

# Decriminalization, Regulation, Privatization: A Response to Professor Natapoff

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## INTRODUCTION

Recent reforms in U.S. criminal justice—and the prospect of more—arise from two important changes. One is widespread recognition in both political and public spheres that crime rates have been declining significantly for more than twenty years. The other is an overdue acknowledgement that American criminal justice systems put far too many people behind bars. These developments now seem sufficiently broad and well established to have supplanted the tough-on-crime political rhetoric through which criminal justice policy has been crafted for a half-century. And they go far toward explaining that the two most important and promising trends in U.S. criminal justice this decade are sentencing reforms and legislation to decriminalize many offenses.<sup>1</sup>

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1. Decriminalization is a response to “overcriminalization.” See, e.g., DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2009). It bears noting, however, that

Many developments demonstrate these two trends. Seven states have abolished capital punishment in the last eight years—six by legislative action.<sup>2</sup> Many more have repealed or moderated some of their harshest, often mandatory, sentencing laws.<sup>3</sup> Drug courts and other “problem-solving” courts have proliferated to facilitate various alternatives to ordinary prosecution and sentencing for criminal wrongdoing.<sup>4</sup> More haltingly, states have reduced some of the “collateral” consequences attached to criminal convictions that impair ex-offenders’ reintegration by limiting everything from their job opportunities to their right to vote.<sup>5</sup> And there is at least more attention—if not consensus and meaningful reform—directed at the costly racial disparities in policing as well as punishment practices.<sup>6</sup>

Another part of this shift in criminal justice policy is the decision in many states to “decriminalize” various misdemeanor offenses. This is a critical piece of a larger reform agenda. Misdemeanors are the offenses for which the vast majority of people are investigated, arrested, convicted, and sentenced.<sup>7</sup> Those are the offenses that overwhelm most state courts, prosecutors, and public defense agencies. Those are the offenses that give police greater power to stop, search, and arrest people; those offenses are the basis for many of the racially disproportionate patterns of enforcement. Despite their low status, misdemeanor criminal records have significant collateral consequences that diminish employment prospects, housing options, rights to drive or

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much of the decriminalization discussed in this essay (and in the article to which it responds) does not address the harsher criminalization policies that Husak and others have criticized.

2. The Death Penalty Information Center lists the 19 states that have abolished the death penalty and the year each did so. *See States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> [perma.cc/LQ7P-CVXS] (last updated July 1, 2015).

3. RAM SUBRAMANIAN & RUTH DELANEY, VERA INSTITUTE OF JUSTICE, PLAYBOOK FOR CHANGE? STATES RECONSIDER MANDATORY SENTENCES 8, 22–23 (2014) (listing out the twenty-nine states that have “taken steps to roll back mandatory sentences since 2000”).

4. *See* Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1611 (2012) (discussing reformist models used by criminal courts).

5. RAM SUBRAMANIAN ET AL., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009-2014 11, 50–53 (2014) (listing and describing 155 pieces of legislation passed by forty-one states since 2009 aimed at reducing the burden of collateral consequences of criminal conviction).

6. Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing*, U.S. NEWS (Aug. 3, 2010), <http://www.usnews.com/news/articles/2010/08/03/data-show-racial-disparity-in-crack-sentencing> [perma.cc/UAJ9-BLW7] (discussing attempts to curb substantial disparities in sentencing for drug crimes).

7. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–81 (2011) (“A 2008 analysis of eleven state courts revealed that misdemeanors comprised 79% of the total caseload in those courts.”).

travel, and custody of one's children. And despite their status as minor offenses, misdemeanor charges often result in jail time, either as pretrial detention, punishment, or as a consequence for failing to comply with other court-imposed obligations (such as paying fines). Even short misdemeanor stints in jail—especially when “short” can be several weeks—can jeopardize offenders' employment and put severe strain on their families.

For all these reasons, state legislation that decriminalizes many low-level offenses would seem to be a welcome development. Alas, nothing in life is simple, as Alexandra Natapoff—a leader in a new wave of scholarship focused on misdemeanor criminal justice<sup>8</sup>—confirms in her insightful, cautionary, and somewhat dispiriting article, “Misdemeanor Decriminalization.”<sup>9</sup> From her careful and perceptive analysis we learn that there is less to this reform trend than meets the eye. After briefly noting some of Natapoff's key findings and arguments, I offer some modest skepticism about how broadly we can realistically expect decriminalization to extend, and likewise about how much advantage the state gains when it switches from criminal to civil adjudication. Following that, I elaborate on two of Natapoff's perceptive observations about what keeps decriminalization from leading to less punitive regulation. The first stems from *who* enforces. Even when legislatures downgrade the status of misdemeanors, enforcement is left to the same police, prosecutors, and courts, which reduces the prospect that changes in law will lead to changes in practice. The second offers an explanation grounded in durable features of American policymaking. Jurisdictions within the United States have long embraced a strong state capacity for criminal law enforcement as an exception to the general disfavor of a strong public sector. The longstanding aversion to robust state capacity leads to a preference for privatizing public functions and for narrowly targeted user fees over broad-based taxes even to fund core public agencies such as courts. This policy context constrains contemporary decriminalization reforms, which tend to preserve much of the scope of criminal regulation, while aiming to reduce the public cost of enforcement and shift more of it directly onto violators.

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8. Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) (suggesting that understanding petty misdemeanors is key to understanding the criminal process as a whole); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1712–22 (2010) (analyzing the different approaches prosecutors take in big cases versus small cases); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–22 (2008) (arguing that plea bargaining is a normative good and thus should be available to innocent defendants).

9. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

## I. HALF-HEARTED DECRIMINALIZATION

A. *Decriminalization Versus Legalization*

“Decriminalization” turns out to be something of a term of art in current policy debates. Few state law reforms that decriminalize various misdemeanors actually *legalize* the conduct. Oftentimes, misdemeanors are converted into civil infractions; the conduct is still illegal but is punished typically only by civil fines and results in no criminal conviction. More bizarrely, as Natapoff demonstrates with a range of specific state law examples, some “decriminalized” offenses in fact remain *crimes*, although now punishable only by fines, probation, or other sanctions short of jail time.<sup>10</sup> More precisely, they are not *directly* punishable by jail sentences. Dismayingly, suspects can still be arrested and jailed, pretrial, for “nonjailable offenses.”<sup>11</sup> And after conviction, offenders who do not pay their fines for these petty offenses can still end up in jail for failure to pay. The same is true for offenses that are actually decriminalized—that is, redefined as civil infractions.<sup>12</sup>

For the most part, recent *decriminalization* policies do not aspire to *deregulation*; that is, legislatures do not legalize formerly prohibited conduct. Natapoff acknowledges that this shift addresses “an important proportionality concern” by limiting sanctions in accord with the modest nature of offenses such as small-quantity marijuana possession.<sup>13</sup> A laudable goal of these reforms is to reduce the lasting impact of minor criminal convictions and brief periods of incarceration on individuals’ lives, families, and employment prospects. But Natapoff makes clear that she favors full legalization for much of the conduct regulated by these offenses, and she criticizes this shift to noncarceral regulation because it “does not . . . answer underlying questions about whether we should punish at all.”<sup>14</sup> One might respond, however, that noncarceral regulation does in fact answer that question. The problem, for those of us who take a different view, is that the legislature’s answer is, “Yes, we still should.”

Depending on the conduct regulated by any particular offense, this may not be the right answer. In the wake of blatantly biased

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10. Natapoff, *supra* note 9, at 1055–56.

11. Natapoff, *supra* note 9, at 1079 & nn.99–101 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (affirming constitutionality of arrest for nonjailable traffic offense)).

12. *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510 (2012) (affirming six-day incarceration following arrest for failure to pay civil fines); Natapoff, *supra* note 9, at 1079.

13. Natapoff, *supra* note 9, at 1066–67.

14. *Id.*

enforcement patterns for traffic violations and marijuana offenses as well as the hotly contested benefits of such enforcement, regulation backed by lesser penalties is not the answer many favor.<sup>15</sup> On the other hand, answers here are not easy because they vary with context. Where enforcement is reasonable and unbiased, for example, support for high traffic-offense sanctions is probably high. Moreover, some answers turn on contested policy or normative preferences, and few people likely endorse the same answer—to punish or not to punish—across the broad range of offenses on the decriminalization agenda.

Natapoff criticizes states that merely lower penalties on marijuana possession, and she criticizes their failure to fully legalize with an analogy to *Lawrence v. Texas*: few would be content if the regulatory status of private adult sex were merely revised from a criminal to a civil offense. This is surely true, but the societal consensus against regulation of consensual, private, adult sex is now broad. Support for legalizing marijuana, on the other hand, is lower, although substantial and apparently growing.<sup>16</sup> Conversely, few favor legalizing all driving conduct that is now restricted by ordinary traffic laws. The same is probably true for much conduct that fits under “disorderly conduct” offenses, for failure to pay child support, and for various other offenses on the decriminalization agenda.

Take a harder example—petty offenses such as putting one’s feet on subway seats, taking up two subway seats, or eating food in subways or buses.<sup>17</sup> I share Natapoff’s view that this kind of conduct should not be criminalized, even though such offenses fit within a two-century Anglo-American tradition of enforcing minor, public-order regulations through criminal sanctions.<sup>18</sup> In my view it is hard to argue that they should be civil infractions punishable by more than a very modest fine, ideally with a policy that fines for first offenses are automatically

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15. See Natapoff, *supra* note 9, at 1064–65 (noting disparate enforcement patterns for minor offenses).

16. Even the decision to legalize personal marijuana possession may not be the ambiguous policy improvement that many (myself included) hope it would be. The leading expert on marijuana policy, Mark Kleiman, has repeatedly cautioned that legalizing marijuana on terms analogous to alcohol requires a substantial regulatory infrastructure (DUI and underage-use laws, vendor and manufacturer licensing, purity and potency rules), which nonetheless fails to prevent tremendous social costs of substance abuse. See MARK A.R. KLEIMAN ET AL., DRUGS AND DRUG POLICY: WHAT EVERYONE NEEDS TO KNOW (2011) (analyzing the drug trade and its relevance to the global economy and foreign policy); Patrick Radden Keefe, *Buzzkill: Washington State Discovers That It’s Not So Easy to Create a Legal Marijuana Economy*, THE NEW YORKER (Nov. 18, 2013), <http://www.newyorker.com/magazine/2013/11/18/buzzkill> [perma.cc/G4HU-UGAY] (examining the difficulty of creating a legal drug trade and the possible effects of initiating one).

17. Natapoff, *supra* note 9, at 1074–75.

18. See Darryl K. Brown, *Public Welfare Offenses*, in OXFORD HANDBOOK OF CRIMINAL LAW 862, 882 (Markus Dubber & Tatjana Hörnle eds., 2014).

waivable and coupled with an enforcement practice in which police frequently issue only warning citations.

But it is not crazy or unduly oppressive to have prohibitions against even this kind of petty, mildly antisocial (or perhaps simply inconsiderate) conduct when a society no longer has norms that successfully discourage this conduct. These are rules that define norms of basic courtesy toward others, which are important especially in urban settings. Ideally we would maintain norms of courteous conduct informally, without the need for law. But, for whatever reasons, our society lacks strong, widely observed norms against such conduct. Observance of these rules makes public spaces and facilities more pleasant for all users. *Some* kind of policy ought to encourage that; the problem is that we lack any good options between nonmandatory social custom and formal law enforcement. The former seems too often to be inadequate. The latter brings familiar concerns about overaggressive or unequal enforcement by police.

Alternately, consider how to deal with failures to pay either fines or obligations such as child support. Confronting failures to pay by those with few or no means is an enduring administrative challenge.<sup>19</sup> If we punish by fines instead of jail, how do we then punish, or otherwise gain compliance from, those who fail to pay? Sometimes we order them to pay *more* (as with late fees), but that does not work for those with no money in the first place. Community service sometimes replaces fines, but it cannot substitute for child support payments or many court fees. Incarcerating people for failure to pay only diminishes their ability to pay. Yet we cannot let people walk away scot-free from such obligations. Jurisdictions continue to resort to jail to enforce even civil obligations because of the seeming lack of other alternatives.

In sum, unless one has strong libertarian commitments, not every offense on the decriminalization agenda is a strong candidate for legalization, or even for non-incarceration. For many of the regulations Natapoff surveys, the shift from jailable to nonjailable offenses seems like a reasonable policy, at least when the alternative sanctions are not counterproductive or unduly harsh. The real problems for many of these offenses, as Natapoff amply demonstrates, are that: (a) they are especially susceptible to biased and excessive enforcement, and (b) people can still end up in jail for nonjailable offenses, including civil infractions.

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19. The same problem motivated the policy of imprisoning insolvent debtors until the early nineteenth century. See BRUCE MANN, *REPUBLIC OF DEBTORS* (Richard Audet ed., 2002) (detailing the stories of people struggling to pay back their debts in the United States).

*B. The Fiscal and Enforcement Ambitions of Decriminalization*

Aside from disagreements about which activities should be fully legalized, which should be merely converted to civil infractions, and what level of noncarceral sanctions ought to attach, the current decriminalization agenda has another problem. Optimal regulation and fair sanctions are not always reformers' only—or even primary—motivation. A higher priority often is to reduce the public cost of law enforcement. By turning traditional, jailable offenses into fine-only petty crimes or civil infractions, jurisdictions reap financial gains in several ways: The cost of legal process drops because the state does not have to provide counsel or jury trials for defendants charged with civil infractions or nonjailable petty crimes.<sup>20</sup> And instead of the state paying *to* punish defendants (by jailing them), the state gets defendants to pay *as* punishment (fines) and also *for* punishment (through fees for court and probation services).

As an added bonus, the shift to formally civil regulations provides the state with the opportunity to adopt a lower standard of proof, which should make enforcement marginally easier. That states consistently employ the lower standard for these nominally civil infractions confirms Natapoff's argument that policymakers remain committed to regulating, rather than simply expanding, liberty. It is worth noting that the lower standard is traditional for civil litigation, but it is not required. States *could* retain the higher beyond-reasonable-doubt standard when they transform criminal offenses into civil ones. The higher standard reflects a basic choice to forgo a modest enforcement advantage in exchange for tilting more errors in the direction of false acquittals rather than wrongful convictions. Legal systems could make that same choice for civil infractions; apparently none have.

On the other hand, a difference in the proof standard probably makes little practical difference. Few cases go to trial, even in criminal courts where the higher standard applies. Guilty plea rates are now routinely above 90 percent,<sup>21</sup> so there is not much room for a lower

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20. See U.S. CONST. amend. VI (guaranteeing a jury trial only in "criminal prosecutions"); U.S. CONST. amend. VII (guaranteeing a jury trial in "Suits at common law, where the value in controversy shall exceed twenty dollars"); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (limiting criminal defendants' Sixth Amendment right to counsel to cases where defendant is actually sentenced to a term of imprisonment); *Minneapolis & St. Louis R.R. Co. v. Bombolis* (1916) (civil jury trial right does not apply to state courts).

21. In U.S. federal courts in the years 2007–2011, guilty plea rates increased from 95.8 to 96.9 percent of all convictions; the percentage of convictions following trial declined from 4.2 to 3.1 percent. U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. C, <http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2011/sourcebook->

burden of proof to increase that percentage. One reason is that many offenses are based on straightforward factual questions—did the defendant possess marijuana, did he put his feet on a subway seat, etc. Another reason is the nature of the evidence in petty offense cases, which typically consists of little more than police testimony on the one hand and defendants’ accounts on the other. At least in front of judges, police seem usually to win those swearing matches.<sup>22</sup> To be sure, the quick-and-dirty nature of much misdemeanor litigation leaves much room for error in individual cases. But the proof standard doesn’t address that problem. For these reasons, I am also skeptical that “the streamlined road from citation to conviction” enables the state to pursue many more charges in civil form than it would if the same violations were prosecuted as petty crimes.<sup>23</sup>

Access to counsel, on the other hand, could address errors. It usually takes defense counsel to bring to light the factual errors that underlie erroneous charges. Examples abound: Walter Rothgery spent weeks in jail based on his arrest for possession of a weapon by a convicted felon, although he had never been convicted of a felony; it took a defense lawyer to reveal that the database on which police relied erroneously reported that he had been.<sup>24</sup> Tyron Tomlins spent weeks in jail after his arrest for possession of a soda straw, which police mistakenly assumed was drug paraphernalia. Defense counsel eventually brought to the state’s attention a lab report concluding the straw showed no trace of drugs.<sup>25</sup>

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2011 [<http://perma.cc/V8K2-AA86>]. For state court data, see, for example, VA. CRIMINAL SENTENCING COMM’N, 2014 ANNUAL REPORT 33, <http://www.vcsc.virginia.gov/2014AnnualReport.pdf> [<http://perma.cc/FXF3-GSKL>] (90 percent of felony sentences in circuit courts followed guilty pleas, 9 percent bench trials, 1.2 percent jury trials). In 2001, data from twenty-two states found three percent of state criminal cases were resolved by either bench or jury trial, the remainder by guilty pleas, dismissals or other disposition. See NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2001: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 63 (Brian J. Ostrom et al. eds., 2001), <https://www.ncjrs.gov/pdffiles1/Digitization/195881NCJRS.pdf> [<http://perma.cc/KUP4-E564>].

22. Solid empirical data on the credibility of police testimony is hard to come by, but literature on police credibility is nonetheless vast. For a good overview citing leading studies, see Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2201–08 (1975) (noting, inter alia, widely held views that police “testilying” about the basis for probable cause to search and arrest grew common in the 1960s once the exclusionary rule was applied to state courts). Studies of juries also find that police credibility is a significant influence on jurors’ first votes, although some jurors in some jurisdictions are notably skeptical of police testimony. See Stephen P. Garvey et al., *Juror First Votes in Criminal Trials*, 1 J. EMPIRICAL LEGAL STUD. 371, 385–95 (2004) (study of jurors in four jurisdictions).

23. Natapoff, *supra* note 9, at 1101.

24. Rothgery v. Gillespie Cty., 554 U.S. 191, 195 (2008).

25. Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> [[perma.cc/4SXD-C7V7](http://perma.cc/4SXD-C7V7)].

Moreover, some offenses are not defined by bright-line elements. These vaguer offenses create opportunities for overzealous police interpretation about what constitutes, for example, “obstructing pedestrian traffic” if a person stands and chats on a sidewalk, or whether one has loitered “without apparent purpose” or posed a “risk to public safety” by sitting intoxicated in public.<sup>26</sup> Sometimes judges sort out such cases by questioning defendants and police in a quick hearing. A few questions can be all it takes to learn, for example, that that no other pedestrians were even present, much less obstructed, by a defendant’s presence on a sidewalk.<sup>27</sup> But sometimes it takes defense counsel to uncover an ill-founded charge or a valid defense for even such simple infractions. By shifting regulation of minor offenses into a form that is still adjudicated adversarially but that eliminates the right to counsel, it seems nearly certain that we have moved to a system that tolerates a higher rate of error for this category of offenses.

There is a cynical response to this point as well, though hardly one that reformers who remove the right to counsel in such cases should want to make. The loss of counsel when petty crimes are converted to civil infractions may not change things for many defendants in many jurisdictions. In innumerable localities, appointed counsel for misdemeanors are present in little more than name only. Studies of localities around the country periodically find places where defense counsel meet clients for the first time at their court hearing, spend a few minutes reviewing a brief case file, and suggest the client accept the standard guilty plea offer.<sup>28</sup> Most defendants lose little when denied this kind of assistance. And where that it is the case, removing counsel altogether does little to speed up an already “streamlined road.”<sup>29</sup>

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26. *People v. Kellogg*, 14 Cal. Rptr. 3d 507, 507 (Ct. App. 2004) (affirming conviction for public intoxication “in any public place” while “unable to care for his or her own safety”).

27. *See, e.g., MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* (2014) (describing Andrew Brown charged under N.Y. Penal L. § 240.20(5) for “obstructing pedestrian traffic”; charge subsequently dismissed after a judge briefly questioned the defendant and the arresting officer); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 88 (1965) (defendant convicted under city ordinance that made it “unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk”).

28. *See, e.g., Wilbur v. Mount Vernon*, 989 F. Supp. 2d 1122, 1125 (W.D. Wash. 2013) (“The appointment of counsel was, for the most part, little more than a formality, a stepping stone on the way to a case closure or plea bargain having almost nothing to do with the individual indigent defendant.”); *Hurrell-Harring v. New York*, 930 N.E.2d 217, 224 (N.Y. 2010) (“Lawyers were eventually nominally appointed for plaintiffs, they were unavailable to their clients . . . and ultimately appeared to do little more on their behalf than act as conduits for plea offers, some of which purportedly were highly unfavorable.”).

29. Natapoff, *supra* note 9, at 1101.

Still, that baseline of law-in-action is hardly one to embrace. In addition to the fact that many defendants *do* get adequate representation in misdemeanor courts, “most” is not the same as “all.” The cost of moving from often-poor representation to no representation is that some unknown portion of judgments—two, five, ten percent?—will almost certainly go awry for lack of a skilled adversary on one side.

The Supreme Court has long recognized this risk. *Argersinger v. Hamlin* cited it as a central rationale for extending the right to counsel to petty misdemeanors: “The requirement of counsel may well be necessary for a fair trial even in a petty-offense prosecution.”<sup>30</sup> The Court was “by no means convinced that legal and constitutional questions” for petty offenses “are any less complex” than for more serious ones.<sup>31</sup> In support of this point, the Court cited two of its recent decisions in which the successful petitioners were convicted of petty offenses that were punished only with modest fines.<sup>32</sup> Ironically, the *Argersinger* holding would have guaranteed counsel to neither defendant. The Court limited the right to counsel to only those prosecutions that result in actual deprivation of liberty.<sup>33</sup> But that has always been a poor proxy (as the *Argersinger* concurrence noted) for distinguishing offenses for which legal assistance may be significant from those in which it likely would not be.<sup>34</sup> Merely removing the possibility of jail from offense definitions is functionally the same, and no better.

Here, as well, we could imagine doing things differently, devising a system that mitigates this risk and still saves money. The right to defense counsel is justified in good part by the fact that the state has counsel. But in many limited-jurisdiction courts, police officers present petty offenses without prosecutors. Moreover, lay magistrates sometimes preside. A fair compromise might be a right to non-lawyer defense advocates whenever the state relies on police officers instead of prosecutors. One could imagine a corps of advocates certified after some weeks of training roughly equivalent to police officers’ legal training.<sup>35</sup>

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30. 407 U.S. 25, 33 (1972).

31. *Id.*; see also *id.* at 47 (Powell, J., concurring) (“Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel.”).

32. *Powell v. Texas*, 392 U.S. 514, 517 (1968) (public intoxication offense, \$50 fine); *Thompson v. Louisville*, 362 U.S. 199, 202 (1960) (loitering and disorderly conduct offenses, \$10 fines for each).

33. *Argersinger*, 407 U.S. at 37.

34. *Argersinger*, 407 U.S. at 47–51 (Powell, J., concurring).

35. For a full-length argument for a somewhat similar proposal, see Donald Dripps, *Up From Gideon*, 45 TEX. TECH. L. REV. 113 (2012).

## II. PRESERVING STATE POWER THROUGH DECRIMINALIZATION

A core insight that Natapoff's close consideration of recent reforms provides is that decriminalization is not about reducing state control.<sup>36</sup> It is often about maintaining or even expanding the same kinds of regulation at lower public cost. Few jurisdictions actually shrink the scope of public enforcement authority by replacing jailable misdemeanors with nonjailable ones or with civil offenses. The state gives up authority to incarcerate, at least in the first instance, as a direct punishment for an offense.<sup>37</sup> But in exchange, the state often reaps a net *gain* in enforcement authority. Government officials gain power as the mode of adjudication becomes less adversarial and more administrative. Checks on police, prosecutors, and judges in the form of defense counsel and lay jurors diminish. Enforcement becomes even more efficient and effective—in the sense of achieving dispositions with minimal adjudicative cost—while any reductions in accuracy and procedural fairness are well concealed.

In what follows, I elaborate on two important features of state justice systems, both noted by Natapoff, that make it unlikely that decriminalization will result in either less regulation or less punitive enforcement of regulations. The first reason is based on who is responsible for enforcement, the second on state incentives for enforcement.

### A. *Changing Regulations Without Changing Regulators*

A critical reason that enforcement patterns do not change in the wake of decriminalization is that the *enforcers* do not change; the substantive law changes, but the enforcement infrastructure mostly does not.<sup>38</sup> That is, the same criminal justice agencies administer the same body of substantive offenses, even if they are now formally civil regulations. The same police forces patrol, ticket, and arrest for the same regulated conduct; the same state prosecutors present those charges to the same state court judges with busy misdemeanor dockets. To be sure, enforcement policies vary greatly with local leadership, local politics, and local conditions. Some jurisdictions (such as New York City) rigorously pursue petty marijuana possession with stop-and-frisk

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36. See, e.g., Natapoff, *supra* note 9, at 1062, 1067, 1095, 1103–04 (explaining that decriminalization is not antithetical to the “culture of control”).

37. Of course, the state often retains and uses authority to incarcerate in the wake of an *arrest* and as a remedy for failure to pay fines.

38. Natapoff, *supra* note 9, at 1081.

practices and other tactics;<sup>39</sup> others don't. But from Natapoff's account, decriminalization seems to have little effect on those variations in enforcement practices.

On reflection, that is to be expected. Legislatures that reform criminal codes generally are not sending a strong signal that they want less enforcement. Even if they sought to, state legislatures exercise only relatively modest influence—through budgets or other policymaking options—on the enforcement policies of police and prosecution agencies.<sup>40</sup> Here, as elsewhere, we imagine a different regime, but a transformation would require more than merely reclassifying various statutes. Take petty offenses such as the no-feet-on-subway-seats law described above. Primary responsibility for enforcing those rules could be shifted from police to non-law-enforcement officials (perhaps uniformed train conductors). With occupational norms less embedded in policing, those kinds of officials might enforce the rules—and help to change public norms—mostly by telling violators not to do these things, perhaps backed by the capacity to order recalcitrant passengers to leave the train at the next stop or to call in police to issue a civil citation.

We have this kind of enforcement infrastructure in some regulatory settings. Contrast subway passengers with airline passengers, who also must abide regulations for equivalent petty conduct—think of the requirement that passengers wear seatbelts when the seatbelt sign is on. The Federal Aviation Administration (“FAA”) can impose civil fines on passengers who disregard the seatbelt sign.<sup>41</sup> Yet, although commercial flights have carried more than three billion passengers in the last five years, the FAA has not issued a single fine solely for a seatbelt violation over that period (and it has issued only four warning letters for that infraction).<sup>42</sup> Violations of more substantial regulations—such as being an “unruly passenger”<sup>43</sup>—see

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39. *Id.* (describing marijuana enforcement practices of the New York City Police Department).

40. Eric Rasmusen et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, 11 AM. LAW. ECON. REV. 47, 68 (2009) (“Half of [state prosecutor's] offices received at least 85% of their funding from the county government, and a third relied entirely on the county. Half received some state funding, and 6% had their entire funding from the state.”).

41. 14 C.F.R. § 121.317(f) (2015).

42. Jeff Friedrich, *Emergency Evacuation*, SLATE (Aug. 13, 2015), [http://www.slate.com/articles/life/travel\\_explainer/2015/08/airplane\\_bathroom\\_emergency\\_is\\_it\\_ever\\_all\\_right\\_to\\_ignore\\_the\\_seatbelt.html](http://www.slate.com/articles/life/travel_explainer/2015/08/airplane_bathroom_emergency_is_it_ever_all_right_to_ignore_the_seatbelt.html) [perma.cc/T5TW-DZYQ] (reporting these FAA figures).

43. See 14 C.F.R. § 91.11 (2015) (prohibition of interference with aircraft crew members); 14 C.F.R. § 121.317(k) (2015) (smoking prohibition and seat belt requirements), 121.580 (prohibition of interference with aircraft crew members); 14 C.F.R. § 135.120 (2015) (prohibition of interference with aircraft crew members).

modestly more enforcement. The FAA fined forty-one “unruly passengers” in 2014.<sup>44</sup>

Rule enforcement in the air travel setting is one example of “responsive regulation,” an enforcement model that is much better established in many commercial and industrial contexts than it is in the sorts of settings overseen by local police departments. The basic idea of responsive regulation is to start with and emphasize cooperative and persuasive strategies as the primary means to gain compliance, escalating to warnings and civil fines only in cases in which those efforts fail and reserving criminal sanctions or license suspensions as last resorts.<sup>45</sup> Police departments and prosecutors are certainly capable of adopting such strategies, and many do. An official “caution” issued by police in lieu of prosecution is widely employed in England, for example.<sup>46</sup> Some community policing policies in the United States focus more on building cooperative citizen-police relations than on zealous enforcement of minor offenses under the “broken windows” model.<sup>47</sup> Broadly speaking, however, merely changing the status of longstanding offenses to nonjailable crimes or civil infractions, while leaving enforcement in hands of the same police departments, is unlikely alone to trigger much change in enforcement policies.

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44. See Friedrich, *supra* note 42 (reporting these figures).

45. See JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION* 31–42 (2002) (arguing against punitive justice systems and for restorative justice systems).

46. On police cautions in England, see ANDREW ASHWORTH & MICHAEL REDMAYNE, *THE CRIMINAL PROCESS* 176–80 & 189–90 (4th ed. 2010); MINISTRY OF JUSTICE, *SIMPLE CAUTIONS FOR ADULT OFFENDERS* 4–5 (2013) (summarizing the simple caution process in England and Wales). England is testing pilot programs to replace the simple caution policy. See Owen Bowcott, *Police Cautions Replaced with Punitive Sanctions for Three English Forces*, *THE GUARDIAN* (Nov. 1, 2014), <http://www.theguardian.com/law/2014/nov/01/police-cautions-abolished-staffordshire-west-yorkshire-leicestershire-forces-chris-grayling> [perma.cc/GJB2-QRDY].

47. Jeffrey A. Fagan et al., *Street Stops and Broken Windows Revisited: The Demography and Logic of Proactive Policing in a Safe and Changing City*, in *RACE, ETHNICITY, AND POLICING: NEW AND ESSENTIAL READINGS* 309, 311 (Stephen K. Rice & Michael D. White eds., 2009) (calling into question the effectiveness of “broken windows” policing); Dan M. Kahan, *Reciprocity, Collective Action, and Community Policing*, 90 CALIF. L. REV. 1513, 1531–38 (2002) (discussing the experiences of several cities that have adopted community policing models); see also Natapoff, *supra* note 9, at 1076 & n.90 (noting Brooklyn district attorney’s policy of de facto decriminalization of marijuana possession in small amounts); *id.* at 1086 & n.140 (noting various diversion programs for low-level offenses).

*B. Privatization and Punitivism:  
Financial Motivations for Enforcement*

If longstanding norms of enforcement agencies were not barrier enough, governments are likely to continue to vigorously enforcing nonjailable crimes and civil offenses because many have a financial incentive to do so. Many American localities are shockingly dependent on revenue from fines and court-related fees to fund many aspects of their justice systems.<sup>48</sup> The prospect of—and need for—courts to *make* instead of losing money creates powerful, distorting incentives to punish through fines rather than incarceration. Further, it encourages courts to punish rather than to warn, seek voluntary cooperation, change norms, or address social problems and undesirable conduct in other nonpunitive ways. Close scrutiny of localities that have taken this path—such as the 2015 Department of Justice report on courts in Ferguson, Missouri—shows that political officials, police, and judges are all well-aware of the revenue that punitive fines and court fees must provide to fund their agencies.<sup>49</sup> In the worst localities, it is fair to characterize this as the de facto privatization of local justice systems.

The resort to civil and criminal fines as a primary revenue source is of a piece with broader trends of privatization and neoliberal policy strategies in U.S. justice administration. State legislatures have proven much more reluctant to raise broad-based taxes than targeted user fees, and so large court fees—often far exceeding the fine amount—now attach to many criminal and traffic citations.<sup>50</sup> Increasingly, states are attempting to charge fees to indigent defendants for public defender services and to charge jail fees to inmates.<sup>51</sup> Many jurisdictions also privatize their probation offices by contracting with private firms to

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48. See Natapoff, *supra* note 9, at 1098–1102 (discussing various municipalities’ reliance upon fines and court fees).

49. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015); see Natapoff, *supra* note 9, at 1098–1102 (citing additional reports on this topic).

50. For state “processing fees” attached to many Virginia tickets (not including fees added by local governments), see VA. S. CT. R. 3B:2 & 3C:2 (uniform fee schedules for traffic and non-traffic offenses, listing fees of \$51 to \$61 and fines that are generally lower).

My own “comparative law experience” with petty infraction fines and fees is telling. In 2012, I got tickets in both Germany and Virginia for equivalent bike-riding infractions—going the wrong way in a German bike lane, and failing to stop at a crosswalk on a Virginia street. The German penalty was €15 (then about \$20); the Virginia penalty was a \$30 fine plus about \$80 in fees (charged even to those who pay fines by mail and never appear in court).

51. See Katherine Beckett and Alexes Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 CRIMINOLOGY & PUB. POL’Y 505, 505 (2011) (survey and criticism of fees attached to criminal justice services); Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2074 (2006).

provide probation services; those firms, in turn, make money by charging substantial fees to probationers.<sup>52</sup> And in different sector of enforcement, investigative incentives are distorted by policies allowing police agencies to keep huge proceeds from civil asset forfeitures linked to drug offenses or other crimes.<sup>53</sup>

These arrangements have corrupting effects on both public and private actors who work within them. They corrupt in the sense that they create conflicting motivations that undermine officials' abilities to carry out their work focused singularly on goals that are fundamentally public: to investigate, charge, and punish—and then regulate probationers—only when such enforcement is effective and appropriate for the social ills that laws target. These trade-offs are inherent in the cross-purposes created by financial interests, and they define and reflect the practical understanding of what counts as fair treatment. The implicit premise is that it is fair to impose outsized financial burdens for administering justice on those who run afoul of even the most petty of regulations—those that in many cases are easiest to replace with less punitive compliance strategies. And financial interests that motivate enforcement cut against fairness in an additional dimension—petty offenses are more widely committed than serious crimes, which means enforcement inevitably will be selective, and, thus, almost inevitably biased and arbitrary in nature.

These trends in justice administration arise from deeply embedded features of American policymaking. American political culture has an enduring aversion to a strong state with capable, professional public bureaucracies.<sup>54</sup> Instead, the U.S. government favors decentralized agencies (like local police forces and prosecutors) and privatization of public functions when possible. This aversion extends to broad-based taxes needed to fund a strong state, which leads to reliance on narrowly targeted user fees. User fees support the

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52. See Sarah Stillman, *Get Out of Jail, Inc.*, THE NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/get-out-of-jail-inc> [perma.cc/7J8F-JMKU] (private probation firms); Natapoff, *supra* note 9, at 1085–87, 1100 (describing the private probation industry and its problems).

53. See Sarah Stillman, *Taken*, THE NEW YORKER (Aug. 12, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken> [perma.cc/GTD2-L9LM] (describing civil forfeiture practices); John L Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171, 171 (2001); Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 35 (1998).

54. The canonical work on the American aversion to a European-style “strong” state is STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920* (1982).

aspiration to make even public agencies such as courts essentially self-funded service providers.

#### CONCLUSION

The American aversion to a strong state has long had a big exception—the government’s exceedingly strong capacity for criminal law enforcement. Too little hesitancy about criminal law and punishment is what led to the excessive criminalization that reformers are now trying to reverse. Natapoff’s article proves the point. In the name of decriminalization, states have changed sanctions and procedures but have only rarely made prohibited conduct legal. Some of that approach is appropriate given the nature of the conduct, but much of it is also the result of reformers’ motivation to reduce public expenditures by cutting the costs of incarceration and adjudication—that is, an ambition to benefit the state as much as individuals. Natapoff’s central insight is an important one: changes often described as “decriminalization” so far have shrunk the scope of state regulation relatively little, and many of those reforms make regulatory offenses easier—and more lucrative—to enforce.