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CRIME, POLITICS, AND RACE

SAMUEL R. GROSS*

The biggest problem with the criminal justice system is that too many crimes are committed—too many rapes, too many murders, too many robberies; too much violence that inflicts an untold amount of suffering and destruction on too many people. If that seems obvious, what follows should be equally obvious. The most important step to take to solve the problems of the criminal justice system is to reduce the number of crimes that are committed: to prevent crimes. The best thing we can do to help the victims of crime is to keep them from becoming victims in the first place. Chief Reuben Greenberg is doing an admirable job of that in his own city¹—many of his reforms have been adopted by other police departments—but overall, crime prevention has not been a high priority. In general, we don't half try.

What do I think we should do that we're not doing? I'm not talking about some liberal, big-government, tax-and-spend programs—such as a Job Corps that really reduces unemployment, or a program for rebuilding destroyed inner cities. These might be good ideas, but I'm talking about something simple and basic: policing.

From 1970 to 1992, the number of police officers in this country increased, in proportion to the population, by about twenty-five percent.² That may seem like an improvement, but it

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1. See Reuben M. Greenberg, *Race, the Criminal Justice System, and Community-Oriented Policing*, 20 HARV. J.L. & PUB. POL'Y 397, 401-04 (1997).

2. There were 548,241 police officers in the United States in 1970. See NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973, at 25 tbl.1.3 (1973). By 1992, that number had increased by 56%, to 857,593. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 26 tbl.1.21 (1995). During the same period, the total population of the United States increased from 205,052,000 to 255,458,000—an increase of 25%. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994, at 8 (1995). That

was not, because the crime rate had increased at a much faster rate.³ As a result, the number of police officers *per crime* actually decreased by forty percent.⁴ In the same period, the number of prison guards tripled in proportion to the population.⁵

Could we be more effective if we spent more money on police? Perhaps. Recently the Republican mayor of New York, Rudolph Giuliani, and his police chief, William Bratton, have been getting a lot of credit for reducing the crime rate in that city.⁶ They deserve that praise. But they did not reduce crime in New York by sending criminals to jail for twenty years rather than five years, or by sentencing them to death. They did it by putting more police officers on the street, by revamping a police department that badly needed revamping, and by doing some of the things that Chief Greenberg was doing before his approach became known as Community-Based Policing. Maybe these methods will catch on, but so far New York is an exception. For the most part, we don't try to fight crime by stopping it—which is hard work—but by useless symbolic gestures: executing a

translates into a 25% increase in the number of police officers per capita.

3. The FBI estimated that the total number of index crimes in the country in 1970 was 5,568,200, and the number of violent index crimes was 731,400. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1970, at 6 (1971). In 1992, the FBI estimated that there were 14,438,191 index crimes, and 1,932,274 violent index crimes. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1992, at 5, 10 (1993). Index crimes are those crimes falling within the following categories: criminal homicide, forcible rape, robbery, aggravated assault, burglary (or breaking and entering), larceny (or theft), motor vehicle theft, and arson. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1992, at 383 (Appendix 2).

4. Dividing the number of police officers, *see supra* note 2, by the number of crimes, *see supra* note 3, we can determine that in 1970 there were 0.099 police officers per index crime, and 0.75 per violent index crime. In 1992 there were 0.059 police officers per index crime and 0.44 per violent index crime, for a decrease of slightly more than 40% in each category. For a definition of index crime, *see supra* note 3.

For further discussion of this point, see Stephen J. Schulhofer, *Bashing Miranda is Unjustified—And Harmful*, 20 HARV. J.L. PUB. POL'Y 347, 360-361 & fig.3 (1997).

5. In 1970, there were 152,049 correction employees in the United States. *See* NATIONAL CRIMINAL JUSTICE INFO. AND STATISTICS SERV., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1973, at 25 tbl.1.3 (1973). By 1992, the number of corrections officials had increased to 566,500. *See* BUREAU OF JUSTICE STATISTICS, U. S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 26, tbl.1.21 (1995). After an adjustment for the increase in the population during this time, *see supra* note 2, this reflects an increase of 198% in the number of prison guards per capita.

6. *See* Clifford Krauss, *Poster Boy, For A Drop in Crime*, N.Y. TIMES, Dec. 14, 1995, at B1 (reporting that New York City's crime levels are at their lowest level since the early 1970's and that magazines and newspapers from Australia, Japan, and Norway have featured New York City Police Commissioner William J. Bratton).

small number of those criminals who are caught⁷ and sending others to prison until they're seventy-five or eighty.

President Clinton made a promise, when he started his first term, to provide federal funding to increase the number of police officers in this country by 100,000. I don't believe he'll ever keep that promise.⁸ On the other hand, President Clinton has given us lots of new mandatory minimum prison sentences, and sixty new federal death penalties,⁹ which will do little or nothing.

Let me say a word about the death penalty. I think the death penalty does you about as much good in fighting homicides as Valentine cards do in fighting heart disease. And this isn't just my view. In a recent poll of police chiefs, about two-thirds said that they didn't think the death penalty deters crime, and that they do believe the death penalty is used primarily as a political football by politicians.¹⁰ As for criminologists, I don't think you can find a criminologist who thinks the death penalty reduces the homicide rate.¹¹

I live in Michigan, which hasn't had a death penalty for 150 years. The homicide rate in Michigan rises and falls in sync with the homicide rates in Illinois, which has a death penalty; and in Ohio, which does as well; and in Wisconsin, which does not.¹² Similarly, the homicide rate in Canada—which does not

7. In 1995, 56 prisoners were executed in the United States, the highest total since the reinstatement of the death penalty in 1976. See NAACP LEGAL AND EDUCATIONAL DEFENSE FUND, DEATH ROW U.S.A. REPORTER CURRENT SERVICE, at 907 (Winter 1995). In 1994, the last year with complete data, the FBI reported that there were 23,305 murders and non-negligent homicides in the United States, and 1,864,168 violent crimes all told. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 1992, at 10, 13 (1993).

8. See David Johnston and Tim Weiner, *Seizing the Crime Issue, Clinton Blurs Party Lines*, N.Y. TIMES, Aug. 1, 1996 at A1 (noting that President Clinton's COPS program has put only 19,000 of the promised 100,000 police officers on the street so far).

9. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C.). This made the death penalty applicable to criminals who caused deaths in the course of committing such offenses as kidnapping, bank robbery, and car-jacking. The Act also provided for mandatory life imprisonment for criminals who have committed multiple violent felonies or committed at least one violent felony and one drug felony. Whatever the value of such penalties in the abstract, these particular provisions will have almost no impact because they only apply to federal crimes, and federal criminal prosecutions are used in only a tiny proportion of violent crimes in the United States.

10. See RICHARD C. DIETER, ON THE FRONT LINE: LAW ENFORCEMENT VIEWS ON THE DEATH PENALTY (1995).

11. See Michael L. Radelet & Ronald L. Akers, Deterrence and the Death Penalty, *The View of Experts* 28 (unpublished manuscript, available from the author).

12. See THORSTEN SELLIN, THE DEATH PENALTY (1959) (the classic work on this issue).

have the death penalty—is always lower than the homicide rate in the United States which, for the most part, does.¹³ And so on. I could continue with similar comparisons for pages.

Of course, some people do think the death penalty deters murder. But nobody believes it's nearly as effective as spending more money on street patrols, or on truant officers, as Chief Greenberg has suggested.¹⁴ Why do we focus our attention on ineffective remedies rather than those that might work? The answer has two related parts: politics, and money.

Crime is an electoral issue in America. We are all accustomed to this, but it's not inevitable. Consider Great Britain, a country that is similar to the U.S. in many respects. The death penalty was eliminated in Great Britain in 1965, under a Labor government.¹⁵ Under the Conservative government of Margaret Thatcher, there were some ten or fifteen votes in Parliament to restore the death penalty, but Thatcher lost every one of them despite the fact that she personally supported the death penalty, and she had a strong parliamentary majority.¹⁶ Why? Because in Britain the death penalty—like other issues having to do with crime and punishment—is considered a matter of personal choice (on which party discipline is not exercised) rather than a political issue.¹⁷ That means that members of Parliament in the Conservative majority were allowed to vote their own personal consciences, and many of them voted against reinstating the death penalty. In fact, as far as I know, no member of Parliament has ever lost a seat because of his or her position on the death penalty. Capital punishment is considered something that is not appropriate for electoral debate—despite the fact

For more recent data, see FRANKLIN E. ZIMRING AND GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA, 171-181 (1986).

13. The Canadian Centre for Justice Statistics recorded 630 reported homicides in 1993—a rate of 2.19 per 100,000 people. See CANADIAN CENTRE FOR JUSTICE STATISTICS, CANADIAN CRIME STATISTICS 1993, at 31 (1994). The United States Department of Justice reported 24,530 known cases of murder and non-negligent manslaughter for the same year—a rate of 9.5 per 100,000 people. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 305 tbl.3.94 (1995). The peak Canadian homicide rate was 3.09 per 100,000 inhabitants, in 1975; the peak American homicide rate was 10.2 per 100,000, in 1980. See *id.*; CANADIAN CENTRE FOR JUSTICE STATISTICS, CANADIAN CRIME STATISTICS 1992, at 25 (1994).

14. See Greenberg, *supra* note 1, at 403.

15. See Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, in 13 STUDIES IN LAW, POLITICS AND SOCIETY 71, 90 (1993).

16. See *id.*

17. See *id.*

that Britain has suffered from terrorism far more than we have.

Needless to say, that is not the system we have in the United States. In this country, criminal justice policy is a major electoral issue. We talk about it as the War On Crime. How can a politician get a political advantage out of this issue? There's only one side to be on in the War On Crime, just like there's only one side to be on in the War On Cancer. If you say, "I should be elected President because I am adamantly against cancer," the response is going to be: "Really? And who isn't?"

If the issue is crime, a politician who wants to get ahead has to stand out, to come up with a proposal that sounds like something new. In most cases, that means harsher punishment: more death penalties, longer sentences, no discretion, no parole. There's no *political* reason not to take these positions—at least not in the short run—because there is no constituency on the other side. This means that your opponents must go even farther to do you one better. And so punishments escalate: longer and longer sentences, more and more mandatory penalties, and more and more death penalties. So what if there's no evidence that any of this actually reduces crime?

Crimes that happen are visible, concrete events. The victims, if they survive, can come testify at congressional hearings; they can deliver sound bites on TV. Crimes that are prevented are abstractions. Any one of us may be someone who was not victimized because a crime was prevented, but we wouldn't even know it. It's like a vaccination; it's hard to see the effects of a preventive measure. But crimes that are committed enrage us. Criminals, if caught, are a focus for our anger and frustration, and we can do something to them. Emotionally, you get more bang for your buck if you focus on punishing criminals than on preventing crime.

What's more, punishment is something we can do now, but prevention takes place slowly, over time, and in the future. If your proposal for the War On Crime is, "Let's hire another hundred thousand cops," that's something we have to pay for in cash this year, and it will be very expensive. But if your proposal is, "Let's send them all to prison for the rest of their natural lives"—which means that over time, the prison population will grow and grow and grow and grow—that's a policy we'll pay for later. In other words, a politician has a choice between a promising remedy that we have to pay for now, which might

produce low-visibility results sometime in the future, and an ineffective policy that will produce a big splash now and has heavy costs that can be postponed. Which will it be?

In this country, right now, there are nearly 1,500,000 people in custody.¹⁸ There are roughly 140,000 people in state prison in California alone, not counting county jails.¹⁹ We've been through an unprecedented boom in building prisons, which creates constituencies for building more prisons—including a vast prison guard constituency.²⁰ The prison guard union in California, for example, has become the most powerful public employee union in the State.²¹ Their salaries are up to almost \$45,000 a year, which is more than most school teachers earn.²² Prison guards are major contributors to political campaigns. They were major backers of the three-strikes-you're-out initiative that passed in this State.²³ This law sent more people to prison for longer periods, which generates demand for more prisons, which means that more prisons are being built and more prison guards are being hired. Next year, if the trend continues, California will spend more on prisons—not on police and crime prevention, but just on prisons—than it spends on higher education.²⁴

When we build prisons, we fill them up. With whom? About

18. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1994, at 2 (1994). As of 1993, there were 1,364,686 people in custody in state or federal prisons. Assuming that the 1992-93 growth rate of 5.6% continued, there were approximately 1,607,031 people in American prisons by the end of 1996. See *id.*

19. See Elizabeth Shogren, *Population in U.S. Prisons Is Up Record 8.8%*, L.A. TIMES, Dec. 4, 1995, at A1 (reporting a 5% increase in state prison population—from 125,605 to 131,342—during the year ending June 30, 1995); George Skelton, *3 Strikes and You're Out of Room*, L.A. TIMES, April 25, 1996, at A2 ("The state prison population is roughly 135,000, a 150% increase in 10 years. By mid-2005, it's projected to be 306,000, assuming sentences don't get even tougher.").

20. Since 1970, the number of prison guards has tripled in proportion to the population. See *supra* note 5.

21. See Fox Butterfield, *Political Gains By Prison Guards*, N.Y. TIMES, Nov. 7, 1995, at A1 ("[T]he California Correctional Peace Officers' Association has transformed itself into the most politically influential union in the state . . .").

22. See *id.* at A18 (noting that prison guards' salaries in California have climbed to \$44,676 for guards with seven years' experience, while the average public school teacher in California earns approximately \$10,000 per year less).

23. See *id.*

24. See Martin F. Nolan, *California Sees Prisons Filling as Colleges Decline*, BOSTON GLOBE, Aug 28, 1995, at 3 (statement of California State Assembly Budget Committee chairman John Vasconcellos: "Just 15 years ago, the general fund was six times as high for [the University of California and the California State University system] as for prisons. This year, prisons take the lead. . .").

half the people in prison in this country are black.²⁵ As Chief Greenberg says, this is not primarily the result of discrimination *within* the criminal justice system.²⁶ The direct reason why about half of the people who are arrested for homicide in this country are black is that blacks commit more homicides than whites—and they're much more likely to be victimized by homicide.²⁷ The main reason why nearly two-thirds of the people who are arrested for robbery in this country are black is that blacks commit most robberies²⁸—and blacks are much more likely than whites to be victimized by robbery.²⁹

If there were no discrimination in the criminal justice system, the enormous racial disproportion that we see in our prisons would still look the way it does. But not entirely. There is racial discrimination in the system, and it does make a difference. And, of course, race plays a big role in how we view crime and criminal justice in this country. I'll mention three examples of these racial issues, but briefly.

First, the politics of the War On Crime are deeply racial. The obvious example, of course, is Willie Horton, the convicted black rapist who received a furlough in Massachusetts, and then went to Maryland where he raped a woman and stabbed her husband.³⁰ Willie Horton was considered to be a bonanza for

25. On December 31, 1993, there were 456,570 black prisoners and 431,780 white prisoners under jurisdiction of state and federal correctional authorities. Blacks comprised 48.2% of the total prison population of 946,946 prisoners. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 546, tbl.6.24 (1995).

26. See Greenberg, *supra* note 1, at 397-99.

27. In 1993, 11,656 of the 20,243 people arrested for murder and non-negligent manslaughter were black. In other words, 57.6% of those arrested were black. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 388 tbl.4.11 (1995). Of the 6,299 killings in which single black offenders killed single victims, 5,393 of these victims were black. See *id.* at 343 tbl.3.123.

28. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 388 tbl.4.11 (1995) (reporting that 62.1% of all those arrested for robbery in 1993 were black); Alfred Blumstein, *On the Racial Disproportionality of United States Prison Populations*, 73 J. OF CRIM. L. & CRIMINOLOGY 1259, 1277 (noting that in 1974, 62% of robbery victims reported that the robber was black, and 62% of those arrested for robbery were black).

29. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES 1992, at 24, tbl.6 (1995) (stating that the robbery victimization rate for 1992 was 4.7 per 1,000 whites aged 12 and over, but 15.6 for blacks of the same age).

30. See, e.g., Jacob V. Lamar, *The One That Got Away*, TIME, June 27, 1988, at 22 (arguing that Republican presidential candidate George Bush used the Willie Horton case to portray Democratic presidential candidate Michael Dukakis as soft on crime); Thomas B. Edsall, *Race: Still a Force in Politics*, WASH. POST, July 31, 1988, at A1

George Bush's first presidential election campaign because the furlough was granted during the tenure of Bush's opponent, Michael Dukakis, as Governor of Massachusetts. I think it is shameful that a personal tragedy of this sort could become a major issue in a presidential campaign, on any terms. But what concerns me here is race.

At one point in the campaign, when Rev. Jesse Jackson said that he might want to be the Democratic vice-presidential candidate, Bush's campaign manager, Lee Atwater, said: "Maybe he will put this Willie Horton on the ticket after all is said and done."³¹ And Roger Ailes, Bush's media czar, said "I want to make sure that every family in the country sees his [Horton's] face," and then went on to say, "the only question is whether we depict Willie Horton with a knife in his hand or without it."³²

Needless to say, it's no accident that Willie Horton was black. And I don't mean to pick on Roger Ailes or the late Lee Atwater. It's not just them. Everybody in politics exploits race and crime, Democrats as much as Republicans, including, of course, Bill Clinton—who took time off from his campaign for president to go back to Arkansas to preside over the execution of a mentally defective black prisoner.³³ This was described by the media as something then-Governor Clinton did to show that he was not in Jesse Jackson's pocket. Translation: the future President of the United States participates personally in an execution in order to get white votes because he thinks this act will be seen as distancing him from a prominent black politician. And the public response is bland acceptance. Commentators say: "Naturally." Or even: "Good move." Think about it.

Second, Jesse Jackson was widely quoted when he said: "There is nothing more painful to me at this stage of my life than to walk down the street and hear footsteps start and start thinking

(discussing George Bush's use of the Willie Horton crimes to lure white voters); Walter Shapiro and Jack E. White, *Why It Was So Sour; After 18 Months of Trivial Sound Bites and Empty Photo Ops, the Voters Can Finally Say to the 1988 Campaign: Good Riddance*, TIME, Nov. 14, 1988, at 18 (arguing that the Republican party used Willie Horton's crime to create fear and resentment among whites toward African-Americans).

31. See Jack E. White, *Bush's Most Valuable Player*, TIME, Nov. 14, 1988, at 18, 21.

32. See *id.* at 20, 21.

33. See Marshall Frady, *Death in Arkansas*, NEW YORKER, Feb. 22, 1993, at 105; Michael Kramer, *Frying Them Isn't the Answer*, TIME, March 14, 1994, at 32 ("I can be nicked on a lot," [Clinton said after the execution], "but no one can say I'm soft on crime.").

about robbery—then look around and see somebody white and feel relieved.”³⁴ Most white people were happy to hear this statement. We thought: “Good. Jesse Jackson has said it; now I can feel comfortable thinking and saying the same thing.”

But imagine a slightly different scenario. You’re walking down a street at night, alone, and you hear footsteps behind you. You turn around, and it’s a cop. How do you feel? Relieved? What if you’re black?

Racism by police officers against blacks is well-known. The problem is not just Mark Fuhrman and a few other villains who make the nightly news.

Recently, at the university where I teach, a senior administrator was going into a campus gym to judge a basketball contest at about 11:30 p.m. on a Saturday night. He is roughly fifty, slightly overweight, about five-foot-nine, and soft spoken. There was a crowd at the door and two cops were trying to make way to let some people out. The cops say he pushed one of them; he says they pushed him. In any case, he was grabbed, dragged into the building, arrested, handcuffed, and taken down to the police station. Then they discovered who he was.³⁵

Can you guess his race? Do you have any doubt? The same thing could happen to Chief Greenberg away from Charleston and out of uniform. We understand this, and we’re all used to it by now.

Third, my last example—the War On Drugs. Between 1980 and 1993, the number of people in custody in this country for drug offenses grew by a factor of ten, from about 24,000 to nearly 240,000 prisoners.³⁶ About forty percent of those arrested for drug offenses, and nearly sixty percent of those imprisoned, are black.³⁷ In this case, however, it’s not because they are more likely to break the law than whites.

Even if you have never used illegal drugs yourself, it’s likely

34. Bob Herbert, *In America*, N.Y. TIMES, Dec. 12, 1993, at 15.

35. See Stephen Cain, *U-M Orders DPS Officers to Hearing*, ANN ARBOR DAILY NEWS, May 9, 1996, at A-1.

36. See BUREAU OF JUSTICE STATISTICS, U. S. DEP’T OF JUSTICE, BULLETIN: PRISONERS IN 1994, at 10 tbls.11, 13-14 (1995). The numbers in the text were obtained by adding the separate figures provided for federal and state prisons.

37. See Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 751 (1993) (noting that while blacks account for only 40.4% of those arrested for drug offenses, they comprise 57.7% of those in prison for drug offenses).

that someone close to you has: a friend, a former roommate, a cousin, a brother. That's true for most Americans. And virtually everybody who has studied the issue agrees that white Americans abuse³⁸ and distribute³⁹ drugs about as much as blacks. But blacks are much more likely than whites to be arrested for drug crimes.⁴⁰

In Charlottesville, Virginia, in 1991, there was a drug raid on three fraternities at the University of Virginia, and the police arrested twelve students. It created a scandal.⁴¹ The most interesting part was the reaction of the parents. One father said: "I realize that these drugs are illegal, but when I see the national attention these kids are getting, I just find this inconceivable, when I don't see any big distributor being locked up."⁴² Another father said that he did not understand why the authorities singled out the prestigious university that Thomas Jefferson founded and did not raid other universities. This father said about his son: "He goes to jail . . . and his future is shot. It's all gone. It's a damn shame."⁴³ But the waste and destruction that a drug-related arrest causes is a common event; it's only a shock when the sort of thing that usually happens to black kids hits a middle-class white family instead.

Consider all the people you know who have used drugs occasionally. What if they all got busted and ended up in prison for a year or two or three—or longer—under one of the mandatory drug sentences that legislators keep imposing. Would that affect drug policies? The last time anything like that happened was in the 1960s and early 1970s, when many young white people started using marijuana. Some inhaled, some did not, and quite a few were arrested. Until then, marijuana was regarded as a black drug, and the penalties for possession were

38. See, e.g., NATIONAL INSTITUTE ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE, HIGHLIGHTS 1990, at 35, 49 (1991) (reporting no statistically significant difference in the use of marijuana and cocaine by blacks and whites).

39. Information on file with author.

40. See Blumstein *supra* note 37, at 751-53 (noting that blacks comprised 40.4% of arrestees for drug offenses and arguing that blacks do not in probability constitute 40% of drug offenders).

41. See Brooke A. Masters & Thomas Heath, *Raids Aim Message at U-Va*, WASH. POST, March 23, 1991, at A1.

42. Stephen Buckley, *2 Parents Fault U-Va. Drug Raids*, WASH. POST, March 25, 1991, at D1.

43. *Id.*

quite stiff.⁴⁴ But when white kids started using it, the pressure mounted to reduce the penalties.⁴⁵ They were reduced,⁴⁶ and they haven't gone up much since.⁴⁷ Today, if white people were imprisoned for drug offenses at the same rate as black people, there would be nearly *one million* white drug offenders in custody—with a million white mothers, a million white fathers, and millions of white friends and relatives. Don't you think that might force a change in drug policies?

About one third of all black men in America in their twenties are either in custody or on probation.⁴⁸ As I mentioned, most of this vast bulge in imprisonment is not due to racial discrimination within the criminal justice system, although some of it is. But regardless of the cause, it is worth considering for a moment what would happen if all Americans were imprisoned at the same rate as black Americans. That would be about *six million people in custody*. Would we tolerate that? Would we shrug and say: "It happens. That's just how we fight the War On Crime?" Or would we shift away from punishment, punishment, and more pointless punishment, and focus on the prevention of crime?

As things stand, we can manage to ignore the catastrophic effects of current criminal justice policies because their most terrible consequences are visited on a small minority. And it's not just any minority, but black Americans, the descendants of people who were brought here in chains; those who, throughout American history, have been subject to the most persistent and virulent racism and discrimination.

44. See Eric Schlosser, *Reefer Madness*, THE ATLANTIC MONTHLY, August 1994, at 45, 49 (noting that the Boggs Act, passed during the McCarthy era, and the Narcotic Control Act, passed in 1956, had specified long sentences for both marijuana and heroin offenses—2 to 5 years in prison for a first possession offense; many state penalties were even tougher).

45. See *id.* ("As marijuana use became widespread among white middle-class college students, there was a reappraisal of marijuana laws that for decades had imprisoned poor Mexicans and African-Americans without much public dissent.")

46. See *id.* (noting that in 1970 the Comprehensive Drug Abuse Prevention and Control Act reduced federal penalties for possession of small amounts of marijuana, and in the 1970s eleven States decriminalized marijuana).

47. See *id.* at 54-55 (noting that although acts passed in the 1980s toughened federal and state marijuana laws, possession of less than an ounce of marijuana does not generally lead to imprisonment).

48. See MARC MAUER AND TRACY HULING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I (1995) ("Almost one in three (32.2%) young black men in the age group 20-29 is under criminal justice supervision on any given day—in prison or jail, on probation or parole.")