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REWARDING THE NAUGHTY

A California ballot measure would reduce many felonies to misdemeanors

By *Julius (Jay) Wachtel*. According to its proponents, California Proposition 47, enticingly entitled “The Safe Neighborhoods and Schools Act,” will *increase* public safety by *reducing* punishment. This extract from arguments in favor of the measure explains how its seemingly counterintuitive approach will work:

- **Prioritizes Serious and Violent Crime:** Stops wasting prison space on petty crimes and focuses law enforcement resources on violent and serious crime by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors.
- **Keeps Dangerous Criminals Locked Up:** Authorizes felonies for registered sex offenders and anyone with a prior conviction for rape, murder or child molestation.
- **Saves Hundreds of Millions of Dollars:** Stops wasting money on warehousing people in prisons for nonviolent petty crimes, saving hundreds of millions of taxpayer funds every year.
- **Funds Schools and Crime Prevention:** Dedicates the massive savings to crime prevention strategies in K—12 schools, assistance for victims of crime, and mental health treatment and drug treatment to stop the cycle of crime.

Proposition 47 reduces penalties from felonies to misdemeanors for six “non-serious, nonviolent” crimes which, depending on severity and the offender’s prior record, can presently be charged as felonies. Five – grand theft, shoplifting, receiving stolen property, writing bad checks, and check forgery – would only be chargeable as misdemeanors as long as the loss is \$950 or less. Possession of illegal drugs would also be a mandatory misdemeanor (the change would not affect marijuana possession, already a petty offense.) Persons already serving felony sentences for such convictions would be eligible for resentencing and early release from custody or supervision. To provide reassurance, the measure explicitly forbids giving breaks to persons who have been convicted of murder, rape and child molestation.

There are influential voices on both sides. The measure’s sponsors include the current San Francisco D.A. and the former police chief of San Diego. Opponents include the presidents of the California Police Chiefs Association and the California District Attorneys Association. One of the big quarrels is over the consequences of releasing as many as 10,000 prisoners should the initiative pass. Opponents claim it could cause a public safety disaster. Proponents say not to worry, as the text of the proposed law forbids resentencing prisoners whose criminal record suggests they present an “unreasonable risk of danger to public safety.”

Exactly what does “unreasonable risk” mean? Section 14 of the measure defines it as a prior conviction for an offense enumerated in Penal Code section 667(e)(2)(c)(iv). Here is the subsection in full:

- (I) A "sexually violent offense" as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.
- (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289.
- (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288.
- (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive.
- (V) Solicitation to commit murder as defined in Section 653f.
- (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245.
- (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418.
- (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death.

Senator Diane Feinstein, an avowed liberal who opposes the measure, pointed out that serious crimes such as burglary, armed robbery and aggravated assault are not on the list. Accordingly, should Proposition 47 pass, persons with prior convictions for such crimes would indeed be eligible for early release.

Proposition 47 may also reward the wrong people. According to the nonpartisan Legislative Analyst, nearly all offenders who stand to gain from the proposition received prison terms not because of what they actually did, but due to their prior record:

A relatively small portion—about one-tenth—of offenders of the above crimes are currently sent to state prison (generally, because they had a prior serious or violent conviction). Under this measure, none of these offenders would be sent to state prison. Instead, they would serve lesser sentences at the county level.

Another concern relates to negotiated pleas, which account for at least ninety percent of adjudications. For example, burglars frequently plead to grand theft, and dope dealers to drug possession. If Proposition 47 passes many defendants stand to benefit twice: first from a plea

deal, then from mandatory misdemeanor sentencing. (Our system's dependence on plea deals makes withholding them highly unlikely.)

Recalibrating punishment may be a good idea. But if the measure's objective is to improve public safety, offender criminal histories must not be glossed over or, even worse, ignored. Neither should the proposition become an invitation to keep committing "minor" crimes. Under Proposition 47 stealing an object valued at \$950 or less – say, an iPad, or an iPhone – is a misdemeanor, period. That's true even if the thief is a repeat offender or has a prior conviction for, say, burglary, armed robbery or grand theft. Indeed, Proposition 47 seems almost an invitation for pickpockets, shoplifters and common thieves to go "pro."

Imprisonment is a crude tool, but it works, if only by incapacitating offenders so they cannot strike while locked up. We might hate to admit it, but incarceration undoubtedly helped break the crime wave of the 80s and early 90s. Now that society seems eager to ease up, it must be done transparently, based on relevant and clearly articulated criteria. Efforts such as Proposition 47, which tinker with a ridiculously complex system (read the initiative, and be sure to have aspirin on hand) are likely to be ineffective, with consequences that we will all regret.