (Md. 2014) (legalization bill that died).

Although decriminalization purports to take incarceration off the table, it is actually unclear how much it can reduce the prison-centric phenomenon of mass incarceration.[263] Most criminal misdemeanor sentences already involve fines and supervision.[264] If misdemeanants go to jail at all, they do so briefly.[265] Even when they do, they are filling jails, not prisons, and thus do not directly contribute to the long-term crushing sentences and prison overcrowding for which mass incarceration is famous.[266] Eliminating jailtime for misdemeanors is therefore at best an indirect response to the prison problem.[267]

Decriminalization thus provides an updated understanding of the concrete mechanisms through which we now "govern through crime" and perpetuate a "culture of control."[268] Today's criminal apparatus reaches far beyond the jail and courthouse deep into civilian life, even for the most minor of offenses. It influences not only the offender, but his or her family, neighborhood, community, and social institutions. It operates directly by imposing fines, supervision, and criminal records, and indirectly by changing social and institutional relationships. Offenders whose formal punishment is limited to a nonjailable misdemeanor conviction and a fine may nevertheless experience long-term restrictions on their earnings, credit, housing,

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263. Of the 2.2 million people incarcerated in the U.S., approximately 750,000 of them are in jail. BUREAU OF JUSTICE STATISTICS, *supra* note 246, at 3.

264. *See, e.g.*, TAMARA FLINCHUM, ASHLEIGH GALLAGHER & GINNY HENEVER, N.C. SENTENCING AND POLICY ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS, FISCAL YEAR 2007/08 45 (2009) (seventy-six percent of misdemeanor sentences were nonincarceration community punishments); *see also* Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 502 (2007) ("Most defendants charged with misdemeanor offenses that are punishable by imprisonment do not actually receive imprisonment sentences. Instead, many are sentenced to probation or fines."); Hashimoto, *supra*, at 497 n.144 (stating that while there is no reliable state data on incarceration rates for misdemeanants, ten percent of federal misdemeanants received a sentence of incarceration).

265. *See, e.g.*, FLINCHUM, GALLAGHER & HENEVER, *supra* note 264, at 45 (of the twenty-two percent of misdemeanants who received a sentence of incarceration, eighty-eight percent served fewer than ninety days). By definition, misdemeanor sentences are typically capped at one year or less.

266. As a case in point, when the Supreme Court ordered California to empty its prisons, California's first response was to transfer prisoners to county jail. Schlanger, *supra* note 224, at 166.

267. *But see* Paige St. John, *Prop 47 Would Cut Penalties for One in Five Criminals in California*, L.A. TIMES, Oct. 11, 2014, http://www.latimes.com/local/politics/la-me-ff-pol-proposition47-20141012-story.html, *archived at* http://perma.cc/T6YT-LTDH (California proposition responding to prison overcrowding by converting certain low-level drug and theft felonies into misdemeanors thereby shifting thousands of potential prisoners into the jail population).

268. JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 6 (2009); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY xi (2002).

employment, public benefits, and immigration.[269] It is this expansive social "process" that represents the full "punishment" triggered by an encounter with the American criminal system.[270] Because decriminalization preserves and even intensifies some of these consequences, it functionally extends the punitive reach of the state even as it purports to roll it back.[271]

VII. DECRIMINALIZATION AS COMPROMISE

For all its flaws, the ultimate value of decriminalization must be measured against the baseline of the status quo. With the highest incarceration rate on the planet and a misdemeanor apparatus that casually imposes arrests, jailtime, and crippling criminal records—particularly on young men of color—the American criminal process needs precisely the kinds of reform imperfectly and only partially delivered by decriminalization. The critique of decriminalization is thus not an argument against it so much as a recognition of its limitations.

To put it another way, decriminalization can be thought of as a conservative response to a radical challenge. If we really wanted to shrink the criminal governance apparatus and meaningfully "decriminalize" our democracy, we would legalize minor conduct, constrain the police power of arrest, and roll back the entire petty offense process. Instead, decriminalization permits the state to retain broad powers of punishment and control triggered by the most innocuous individual behaviors. It also tends to burden the same vulnerable populations that the U.S. system has historically punished. Nevertheless, it differs from the status quo in significant ways. Decriminalization imposes fewer arrests and jail sentences, easing the threat of immediate incarceration that has crippled so many individuals and communities over the past thirty years.[272] And although decriminalization admittedly preserves much of the reach of the criminal system, it does so with a renewed respect for the principle of proportionality in punishment that has been missing from the U.S. debate for decades.[273] In much the same way that the prison was once

269. *E.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); Logan, *supra* note 12, at 1103–05.

270. *See generally* FEELEY, *supra* note 189 (describing the punitive impact of the formal judicial process).

271. *See* McLeod, *supra* note 45, at 1591 (arguing that most drug court models do not actually promote decarceration because they continue to expand the criminal apparatus).

272. *See* Dolovich, *supra* note 62 (on the uniquely destructive human costs of incarceration).

273. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 83 (2003) (Souter, J., dissenting) ("If Andrade's sentence is not grossly disproportionate, the principle has no meaning."); *see also* Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 271 n.33 (2011) ("[T]he

seen as a civilizing upgrade from a violent regime of public torture, decriminalization should be understood as an incremental move away from an unsustainably punitive state of affairs.[274]

Given these limitations, decriminalization reform should aim to maximize its two main contributions to a fairer and more equitable criminal system: keeping people out of prison and jail (decarceration), and curtailing the power of the petty offense machinery to stigmatize and burden millions of Americans for their common minor conduct. These two values represent the heart of the decriminalization bargain—that reduced procedure will lead to reduced punishment. To put it another way, if we are going to make it easier to turn people into criminals, we must make it authentically less burdensome to be one.

In practical terms this commitment means three things: no arrests, no jail for unpaid fines, and cabining criminal records. Arrest is a form of both incarceration and criminal marking. Similarly, jailing people for unpaid fines violates decriminalization's core promise to eliminate incarceration. And the imposition of a criminal record—for either arrest or conviction—moves offenders into a disadvantaged criminalized population who may be forever hampered by the mark. Accordingly, these three features offer a concrete way of evaluating decriminalization reform: does it authentically protect offenders from criminal stigma and punishment other than a fine, or does it engage in the sleight-of-hand of partial decriminalization?[275]

Like most criminal reform, none of these results can be guaranteed by formal rule changes alone.[276] They require inter-branch consensus among legislators, law enforcement, and courts to ensure that decriminalization actually keeps people out of jail and out of the criminalized population. The proposals below thus require not only statutory revisions but also altered judicial interpretation and police practice.

A. No Arrests

Decriminalized offenses are often marketed and applauded as "nonarrestable," but as described above, this can be inaccurate both as a doctrinal and practical matter.[277] Police often have discretion under

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frequently disproportionately harsh character of many criminal sentences when compared with the offense of conviction belies any claim that the imprisonment of convicted offenders in the United States is driven by a meaningful commitment to just deserts [sic].").

274. *See generally* FOUCAULT, *supra* note 244 (on the origins of the prison).

275. *See supra* Part III.

276. Stuntz, *supra* note 223, at 510–11.

277. *Supra* Part V.A.1.

state law over whether to arrest or issue a summons, and even when they don't, many courts interpret their power to include the authority to arrest.

As a result of these ambiguities, statutory decriminalization may, but does not always, meaningfully alter police arrest practices. In California, for example, the decriminalization of marijuana led to a forty-seven percent reduction in juvenile arrest rates, a plunge with ripple effects throughout the juvenile system.[278] In Massachusetts, marijuana arrest rates have fallen eighty-six percent since 2001.[279] By contrast, in Nebraska—a partial decriminalization jurisdiction—marijuana arrests remain over seventy percent of all drug arrests.[280] In Nevada, another partial decriminalization state, marijuana arrest rates actually increased ninety-six percent over the course of the decade.[281] In Chicago, decriminalization reduced arrest rates in white, but not African American, neighborhoods. In some black neighborhoods, arrests rates actually went up.[282]

To make decriminalized offenses truly nonarrestable, two things are required. First, state law must be written to eliminate police discretion, preclude arrest, and require summonses. For example, in Chicago, police retain discretion over whether to arrest or issue a ticket, thus opening the door to racial and neighborhood arrest disparities.[283] By contrast, Maryland's new decriminalization statute requires that "[a] police officer shall issue a citation to a person who the police officer has probable cause to believe has committed a violation."[284] Similarly, the District of Columbia police department interprets their new decriminalization ordinance to preclude arrest.[285]

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278. Mike Males, *California Youth Crime Plunges to All-Time Low*, CENTER ON JUV. & CRIM. JUST. 2 (Oct. 2012), http://www.cjcj.org/uploads/cjcj/documents/CA_Youth_Crime_2011.pdf, *archived at* http://perma.cc/WF5H-YWZQ (noting that juvenile drug arrests fell forty-seven percent after marijuana decriminalization); *see also* BORUCHOWITZ, *supra* note 67, at 5–6 (describing Sarasota, Florida decriminalization program that reduced the jail populations and cut arrest rates in half).

279. AM. CIVIL LIBERTIES UNION, *supra* note 23, at 42.

280. *Id.* at 40 (noting seventy-two percent of all Nebraska drug arrests were for marijuana in 2010 despite decriminalization).

281. *Id.* at 42.

282. KANE-WILLIS ET AL., *supra* note 68 (finding decriminalization did not reduce disproportionate minority contact between police and black arrestees).

283. *Id.* at 20.

284. MD. CODE ANN., CRIM. LAW § 5-601.1 (2014).

285. D.C. METRO. POLICE DEP'T, SPECIAL ORDER: MARIJUANA POSSESSION, DECRIMINALIZATION AMENDMENT ACT OF 2014, at 2 (2014), *available at* http://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/page_content/attachments/SO-14-04%20FINAL.PDF, *archived at* http://perma.cc/F7ZR-HASQ ("Possession or transfer without payment of one ounce or less of marijuana is a civil violation and not an arrestable offense.").

Second, state courts must interpret no-arrest statutes to preclude arrest. For example, California courts permit arrest for decriminalized offenses.[286] By contrast, the Massachusetts Supreme Court has held that the police observation of a person with a small amount of marijuana, or two persons sharing a small amount of marijuana, does not give rise to probable cause that they are committing a "crime" and therefore cannot support an arrest. The Court reasoned that to interpret the law otherwise "would undermine the clear intent of the voters to alter police conduct toward marijuana users."[287]

Of course, as long as the U.S. Supreme Court maintains that the Fourth Amendment requires only probable cause for arrest regardless of state arrest law, no decriminalized offenses will be fully nonarrestable.[288] But state decriminalization efforts can go a long way.

B. No Incarceration for Unpaid Fines

As described above, many states authorize their courts to use civil contempt to incarcerate offenders who fail to pay their fines.[289] In order to protect poor defendants from the equivalent of debtor's prison, the Brennan Center has proposed model statutory language that would end the practice of extending probation and parole terms for failure to pay.[290] That language could be tailored for decriminalization statutes as follows:

> No defendant shall be incarcerated for civil contempt or given extended supervision or probation solely because of a failure to make full payments of fees, fines, or costs under this provision.

Such revisions would also bring civil contempt into closer alignment with constitutional doctrine that constrains criminal law. Recall that *Bearden* and *Tate* held that equal protection prohibits punishing defendants merely because of their poverty, and even a defendant who willfully fails to pay a criminal fine cannot be punished with jailtime if the underlying statute does not authorize incarceration.[291] Courts

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286. *See supra* note 99.

287. Commonwealth v. Jackson, 985 N.E.2d 853, 859 (Mass. 2013) (reasoning that one of the main purposes of Massachusetts's decriminalization statute was "to reduce the direct and collateral consequences of possessing small amounts of marijuana"). The Massachusetts Supreme Court has further interpreted the decriminalization statute strictly to preclude search incident to arrest, car searches, and other incidents of criminality. *E.g.*, *Jackson*, 985 N.E.2d at 855; Commonwealth v. Cruz, 945 N.E.2d. 899, 902 (Mass. 2011).

288. *See* Virginia v. Moore, 553 U.S. 164, 178 (2008).

289. *Supra* Part V.A.2.

290. BANNON ET AL., *supra* note 113, at 21.

291. *See* discussion *supra* Part V.A.2.

simply lack authority to punish defendants in ways that legislatures have precluded. Accordingly, courts should not be permitted to expand their own criminal jurisdiction and circumvent the Equal Protection Clause covertly through the back door of civil contempt. This is especially so when legislatures have intentionally revised the criminal code to ensure that a particular decriminalized offense will not trigger incarceration.

C. No Criminal Records

In contrast to felonies, the public record of a minor infraction can turn out to be more burdensome for the offender than the formal punishment itself. Part of the promise of decriminalization is to reduce this informal type of punishment.

As a statutory matter, decriminalization can, but need not, eliminate the mark of conviction. In Massachusetts, the decriminalization statute expressly forbids the creation of a criminal record, while in Nevada, marijuana offenses still mark a person's record with an infraction.[292] Informally, however, eliminating criminal records is easier said than done. Even decriminalized civil infractions can show up in employer or public databases, and state laws against considering such records have been partially effective at best. In this age of commercial records databases and the internet, it is hard enough to keep your social security number secret, let alone a conviction or ticket.

At a minimum, decriminalization statutes should make clear that offenses are civil in nature and do not give rise to a criminal record or other collateral consequences. For example, the Massachusetts statute states that no government entity "may impose any form of penalty, sanction or disqualification on an offender" based on a marijuana infraction. The Maryland statute provides that a decriminalized marijuana violation "is not a criminal conviction for any purpose; and [ ] does not impose any of the civil disabilities that may result from a criminal conviction" and cannot be included in the Judiciary's public website of convictions. [293]

With respect to the informal impact of a record, numerous proposals exist to combat the dissemination and use of criminal records

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292. *Compare* MASS. GEN. LAWS ANN. ch. 94C, § 32L (2014) (stating that no government entity "may impose any form of penalty, sanction or disqualification on an offender" based on a marijuana infraction), *with* State v. Kitt, No. A-11-629, 2012 WL 1349905, at *23 (Neb. Ct. App. Apr. 17, 2012) (discussing defendant's "criminal history" as including a marijuana infraction).

293. MD. CODE ANN., CRIM. LAW § 5-601.1 (2014).

for employment, social services, housing, and other civil purposes.[294] For example, Indiana recently passed a law providing for the expungement and sealing of all but the most serious criminal records, and makes it unlawful for any person, including an employer, to discriminate based on those expunged records.[295] The NACDL has proposed a wide array of comparable reforms.[296] Decriminalization statutes should follow in these footsteps by including specific provisions to keep records out of criminal databases, with sanctions when official or civil actors use those records improperly.

D. Changing the Process

If decriminalization reform adopted these core rules—no arrests, no jail, and a limited record—it would go a long way towards easing the punitive burdens imposed by the misdemeanor system. But the massive, sloppy world of minor offense processing has a way of evading formal rules, and often the process itself inflicts the harm. Merely being arrested for a misdemeanor or infraction can expose people to unauthorized jailtime, incidental fees, and pressure to plead guilty.[297]

This suggests that decriminalization might require its own processes. For example, a separate civil administrative system could protect infraction recipients from the burdensome criminal misdemeanor apparatus. In King County, Washington, an independent Relicensing Program does this by diverting people with suspended licenses out of the criminal system and into manageable payment programs or community service.[298] The program not only doubled the rate at which people restored their licenses but also slashed defender caseloads, reduced criminal case filings by eighty-four percent, and prevented over 1,300 days of incarceration.[299]

Decriminalization might also require altering the state's underlying incentives to punish in the first place by eliminating courts'

294. *See, e.g.*, Logan, *supra* note 12, at 1110 (advocating a more robust understanding and public dissemination of conviction information); Pinard, *supra* note 170, at 1222 (suggesting the compilation and notification to defendants of each state's collateral consequences).

295. IND. CODE ANN. § 35-38-9 (West 2015).

296. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME, A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION, 54–61 (May 2014), *available at* http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33203&libID=33172, *archived at* http://perma.cc/FM8Z-PRVJ.

297. *See generally* FEELEY, *supra* note 189 (exploring the various costs incurred by defendants in their experiences with criminal courts); Kohler-Hausmann, *supra* note 21 (documenting substantial burdens inflicted on misdemeanor defendants whose cases were ultimately dismissed).

298. BORUCHOWITZ, *supra* note 67, at 7–8.

299. *Id.* at 9.

economic reliance on infraction fines and fees and diverting infraction revenues away from law enforcement coffers. For example, Maryland directs all revenues from decriminalized marijuana offenses to the Department of Health and Mental Hygiene, which "may use money received under this subsection only for the purpose of funding drug treatment and education programs."[300] Such reforms would change not merely the punishment but the punitive machinery that incentivizes and delivers it.

Ironically, decriminalization is probably a poor candidate for the most hallowed of reform traditions: the right to counsel. This is in part because the decriminalized misdemeanor process is resistant to lawyering and its legalistic interventions: between bulk citations and arrests, low-stakes cases, and assembly-line dockets that permit little or no adjudication, there's not much time or room for a defense attorney to put up a fight.[301] Many of the harms of decriminalized offenses, moreover, are informal, financial, and social: the sorts of things that lawyers can do nothing about. More profoundly, the decriminalization train is gaining speed precisely because so many legislatures and advocates are hoping to save money on the costs of public defense. Were decriminalized offenders entitled to counsel, many states might lose interest altogether, and the question would disappear.

The overarching lesson is that states experimenting with decriminalization should resist the temptations of the nonjailable misdemeanor and convert offenses to fully civil infractions. Massachusetts provides a robust model: a statute carefully crafted to eliminate the burdens of criminal conviction, judicial interpretations fully honoring that intent, and police practices that significantly reduce arrest. Were every state to engage in Massachusetts-style decriminalization, our criminal justice process and population might look very different.

VIII. CONCLUSION

Many commentators believe that the United States is not merely tinkering with the machinery of punishment but rethinking it as a governance structure for engaging our fellow citizens. If so, decriminalization in its most robust form might well represent a counter to the very spirit of mass incarceration: a more proportionate,

300. MD. CODE ANN. CTS. & JUD. PROC. § 7-302(g) (2014). *See also* Logan & Wright, *supra* note 208, at 1213 (arguing that all revenue from criminal fines and fees "should go into the general treasury").

301. *See generally* Natapoff, Gideon *Skepticism*, *supra* note 13 (describing the inherent limits of defense counsel to affect outcomes in the misdemeanor process).

less punitive approach that rejects incarceration and heavy punishment as a routine governance mechanism.

Whether decriminalization will fundamentally reshape the landscape is ultimately a matter, not of any one particular reform, but of this penal zeitgeist. If we are in fact becoming a more "benevolent nation" and our criminal system is indeed relinquishing some of its worst racial and inegalitarian features, then we should expect to see more states embrace full decriminalization Massachusetts-style and the rollback of the burdens associated with minor offenses. We might then look back at this era someday, not only as the end of mass incarceration but the demise of the punitive turn that fueled the carceral explosion of the late 20th century.[302]

If, however, the culture of control is not retreating so much as regrouping, we should expect partial decriminalization to remain ascendant, retaining its diffuse punitive hold over an expanding criminal justice population. History might then recall today's decriminalization as yet another example of a well-meaning reform that somehow managed to widen the criminal net and exacerbate social inequality. Either way, misdemeanor decriminalization will be central to understanding this seminal moment.

302. GARLAND, *supra* note 268, at 53; Simon, *supra* note 9, at 221; *see also* Carl Hulse, *Unlikely Cause Unites the Left and Right: Justice Reform*, N.Y. TIMES, Feb. 18, 2015, http://www.nytimes.com/2015/02/19/us/politics/unlikely-cause-unites-the-left-and-the-right-justice-reform.html?_r=0 *archived at* http://perma.cc/3FXN-T79W (describing new bipartisan coalition launching "a multimillion-dollar campaign on behalf of emerging proposals to reduce prison populations, overhaul sentencing, reduce recidivism and [ ] similar initiatives").