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To my mind, one of the clearest examples of reparations being implemented in recent years has been the "social equity" provisions enacted in some localities in California and in a number of American states in the wake of marijuana legalization. While these provisions differ from place to place they include things like (1) the expungement of old marijuana convictions (2) special licensing regimes that provide economic opportunities to those previously convicted of marijuana offenses (3) public investment in communities that were disproportionately impacted by prior laws criminalizing marijuana. These social equity provisions are worth examining because I think they might provide a useful model for reparations for individuals and communities that have been unjustly criminalized and over-sentenced in other contexts.

Generally speaking, when we make changes to the criminal law, we don't provide reparations to those previously convicted and sentenced under the prior legal regime. I think the fact that many jurisdictions have chosen to provide reparations in the wake of marijuana legalization is in part because we have an intuition that our prior marijuana laws were not merely imperfect, deficient, or warranting improvement but rather that the laws were immoral, unjust, and enforced in a racially disparate manner. In other words, I think these reparation provisions reflect the fact that our culture has had a moral awakening with regard to marijuana criminalization – an awakening perhaps not unlike the moral awakening that accompanied the abolition of slavery and the end of Jim Crow – and we have a sense that that moral awakening creates an accompanying moral imperative to provide reparations to those who were victimized by the prior legal regime.

I would further submit, that if we look carefully at some of the other criminal justice reforms California has made in the past decade, there are other changes that might fall into this category, where we might say that the reforms reflect not merely an effort to fix deficient laws, but rather a deeper moral judgement that the prior laws were cruel, unjust and racist. And like with marijuana, we should consider reparations to individuals and communities unfairly impacted by those laws.

So what are some of these reforms to California's criminal law that may reflect such an awakening? Here are a few worth considering:

(1) Proposition 36: In 2012 by a vote of 69% to 31% Californians enacted a ballot measure, Proposition 36 that amended California's draconian Three Strikes Law. While other states had enacted these kind of "habitual offender" laws during the 1990s, California's Three Strikes law was one of the broadest and harshest in the nation, providing for decades-long mandatory minimum sentences for a third strike offense, even when that offense was nonviolent and exceedingly minor. Individuals convicted of petty thefts like stealing a slice of pizza, a pair of white tube socks or a pair of baby shoes ended up with exorbitant decades-long sentences. Similarly, individuals convicted of possession of a single dose of heroin ended up with life sentences. In some instances like a famous case where a man received a 50 year mandatory minimum for stealing five videotapes of children's movies, the third-strike sentence for shoplifting was more than six-times longer than the sentence that same individual would have received for rape.

It is worth noting that California's Three Strikes law, enacted amidst a media-generated hysteria in the wake of the kidnapping and murder of 12-year-old Polly Klaas, has since been repudiated by Klaas's own sisters. They now call California's Three Strikes law a "pervasive injustice." They recently told Elle Magazine: "It's difficult to describe how strange it is to be connected to this legacy of mass incarceration… and then to carry the shame and the pain of that legacy. It's been heavy for us for a really long time." In short, even the people in whose name California passed its Three Strikes Law have come to see it not just as a misguided policy but as unjust and shameful.

(2) SB 1010 – In 2014 California enacted Senate Bill 1010 which eliminated the state's crack-cocaine disparity. Prior to the reform, California provided harsher punishments for the sale of crack cocaine than powder cocaine and it made it harder for those convicted of crack offenses to qualify for probation. Similarly, a far smaller amount of crack cocaine than powder cocaine triggered a California law which allowed for the forfeiture of property used in drug-related commerce.

It is now widely acknowledged that there is "no scientific basis" for treating crack and powder cocaine differently. Indeed, California's 2014 reform law contained a legislative finding that crack and powder cocaine are "two different forms of the same drug." Furthermore, it is now widely acknowledged that prior law produced dramatic racial disparities. In California, those imprisoned for powder cocaine offenses were far more racially heterogeneous than those imprisoned for crack offenses. And according to CDCR data 77% of those imprisoned for crack offenses were black whereas less than 2% were white.

(3) SB 1437 – In 2018 California enacted Senate Bill 1437 which amended the archaic felony murder rule and the natural and probable consequences doctrine, dramatically narrowing the circumstances in which people who neither kill nor intend to kill can be convicted of murder as though they were the actual killer. The reform bill recognized the inherent unfairness of pre-existing law and provided retroactive relief to those who had been convicted prior to the reform's enactment.

Prior to the reform law, merely agreeing to participate in one of certain enumerated felonies made one strictly liable for any death that occurred. Thus, a person could be charged with first or second degree murder even for deaths that one did not commit, did not intend, and did not foresee, and even those about which one had no knowledge. So people like Neko Wilson could be prosecuted for first-degree murder in connection with the deaths of a couple during a robbery in the Central Valley, even though prosecutors conceded that Wilson had merely helped to plan the robbery and was not physically present when the robbery or the deaths occurred.

In short, prior to the reforms, California law allowed people who were peripheral to felonies – lookouts, getaway drivers, and other minor participants – to be prosecuted as though they were the triggerman in an intentional first-degree murder. This law frequently ensnared people like women and youth who often play a small role in the crimes of others. Indeed, 72% of the women serving a life sentence for homicide in California did not actually commit the homicide.

England and other commonwealth countries around the world that previously employed the felony murder rule have long since narrowed or abandoned it, because it is archaic and produced unjust results. And indeed, the California Supreme Court itself has called the felony murder rule "barbaric." In short, there is significant evidence that in California SB 1437 did not merely reform an imperfect or deficient law, but sought to end a pervasive injustice.

(4) SB 394 – In 2017 California ended JLWOP sentences – that is, life without the possibility of parole sentences for juveniles. Prior to its enactment, California had more than 300 children serving such sentences and was one of just nine states that accounted for more than 80% of JLWOP sentences nationwide. Of the more than 3000 counties in America, Los Angeles County was the second most prolific user of such sentences.

JLWOP sentences first became common during the 1990s, at the height of what has now become known as the Juvenile Super-Predator Panic. The panic was

initially fueled by Princeton professor John DiLulio then seized on by politicians and the media who opined that a new generation of youth that had "no respect for human life" was going to drive a crime wave unprecedented in U.S. history. In the coming years, juvenile crime didn't rise; in fact it plummeted. For his part, DiLulio has since admitted he was wrong, expressed remorse, and joined a brief to the U.S. Supreme Court repudiating his own work.

As many have subsequently noted, the Juvenile Super-Predator Panic specifically "tapped into and amplified racial stereotypes" suggesting black children were predatory and prone to criminality. And in fact, among children arrested for homicide, black kids were twice as likely to be sentenced to JLWOP as white kids. In California, black youth were 18 times more likely to receive such a sentence than white youth.

As the U.S. Supreme Court itself has pointed out, the differences between adult and adolescent brains make adolescents less morally culpable than adults and render adolescents more capable of rehabilitation, making the irrevocability of an JLWOP sentence generally inappropriate. Indeed, brain science shows that adolescents are more susceptible to impulsivity, risk-taking behavior and peer pressure and less likely to weigh the consequences of their actions than adults, in large part because their brains are still developing. In California, more than half of the children who received the sentence did so as part of a crime with an adult and in many cases, the adult did the killing, with the child playing a peripheral role.

For these reasons, in recent years more than 30 U.S. states have abandoned the practice of sentencing children to JLWOP in law and in practice, and the U.S. remains the only nation in the world that allows JLWOP at all. In short, California's SB 394 that eliminated such sentences might reasonably be seen as a moral awakening not merely a practical change in the law.

In conclusion, the four changes to the law that I have discussed are merely illustrative of a broader point: that as we look at the era of mass incarceration and begin to make reforms to the criminal law, some portion of these reforms will reflect an intuition that the laws being changed were not merely deficient or warranting improvement, but were barbaric, immoral and unjust. And when a law falls into that second category, when we have a moral awakening, we have a moral responsibility to repair the harm we have done through reparations, like giving special economic benefits to people who were victimized and special economic investments into communities that suffered disproportionate enforcement.