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Donald A. Dripps

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Race and Crime Sixty Years After *Brown v. Board of Education*

DONALD A. DRIPPS*

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Sixty years after the Supreme Court declared that the doctrine of “separate but equal” has no place in American public life,¹ 549,100 African-Americans are serving time in state or federal penitentiaries.² They comprise 36% of our enormous prison population and 3% of the total black male population.³ The African-American incarceration rate is roughly three times higher than the African-American percentage of the

* © 2015 Donald A. Dripps. Warren Distinguished Professor, University of San Diego Law School. This essay is based on a presentation at the University of San Diego to mark the Sixtieth Anniversary of *Brown v. Board of Education*, held at USD on April 7, 2015. I thank Lynne Lasry for organizing this excellent event. The published version has benefitted from comments at the event, and from follow up conversations with Gary Schons. The author remains solely responsible for the views expressed.

1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“We conclude that in the field of public education the doctrine of ‘separate but equal’ has no place.”). Subsequent cases made clear that “separate but equal” had no place in any other “field.” *See Dawson v. Mayor & City Council of Balt. City*, 220 F.2d 386, 387 (4th Cir. 1955) (holding “separate but equal” public beaches unconstitutional), *aff’d* 350 U.S. 877 (1955) (mem.).

2. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2013, at 8 (2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf> [<http://perma.cc/QFL3-YUFV>].

3. *Id.* at 2, 8 tbl.7.

population.⁴ Per capita the rate of black incarceration is six times higher than for whites.⁵ For young black men attending the schools formally desegregated by *Brown*, the statistical likelihood is that one out of every three will serve time in a penitentiary.⁶

A full account must include the jail, as well as the prison, population. In 2013, the total jail population stood at 731,208.⁷ The black percentage of the jail population was 36%, identical to the black percentage of the prison population.⁸ Therefore, to the 549,100 black prisoners, we should add another 263,235 jail inmates, for a total of 812,335 African-Americans behind bars.⁹

The system leverages the threat of incarceration to hold a far larger number under the control of the probation or parole authorities. Altogether, 6,899,000 Americans were under the control of the criminal justice system in 2013.¹⁰ The Bureau of Justice Statistics (BJS) does not give a racial breakdown, but if the 36% figure for prisons and jails holds, 2,483,000 African-Americans are in the toils of the criminal justice system, even as we celebrate the sixtieth anniversary of *Brown*. That number is near the total black male school-age population in 1950.¹¹

The consequences of mass incarceration do not end when the criminal system clears its books. An enormous web of collateral consequences—

4. See *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> [<http://perma.cc/P6PG-MUCT>] (last revised Sept. 30, 2015) (stating that the black population is 13.2% of the total U.S. population).

5. CARSON, *supra* note 2, at 2 (“Almost 3% of black male U.S. residents of all ages were imprisoned on December 31, 2013, compared to 0.5% of white males.”)

6. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 1 (2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf [<http://perma.cc/8VS2-SPRG>] (“If current trends continue, one of every three black American males born today can expect to go to prison in his lifetime, as can one of every six Latino males—compared to one of every seventeen white males.”) (citing Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (Supp. 2011)).

7. Press Release, Bureau of Justice Statistics, Local Jail Population Declines from 2008 to 2013 (May 8, 2014), <http://www.bjs.gov/content/pub/press/jim13stpr.cfm> [<http://perma.cc/RB4A-6ZXW>].

8. *Id.*

9. The precise figure would be 263,235.88. Obviously, the figures vary slightly over time, and the data collection may not be perfect.

10. LAUREN E. GLAZE & DANIELLE KAEBLE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf> [<http://perma.cc/4DZ6-ASRV>].

11. *Resident Population, by Age, Sex, Race, and Hispanic Origin: United States, Selected Years 1950-2009*, CENTERS FOR DISEASE CONTROL AND PREVENTION (2010), <http://www.cdc.gov/nchs/data/hus/2010/001.pdf> [<http://perma.cc/9V5W-Y3LD>] (stating that in 1950, total US African-American population age 5–14 was 2,888,000; age 15–24 was 2,462,000).

ranging from exclusion from public housing and student loans to disenfranchisement—makes reentry into legitimate society a daunting challenge.¹² It has been estimated that 2.2 million African-Americans—one out every thirteen—is barred from voting by a felony conviction.¹³

This grim state of affairs understandably has prompted national attention. Our national conversation about race and crime, however, has yet to move much beyond the following numbingly familiar exchange:

LIBERAL: The criminal justice system’s disparate impact is so grotesque, the system must be racist.

CONSERVATIVE: Most crime, and almost all violent crime, is intra-racial.

With minor variations, this exchange pretty much exhausts our national “conversation” about race and crime.

Thoughtful people, wherever we place them on the left-right political continuum, have pressed both points eloquently, for decades. For example, in 1998, Michael Tonry argued that the disparate racial impact of the war on drugs was foreseeable enough to count as “intentional” within the usual meaning of “intent” in the criminal law.¹⁴ The following year, Justice Clarence Thomas, dissenting in *Chicago v. Morales*, wrote powerfully about the effect of crime on law-abiding inner-city residents.¹⁵

12. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 140–77 (rev. ed. 2011).

13. THE SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1* (2014) http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf [<http://perma.cc/9YE4-ZPPT>].

14. MICHAEL TONRY, *MALIGN NEGLECT – RACE, CRIME AND PUNISHMENT IN AMERICA* 32 (1995) (“By analogy with the criminal law, the responsibility of the architects of contemporary crime control policies is the same as if their primary goal had been to lock up disproportionate numbers of young blacks.”).

15. *City of Chicago v. Morales*, 527 U.S. 41, 114–15 (1999) (Thomas, J., dissenting) Today, the Court focuses extensively on the “rights” of gang members and their companions. It can safely do so—the people who will have to live with the consequences of today’s opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are . . . people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens.

Id. I was struck by the force of Thomas’s dissent, even though I was on the other side in that case and remain convinced that *Morales* was rightly decided. See Brief for National Ass’n of Criminal Defense Lawyers as Amici Curiae Supporting Respondents, *City of Chicago v. Morales*, 527 U.S. 41 (1999) (No. 97-1121), 1998 WL 614292.

More recently, Michelle Alexander has characterized mass incarceration and the follow-system of collateral consequences as “the new Jim Crow”: “We have not ended racial caste in America; we have merely redesigned it.”¹⁶ James Forman, Jr. responds that Professor Alexander neglects, *inter alia*, African-American support for tough-on-crime policies and the disparate rate of black offending for crimes of violence.¹⁷

There is, oddly, something of a consensus with which to work. After all, the parties to these debates typically do not *deny* the central point made by their adversaries. What they dispute is whether to emphasize the disparate racial impact of mass incarceration and attending social costs, or the racially disproportionate share of criminal victimization. What has eluded us is real engagement with the facts of disparate impact and disparate offending. This essay attempts just such an engagement.

I shall argue that the conservative and the liberal are both half-right: The conservative is right about reactive law enforcement and the liberal is right about proactive law enforcement. Moreover, I shall suggest some constructive steps that might be taken, even steps that might be taken by the same Court that gave us *Brown*, to move us, painfully slowly, toward equal justice under law.

I. DISPARATE RATES OF OFFENDING

Scholars typically use the homicide rate as a measure of violent crime generally, because unlike many other crimes, homicide is almost always reported.¹⁸ Nationwide, the black homicide victimization rate in 2011 was 17.3 per 100,000.¹⁹ The overall national homicide victimization rate was 4.7 per 100,000,²⁰ and among white Americans, the homicide victimization rate was 2.8 per 100,000.²¹

These numbers are down, for blacks as well as whites, from their peaks in the early 1990s, when the total population rate stood at 9.8 per hundred

16. ALEXANDER, *supra* note 12, at 2.

17. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 36–52 (2012).

18. See, e.g., Craig A. Anderson & L. Rowell Huesmann, *Human Aggression: A Social-Cognitive View*, in THE SAGE HANDBOOK OF SOCIAL PSYCHOLOGY 296 (Michael A. Hogg & Joel Cooper eds., 2003) (“Homicide rates are usually considered the best measure of societal violence because they are the hardest to distort or hide.”).

19. See ERICA L. SMITH & ALEXIA COOPER, BUREAU OF JUSTICE STATISTICS, HOMICIDE IN THE U.S. KNOWN TO LAW ENFORCEMENT, 2011, at 4 (2013), <http://www.bjs.gov/content/pub/pdf/hus11.pdf> [<http://perma.cc/R96X-EE5J>].

20. *Id.* at 1.

21. *Id.* at 4.

thousand.²² During that period, the black victimization rate peaked at 39.4 per hundred thousand.²³

The parallel dramatic decline in white and black homicide rates strongly implies environmental causes, the precise content of which no one really knows.²⁴ Whatever the causes, the conservative seems to be right in saying that even with the welcome decline in violence in the last twenty years, violent criminal victimization among blacks is slightly more than six times as frequent as among whites.

In addition, the conservative seems also to be right that most violent crime is intra rather than inter-racial. Of the 2491 murders of blacks in 2013, in 2245 cases—90%—the perpetrator was black, in 189 cases the perpetrator was white, in 20 the perpetrator was “other,” and in 37 the perpetrator was unknown.²⁵ Moreover, since for any given victim of criminal violence there may be multiple accomplices, the higher rate of victimization implies an even larger number of African-American perpetrators eligible for justly severe sentences.²⁶

22. See ALEXIA COOPER & ERICA L. SMITH, BUREAU OF JUSTICE STATISTICS, HOMICIDE TRENDS IN THE UNITED STATES, 1980-2008, at 2 (2011), <http://www.bjs.gov/content/pub/pdf/htus8008.pdf> [<http://perma.cc/E53Q-ZDER>] (explaining that the total U.S. homicide rate “rose again in the late 1980s and early 1990s to another peak in 1991 of 9.8 per 100,000”).

23. See *id.* at 11 (“The victimization rate for blacks peaked in the early 1990s, reaching a high of 39.4 homicides per 100,000 in 1991.”).

24. I do not exclude either deterrence or incapacitation attributable to mass incarceration itself as possible causes. Crime, however, is down all over the world. See, e.g., *The Curious Case of the Fall in Crime*, ECONOMIST, July 20, 2013, at 9, 9. To take a close comparator, the Canadian homicide rate fell to 1.44 per hundred thousand, its lowest since 1966. See The Canadian Press, *2013 Homicide Rate in Canada Lowest Since 1966*, CBC NEWS, (Dec. 1, 2014, 11:58 AM), <http://www.cbc.ca/news/politics/2013-homicide-rate-in-canada-lowest-since-1966-1.2856143> [<http://perma.cc/9VST-PHGW>]. Local policies cannot explain global trends.

25. *Murder: Race, Ethnicity, and Sex of Victim by Race, Ethnicity, and Sex of Offender, 2013*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_6_murder_race_and_sex_of_victim_by_race_and_sex_of_offender_2013.xls [<http://perma.cc/X237-3B79>] (last visited Oct. 30, 2015).

26. For example, COOPER & SMITH, *supra* note 22, at 11, found that in 2008, the black homicide victimization rate was 19.6 per hundred thousand, while the black homicide offender rate was 24.7 per hundred thousand.

II. PROACTIVE VS. REACTIVE POLICING

But the conservative is, as I said, only half right. To see the rest of the story, we need to draw a distinction between reactive and proactive law enforcement. Reactive enforcement responds to offenses brought to the attention of the police from the citizenry, whether by way of victim complaints or witness reports. Proactive enforcement develops cases against offenders detected by the police themselves, typically by street patrol, traffic stops, or employment of informants.

Reactive enforcement focuses on offenses that injure victims directly enough to induce either victims themselves or third-party witnesses to complain. Proactive enforcement targets conduct that is thought to predict or encourage directly harmful offenses that would take place later, unless pretermitted by police intervention. Reactive enforcement typically targets offenses identical or similar to the common-law felonies—murder, robbery, theft, and so on. Proactive enforcement typically targets possessory crimes, such as possession of drugs with intent to distribute or possession of a firearm by a convicted felon.

Reactive policing deals with a stock of reported offenses, which we have seen are characterized by disproportionate rates of black offending. Proactive policing seeks out violations that are not reported by injured citizens. Proactive enforcement has come to dominate federal criminal justice and has come to rival reactive enforcement even in the state systems.

Of the many shocking statistics, I inflict on you today, perhaps the most astonishing is this: only 54% of state prisoners were committed for crimes of violence.²⁷ This figure is deceptively high, because many commitments are made for nonviolent breaches of parole or probation conditions. However, so long as the original offense of conviction is a violent crime, the BJS counts any derivative commitment for such things as failing a drug test as a prisoner sentenced for a crime of violence.

So what are those *other* seven hundred thousand prisoners incarcerated for? Of all state prisoners, 18.8% are sentenced for property offenses, 16% for drug offenses, and 10.7% for public order offenses.²⁸ The latter category, on the felony side, is dominated by firearms convictions, of which felon-in-possession is the most common. In the federal system, more than

27. CARSON, *supra* note 2, at 15.

28. *See id.* at 15 tbl.13.

half of those incarcerated are serving time for drug offenses.²⁹ More than a third were committed for public order offenses.³⁰

According to the most recent National Survey on Drugs and Health, the rate of current illicit drug use is 10.5% among blacks and 9.5% among whites.³¹ If we focus on the most popular illegal drugs, the available estimates suggest that blacks and whites use marijuana and cocaine at virtually identical rates. But blacks are five times more likely to be convicted of marijuana or cocaine offenses as whites.³²

The stereotype of black dealers selling to white users is bereft of evidentiary support.³³ Low-level dealers commonly are users themselves,³⁴ and the segregation of neighborhoods makes it improbable that there is a great deal of inter-racial drug commerce.³⁵

29. *Id.* at 16 (“On September 30, 2013 (the end of the most recent fiscal year for which federal offense data were available), 98,200 inmates (51% of the federal prison population) were imprisoned for possession, trafficking, or other drug crimes.”).

30. *Id.* (“Federal prisoners serving time for public-order crimes—including weapons offenses, racketeering, extortion, and regulatory offenses—has increased, from 26% in 2001 to 36% in 2013.”).

31. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEP’T OF HEALTH AND HUMAN SERVS., RESULTS FROM THE 2013 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 26 (2014), <http://www.samhsa.gov/data/sites/default/files/NSDUHresultsPDFWHTML2013/Web/NSDUHresults2013.pdf> [<http://perma.cc/Z2UN-ZG27>].

In 2013, among persons aged 12 or older, the rate of current illicit drug use was 3.1 percent among Asians, 8.8 percent among Hispanics, 9.5 percent among whites, 10.5 percent among blacks, 12.3 percent among American Indians or Alaska Natives, 14.0 percent among Native Hawaiians or Other Pacific Islanders, and 17.4 percent among persons reporting two or more races.

Id.

32. See TONRY, *supra* note 14, at 109–11; THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 115 (Steven Donziger ed., 1996).

33. See Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 268–69 (2009) (reviewing studies).

34. See BUREAU OF JUSTICE STATISTICS, DRUGS, NCJ-133652, CRIME, AND THE JUSTICE SYSTEM 59 (1992) (stating that one of “the major reason[s] for being a [drug] distributor is to support one’s own use and to assure access to a drug supply”); PETER REUTER ET AL., RAND CORP., MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C. 5 (1990) (“The dealers were generally heavy users of drugs themselves, and even after allowing for personal drug consumption provided by withholdings from the consignments they received for sale, dealers spent an average of one-fourth of their earnings on drug purchases.”).

35. Cross-neighborhood drug dealing would involve not only the inconvenience of travel but two quite serious risks. The first is detection by police on patrol. As Bennett Capers points out, “law-abiding minorities in predominantly white communities face disproportionate stops by and encounters with the police, and law-abiding whites in

Such patterns as there may be of different demographic groups favoring different drugs of choice are largely offsetting and involve relatively smaller numbers. There may or may not be some truth in the common stereotypes about different racial groups or subcultures favoring different drugs of choice.³⁶ Such differences are hard to document and do not change the overall picture of very comparable black and white involvement with illegal drugs.

The felon-in-possession prosecutions have a built-in racial bias based on the higher rates of black offending for crimes of violence and for convictions for drug offenses. While 12% of all US males have a felony record, 34% of black males have such a record.³⁷

One need not support drug legalization to recognize that possessory offenses should be a lower criminal justice priority than crimes of violence. Some tiny percentage of drug sales or gun possession by felons will result in a drive-by shooting or an armed robbery.³⁸ By contrast, the percentage of drive-by shooters who commit drive-by shootings is the same as the percentage of armed robbers who commit armed robbery: 100%.

minority communities face disproportionate stops by and encounters with the police.” I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. REV. 43, 68 (2009) (footnotes omitted). The second is the risk of dealing with a police informant. If most of the people a dealer knows are of his own race, and dealers are reluctant to sell to strangers, it stands to reason that drug sales are largely intra-racial.

36. For example, see the overview of illicit drugs and their usage patterns. See, e.g., *A Social History of America’s Most Popular Drugs*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/buyers/socialhistory.html> [<http://perma.cc/ZG54-V96Y>] (last visited Oct. 30, 2015) (“There are two current basic profiles of methamphetamine users: students (both high school and college) and white, blue-collar and unemployed persons in their 20s and 30s”; “Where cocaine was expensive to purchase, crack could be bought at affordable prices and became prevalent in working class and poorer neighborhoods.”; “[LSD] has made a resurgence in the 1990s, particularly in the rave subculture.”; “In the second major wave of American opiate addiction, heroin was integrated into the new cultural identity of the ‘hipster’, first through the Harlem jazz scene in the 1930s and 1940s and then through the Beatnik subculture of the 1950s.”) (footnotes omitted).

37. *Black Male Statistics*, BLACKDEMOGRAPHICS.COM, <http://blackdemographics.com/black-male-statistics/> [<http://perma.cc/7DLD-H3W3>] (last visited Oct. 30, 2015).

38. CNN reports that there are 310 million nonmilitary firearms in the U.S., and 11,068 homicides with a firearm. See Amy Roberts, *By the Numbers: Guns in America*, CNN (Oct. 6, 2014, 4:58 PM), <http://www.cnn.com/2012/08/09/politics/btn-guns-in-america/> [<http://perma.cc/VL5L-N9LP>]. Tens of millions use illegal drugs every year, which translates into hundreds of millions, perhaps billions, of drug sales every year. B. KILMER ET AL., RAND CORP., *WHAT AMERICA’S USERS SPEND ON ILLEGAL DRUGS: 2000-2010*, at 3, 66 (2014) https://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/wausid_results_report.pdf [<https://perma.cc/2H2L-S9VV>]. The FBI reports 12,253 murders—inclusive of intentional manslaughter—for 2013, of which 386 were “felony type” for narcotics violations, 59 were “brawl due to influence of narcotics,” and 138 were “gangland killings.” *Murder Circumstances, 2009–2013*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_12_murder_circumstances_2009-2013.xls [<https://perma.cc/7UCN-768G>] (last visited Oct. 30, 2013).

The system focuses on possessory crimes because they occur before actual harm is threatened and because they can be proved by officer testimony. They are usually discovered by proactive rather than reactive policing, typically by street patrol, pretextual traffic stops, or the employment of informants.

Possessory offenses push the time point of liability back, but at the same time, they greatly increase the number of offenders. Wherever society chooses to cast the net of proactive policing, possessory offenders will be hauled in.

Where society values the young men who might be tempted into illegal markets, proactive enforcement is rarely seen. The military relies on a demand-side drug control strategy implemented by regular drug testing.³⁹ College campuses have their own police⁴⁰ and to a large extent their own justice system.⁴¹ Parents have shown no appetite for aggressive stop-and-frisk or buy-and-bust undercover operations, on campus.⁴²

Forty-eight percent of black men have attended college, compared to 58% of the male population overall.⁴³ In the 2010 census, the suburban population was 69.7% white and 10.8% black, while the urban population was 44% white and 17.3% black.⁴⁴ It follows that young black men—whether in school or out of it—are likely to spend more time on public urban streets, subject to proactive policing. Indeed, any focus on “urban crime,” as distinct from crime *qua* crime, will have disparate racial impact.

39. See *DoD Urinalysis (Drug Test) Program*, <http://usmilitary.about.com/od/theorderlyroom/l/bldrugtests.htm> [<http://perma.cc/R9Q3-2USL>] (last visited Oct. 30, 2015) (“DoD labs test 60,000 urine samples each month. All active duty members must undergo a urinalysis at least once per year. Members of the Guard and Reserves must be tested at least once every two years.”).

40. See, e.g., BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, *CAMPUS LAW ENFORCEMENT, 2011–12*, at 2 (2015), <http://www.bjs.gov/content/pub/pdf/cle1112.pdf> [<http://perma.cc/L8J8-6WA8>] (“About 95% of 4-year schools with 2,500 or more students operated their own campus law enforcement agency.”).

41. See *id.* at 1 (“About 7 in 10 campus law enforcement agencies had a memorandum of understanding or other formal written agreement with outside law enforcement agencies.”).

42. In 1990, in response to fears of crime on campus, Congress adopted the Clery Act, which requires colleges and universities to report violent crimes on or near campus. See, e.g., *id.* at 12. Illuminatingly, even in 1990, when war-on-drugs rhetoric was most intense, there was no movement in Congress to require any minimum level of drug enforcement by colleges.

43. *Black Male Statistics*, *supra* note 37. In these statistics, white is non-Hispanic.

44. HOUSING ASSISTANCE COUNCIL, *RURAL RESEARCH BRIEF: RACE & ETHNICITY IN RURAL AMERICA* 9 (2012) http://www.ruralhome.org/storage/research_notes/rm-race-and-ethnicity-web.pdf [<http://perma.cc/T63M-NXVR>].

Relatively modest differences in exposure to proactive policing can have much larger long-term effects. Police use prior contacts as support for subsequent stops or arrests. Legislatures create crimes limited to those with records, like the felon-in-possession laws, and enhance the sentences of those with prior convictions. As Bernard Harcourt has argued, this “ratchet effect” magnifies the consequences of each arrest and each conviction.⁴⁵

So the liberal too is half right; a substantial share of the disproportionate racial impact of our criminal justice system results, not from higher rates of offending among blacks, but from decisions made about where and how to deploy proactive enforcement assets. There is surely some old-fashioned racism among police, as there is in society generally. But, racism is not necessary to cause disparate impact, and even if racism were to magically disappear, we would not see a change in disparate impact so long as proactive enforcement patterns remain in place.

III. NEW DIRECTIONS

The normative take-away should be obvious. We should find ways to re-task law-enforcement resources away from proactive enforcement of possessory crimes and toward reactive prosecution of violent offenders. Fewer than half of all reported violent crimes are cleared by arrest—64.1% of murders, 40% of rapes, 29.4% of armed robberies, and 57.7% of aggravated assault.⁴⁶ There is plenty of righteous work still to do on

45. Bernard E. Harcourt, *A Reader’s Companion to Against Prediction: A Reply to Ariela Gross, Yoram Margalioth, and Yoav Sapir on Economic Modeling, Selective Incapacitation, Governmentality, and Race*, 33 L. & SOC. INQUIRY 265, 271 (2008).

The basic intuition is that policing is like sampling: when the police profile higher-offending individuals, they are effectively sampling more from that higher-offending group. The resulting set of successful searches will contain a disproportionate number of those high-offending individuals—disproportionate as compared to their representation in the offending population. This imbalance will get incrementally worse each year if law enforcement departments rely on the evidence of last year’s correctional traces—arrest or conviction rates—in order to set next year’s profiling targets. The resulting ratchet effect will have significant detrimental consequences on the employment, educational, familial, and social outcomes of the profiled populations—including, in the case of racial profiling, the devastating effects associated with the notion of black criminality that pervades the public imagination and, in the case of recidivists, the extreme difficulties of prisoner reentry.

Id. (reference omitted). One need not endorse Harcourt’s critique of actuarial risk-assessments in criminal justice to recognize the path dependence of proactive law enforcement.

46. *Percent of Offenses Cleared by Arrest or Exceptional Means by Population Group, 2013*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-25/table_25_percent_of-offenses_cleared_by_arrest_by_population_group_2013.xls [<https://perma.cc/H95M-KL4D>].

the reactive side of the system, and doing that work would disproportionately benefit African-Americans.

Most of what needs to be done by way of reorienting the system, and facilitating the reentry of released offenders into civil society, will have to be done by us “the people,” through our elected representatives. Nonetheless, on an occasion when we reflect on the role of the Supreme Court in our national life, I can suggest three concrete steps the Justices could take that would help move our criminal justice system in the right direction.

First, the Court might discourage proactive enforcement by putting the “reasonable” back in to the “reasonable suspicion” standard. The theory of the *Terry* case was that reasonable suspicion was probable cause light—strong evidence falling just short of probable cause to arrest.⁴⁷ The practice is different.

The data collected by the New York police on hundreds of thousands of *Terry* stops showed that the frisk recovered some contraband, typically marijuana, in 5.4–6.4% of frisks.⁴⁸ “For every 1,000 frisks of black suspects, officers recovered seven weapons, and, for every 1,000 frisks of similarly situated white suspects, officers recovered eight weapons, a difference that is not statistically significant.”⁴⁹ Since the police frisked only a third of those stopped, the hit rate for drugs was less than three per hundred stops, and for weapons less than three per thousand stops.⁵⁰

Second, the Court could encourage reactive prosecution of crimes of violence by entertaining sober second thoughts about the doctrine announced in *Crawford v. Washington*.⁵¹ The Court has faith in juries to hear notoriously unreliable testimony from eyewitness or jailhouse snitches, but no faith in juries to weigh the credibility of victim hearsay. This strange result poses a serious obstacle to the prosecution of sexual assault, organized crime,

47. *Terry v. Ohio*, 392 U.S. 1 (1968) (upholding temporary detention for investigation based on facts falling short of probable cause, and protective frisk of suspects detained when circumstances suggest suspect might be armed).

48. GREG RIDGEWAY, ANALYSIS OF RACIAL DISPARITIES IN THE NEW YORK POLICE DEPARTMENT’S STOP, QUESTION, AND FRISK PRACTICES 41–42 tbl.5.5 (2007).

49. *Id.* at xiv.

50. *See id.* at 37 tbl.5.2.

51. 541 U.S. 36, 68 (2004) (holding that the confrontation clause, with limited exceptions, bars admissions of testimonial hearsay against criminal defendant absent opportunity for cross-examination).

and domestic violence cases.⁵² If we want to reduce the system’s reliance on possessory crimes provable by officer testimony, we need to put fewer obstacles in the path of introducing reliable evidence other than officer testimony.

Third, the Court could dust off the old *Weems* case⁵³ and rule that any *perpetual* legal disability tethered to a criminal conviction violates the Eighth Amendment.⁵⁴ This would eliminate the majority of so-called collateral consequences, but in a way that permits—and requires—legislatures to reconsider just what sort of disabilities are consistent with the new reality that mass incarceration calls for mass reentry. Sensible restrictions on such things as gun ownership could be readopted for, say, ten years of law-abiding behavior. Silly restrictions on occupational licenses would be better off forgotten.

52. See, e.g., Donald A. Dripps, *Controlling the Damage Done by Crawford v. Washington: Three Constructive Proposals*, 7 OHIO ST. J. CRIM. L. 521, 532 (2010) (“The number of factually-justified prosecutions for violent crime lost as a result of *Crawford* exceeds the number lost as a result of the Fourth Amendment exclusionary rule many times over.”).

53. *Weems v. United States*, 217 U.S. 349 (1910). In *Weems*, the Court ruled that a sentence of *cadena temporal*, or civil death, applied in the Philippine Islands following the transfer of sovereignty from Spain to the U.S., violated the Eighth Amendment’s “cruel and unusual” punishment clause. The Court described the penalty as follows:

By other provisions of the code we find that there are only two degrees of punishment higher in scale than *cadena temporal*, death, and *cadena perpetua*. The punishment of *cadena temporal* is from twelve years and one day to twenty years (arts. 28 and 96), which “shall be served” in certain “penal institutions.” And it is provided that “those sentenced to *cadena temporal* and *cadena perpetua* shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.” Arts. 105, 106. There are, besides, certain accessory penalties imposed, which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life.

Id. at 363–64. “Civil interdiction” barred the convict from disposing of his own property, and, as the Court says, the disqualification from holding office, and the requirement to report to the authorities, were “perpetual.” *Id.*

54. Cf. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Convictions*, 160 U. PA. L. REV. 1789, 1832 (2012) (“[W]hile the states have eliminated the formal regime of civil death, an equivalent system of legal deprivation, in which most rights of people with criminal records are held at sufferance, has arisen to take its place.”). Professor Chin addresses his argument primarily to legislatures. The Court has never cast any doubt on *Weems*, nor has the Court cited *Weems* in any collateral-consequences cases with the exception of *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (holding that statutory provision revoking citizenship of citizen convicted of desertion by court martial is unconstitutional).

IV. CONCLUSION

Whether the Court, let alone the electorate, has the political will to start down this path is another question. But I remind myself that Dr. King did not despair in his Birmingham jail cell,⁵⁵ that Ruth Bader Ginsburg did not despair when asked by the Dean of the Harvard Law School why she was taking a place from a man,⁵⁶ and that Evan Wolfson did not despair when the high Court declared that any claim of a constitutional right to private sex between consenting adults was “at best, facetious.”⁵⁷

Ever since abolitionism, the heroes of every American civil rights movement have all had at least one good reason to reject despair: The success of their predecessors. In America, tomorrow is always vital with the prospect of redemption, however distant that prospect may appear. We must visualize the prospect of redemption for each of us—even for those of us who have transgressed the criminal law. For until we can visualize redemption for each of us, we will never fully realize redemption for all of us, bound together, as we surely are, in a political community scarred from birth by the original sin of slavery.

55. Cf. Letter from Martin Luther King, Jr. to Bishop C.C.J. Carpenter et al. (Apr. 16, 1963), http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf [<http://perma.cc/ZB9W-A8LE>].

56. As Justice Ginsburg tells the story:

The dean in those days had a dinner early in the term for all the women in the first-year class, and I think he kept it up until the number of women exceeded 20. In any case, after dinner he brought us into his living room, and each of us sat next to a distinguished professor, invited to be our escort, and he asked [us] to tell him what we were doing in the law school occupying a seat that could be held by a man. Now he did not mean that question to wound. Harvard had only recently begun to accept women, didn't accept women until 1950, 1951, and I came there in 1956, only five years after they started to admit women. There were still some doubting Thomases on the faculty, and the dean wanted the women's answers about what they were doing in law school to arm him with responses to those members of the faculty who still resisted admitting women. So he wanted women's stories so he could report those to his faculty colleagues,

Interview by Academy of Achievement with Ruth Bader Ginsburg (Aug. 17, 2010), <http://www.achievement.org/autodoc/printmember/gin0int-1> [<http://perma.cc/N4LF-TZPV>].

57. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (“*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”).

