Making Crime (Almost) Disappear

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Abstract

This essay sketches the outlines of a future world in which crime has been drastically reduced. The author proposes two radical approaches to achieve this crime reduction. Some crimes, like drunk driving, can be almost completely eliminated by using technology to prevent the operation of a vehicle by a driver with a blood alcohol greater than the permissible level. Other crimes, like larceny or burglary of expensive items, can be made extremely easy to solve by requiring the installation of microchips that will, when activated, broadcast their location to police.

To the objection that it will be expensive to install the necessary technology, the answer is found in what crime costs us today. Drunk driving is estimated to cost the economy 40 billion dollars a year. The total cost of crime, much of which involves burglaries and larcenies, is estimated at 1.7 trillion dollars a year. If we could reduce that annual cost by a mere 20%, it would save the economy 350 billion dollars per year. That could pay for many sophisticated microchips and blood alcohol detectors with a lot of money left over.

But do we want to live in a “Clockwork Orange” world where government prevents and deters crime by becoming more deeply embedded in our everyday life? Do we want our cars to tell us when we’ve had too much to drink? The last part of the essay probes these questions and provides a controversial answer.
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Making Crime (Almost) Disappear

by

George C. Thomas III

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Making Crime (Almost) Disappear

What if it were possible to design a criminal enforcement mechanism that made crime in some cases impossible to commit and, in other cases, much more difficult to commit without being caught? Would we want to live in that world? The answer, surprisingly, is that certain crimes can be virtually eliminated and the incidence of many other crimes can be radically reduced. Perhaps more surprising, it is less than clear that we would want to live in that world. I will first describe the enforcement system we have in place today and then imagine a far different, far more effective, and perhaps far more ominous alternative system.

For decades, academics and policy makers have assumed that improving the enforcement of criminal law is a matter of doing what we have been doing for a century or so but doing it better. More police, better policing, more prisons, longer sentences, better sentencing schemes, better counseling, new drug courts, juvenile justice, “scared straight” programs, better probation programs, better parole supervision. In my view, any gains in improving what is a wretched system for preventing crime will be marginal at best.

You know the story about the current system. The legislature discerns that conduct X is dangerous or harmful and passes a law making it a crime to do X. Now the police are supposed to arrest those who do X, the prosecutors are supposed to prosecute those violators, and judges are supposed to impose legislatively-authorized sanctions. The legislature, in this model, creates criminal offenses, leaving it to the other actors to enforce its judgments. This is probably a matter
of “it’s always been done this way” than a result of careful planning about how best to structure a system designed to mold conduct and deter particular behavior.

As Mike Seidman has demonstrated, the net effect, if not the purpose, of criminal sanctions is to place most of the burden of controlling crime on those who are tempted to violate the norms embedded in the criminal codes. We do not, for example, punish car owners who leave their cars unlocked as a way to prevent car thefts. Though it sounds odd, punishing negligent car owners and not thieves is far from irrational. But, to put it mildly, that punishment scheme would not be popular. Indeed, Seidman concludes that any significant shifting of the cost of crime control to the general public is politically doomed even if, in fact, it was a more efficient means of achieving crime control.

We punish those who violate the norms embedded in our current criminal code because we have derives those norms from centuries of blaming practices. Taking someone’s property is just viewed as more wrongful, more blameworthy, than the owner failing to protect his property. But, as Seidman notes, that conclusion just shifts the question back one level: Why have we developed the blaming practices that we have? He finds it “plausible that the distribution of the cost of crime reflects no more than the outcome of a political struggle between groups competing to achieve results advantageous to themselves and to those with whom they identify.”


2 Id. at 343.
to my theft example, when humans developed commerce, those who possessed property had more influence, and power, than those who wanted to take property possessed by others.

I think Seidman’s point is insightful and still fresh after two decades. But the point to my essay is to challenge his pessimism about shifting some of the cost of crime to the general public. I think this shifting would be more politically palatable today than in 1984—in part because technology allows us to make shifts more easily today, and in part because of a growing sense that we simply should not be incarcerating two million Americans. I will stop far short of recommending that we punish negligent car owners rather than thieves, but I will suggest some radical shifting of the burden of crime control.

My proposals in this essay are aimed chiefly at prevention rather than deterrence. Neal Katyal has argued that substantial crime control can be achieved by using architecture—e.g., by “hardening” targets like banks and homes. I wish to go far beyond architecture as a means of preventing crime, but I agree with Katyal that we should shift emphasis from deterrence to prevention. If we can make crimes impossible or very difficult to accomplish, we reduce crime without having to worry about deterrence. For example, deterrence argues for telling the public about random drunk driving roadblocks on New Year’s Eve and thereby (hopefully) encouraging party-goers to drink less. Prevention works by putting a mechanism on a car that cuts off gasoline to the engine when the driver is drunk and thus makes it impossible for him to drive drunk.

I proceed in three steps. First, I will demonstrate incurable problems with today’s distribution of the costs of crime. Second, I will offer ways to make certain crimes almost impossible to commit and others far more difficult to commit without being caught. Third, I will deal with the perhaps ominous consequences of shifting the cost of crime to the largely blameless among us.

I.

Criminal codes go at least as far back as the Code of Hammurabi from around 2250 B.C. The Romans had complex criminal codes. The earliest surviving codes in the Anglo-American world, from around 600 A.D., were the laws of King Aethelberht.¹ Today, the federal criminal code contains roughly 3,500 criminal offenses, and another 10,000 or so criminal prohibitions can be found in federal regulations.² Add state crimes and the result is a mind-boggling universe of criminal laws that police and prosecutors are supposed to enforce. All of these laws are designed to mold conduct. One reader of a draft insisted that the only point to criminal law is to punish wrong-doers, but I disagree. We make it a crime to drive drunk hoping to deter people from doing it. When we fail to deter, we punish the ones that we catch, or at least that is how it is supposed to work.

Deterrence works by creating fear of being caught and punished. But there has been for many decades a debate about how well deterrence works. It is a complicated question that depends on the ability of humans to control their conduct, on the perception of the public about the likelihood of being caught and punished, and on the way that a particular individual weighs the potential gain against the potential loss. When weighing gain versus loss, people will put different values on the risk of being caught and punished. A high school classmate of mine for many years dealt illegal drugs and seemed oblivious to the risk of being caught. That would not describe my attitude if I were dealing illegal drugs.

Speaking of illegal drugs, here is a real-life example of when deterrence does not work. Even after Rudy Guilani’s well-publicized crackdown on crime that focused on crimes committed in public, a stroll through Washington Square Park in New York City is likely to produce a chance to buy “smoke.” To be sure, curbing recreational drug is not easy, and even my prevention plan will have to rely on a ramped-up deterrence scheme.

As my “smoke” example shows, one problem with deterrence is that it fails so often. Academics can debate the theoretical efficacy of deterrence all they want, but the reality on the ground is that two million Americans are currently in prison or jail. That does not sound like a very successful strategy for controlling crime.

3 As I have turned down all the offers made to me, I have no way to know whether these are real sellers or undercover cops. I decided not to raise my research to that level.
There is another, often ignored, problem with the current distribution of the costs of crime. It leaves almost unchecked discretion in the police and prosecutors to decide what crimes to prosecute and what perpetrators to arrest. For example, a married couple engaged in consensual anal sex in Indiana in 1965. Later, when the marriage fell apart and divorce negotiations were proceeding, the wife threatened to have the husband prosecuted for the “abominable and detestable crime against nature with mankind or beast; crime against nature,” which, under Indiana law, appeared to apply whether or not it was consensual. The husband (or his lawyer) did not take the threat seriously. But the complainant persisted, and a prosecutor brought the charge. The husband did not retain a lawyer for the criminal case and pleaded guilty, assuming, I suppose, that he would get probation or a fine. The state judge sentenced him to two to fourteen years in prison. The sentence was reversed in a federal habeas proceeding three years later, basically on Griswold grounds, but by then he had served three years for committing a crime that has probably not been prosecuted since Massachusetts was still a colony.

The other side of the coin is that police can be too aggressive in their enforcement, creating its own form of unfairness. Aggressive enforcement of most criminal laws—the drug laws are the best but not the only example—has a disproportionate effect on racial minorities and the poor. Police patrol much more heavily in poor neighborhoods, looking for drug buys or other evidence of drug trafficking. Police routinely make traffic stops on the New York Thruway (and

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4 Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968).

5 I claim only that consensual “crimes against nature” between adults has likely not been prosecuted for a very long time. Of course, forced acts of sodomy are sometimes prosecuted. See Rose v. Locke, 423 U.S. 48 (1975).
they used to do so on the New Jersey Turnpike\textsuperscript{6}) hoping to get consent to search. Do they ask for consent more frequently from black and Hispanic drivers? I think we all know the answer to that question. Our prisons are overflowing. Two million Americans were in prison or jail in 2002.\textsuperscript{7} Fully 13\% of black men between the ages of 25 and 29 were in prison or jail in 2002.\textsuperscript{8}

So we have, really, the worst of three worlds—failed deterrence, under-enforcement of many crimes, and discriminatory enforcement of other crimes. Is there a way to avoid these problems? Yes. We could seek to mold conduct outside the criminal law. For one example, imagine a district attorney in a city where adultery is not against the law who decided (for whatever reason) to deter it. He persuades the city council to require hotels to provide his office with proof of identification for all hotel guests. His office will then send an official notice to the home of the guests asking them to confirm their presence in Hotel X on Y date. That might not deter adultery in the city but it would certainly move most of it out of hotels! Moved out of hotels, the incidence of adultery is likely to decline. And notice that our hypothetical DA has reduced the incidence of adultery not by prosecuting it as a crime but by adopting a more creative

\textsuperscript{6} The New Jersey Supreme Court sought to make pre-textual traffic stops less frequent when it abolished suspicion-less searches following traffic stops. See State v. Carty, 790 A.2d 903 (N.J. 2002). In New Jersey, an officer who makes a traffic stop can search the vehicle only if he has reasonable suspicion that it contains evidence of crime. While I have no illusion that this case will make pre-textual stops disappear, it is likely to reduce their incidence. For other thoughts on racial profiling in traffic stops, see George C. Thomas III, \textit{Race, Terrorism, and a New Approach to Consent Searches}, 73 Miss. L.J. 525 (2003) (symposium on racial profiling in a post-September 11 world).

\textsuperscript{7} See http://www.drugwarfacts.org/racepris.htm.

\textsuperscript{8} Id.
I wish to explore in the rest of this paper other creative approaches to deterring behavior. Most of these ideas will trench, to one degree or another, on civil liberties—the adulterer might think his civil liberties infringed by the hypothetical ordinance (though I doubt the right to privacy goes *that* far). Part IV will focus on civil liberties as well as the long-term consequences of letting government mold conduct in the ways discussed in Parts II and III. The point to those parts is to seek to think creatively about a war on crime that can succeed.

I should be clear about what my essay is *not* about. Though I think legislatures have failed to take advantage of some pretty obvious crime control strategies, I express no opinion about whether this is because of a larger failure of the democratic process. Bill Stuntz has argued that the legislative bodies in this country are happy with the criminal law we have today. “Criminal law is not just the product of politics; it is the product of a political system, a set of institutional arrangements by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability.” The incentives that exist largely favor broader criminal laws with almost limitless discretion in police and prosecutors, perhaps even broader than the public would otherwise wish. While I think Stuntz is correct, the point to my essay is simply to explore options for better crime control, without regard to whether legislatures might embrace these ideas.

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II.

The initiatives I present below can be grouped into two categories. One type seeks to make it literally impossible to offend—for example, using technology to disable a vehicle if someone who consumed too much alcohol seeks to drive it. The other category seeks to make apprehension almost certain, thus increasing the deterrent effect on potential offenders. The schemes thus operate from different theoretical perspective. But what they all have in common is a reliance on mechanisms that have little or nothing to do with police intervention to solve or prevent crimes. I begin with a few crimes that can be virtually eliminated by preventing the crime rather than deterring the actor.

Drunk driving is a terrible crime, one that causes thousands of deaths and roughly 40 billion dollars in monetary costs each year. If legislatures were serious about controlling drunk driving, the would require every new vehicle to have a breathalyzer built into the gasoline line. Gasoline will not flow to the engine when someone attempts to start the vehicle with too high a blood alcohol level. Perhaps the mechanism can be made tamper-proof. If not, perhaps it can be designed to alert the police when it has been disabled. What about the driver who becomes drunk while driving. It would probably be dangerous to have the gasoline stop flowing to the engine so


11 Some states already have a similar requirement for motorists found guilty of drunk driving. Why wait until a driver is caught and convicted? I suspect that the average person convicted of drunk driving has committed the offense many times, putting many lives at risk, before he is caught and convicted.
that sensor would be inoperative after the car started. But a different sensor could then alert the police. I recognize the problem of necessity created by the drunk who is bleeding to death alone at home, but I can’t imagine a scenario in which the bleeding drunk is better off on the highway than calling 911.

Is this a perfect solution? No, my mandatory breathalyzer system will not ensure zero drunk drivers. There is, for starters, the period of time between the disabling of the breathalyzer or the driver becoming drunk and when the police find and arrest the driver. But presumably not many drivers would choose to disable the breathalyzer or drink behind the wheel and thereby guarantee arrest. Finally, there is the cost, which will be borne by teetotalers and drinkers who never drink and drive. The expense would be a greater burden on the working poor than on the middle class. But my proposal should prevent 15,000 deaths and save 100 billion dollars. With that kind of savings, a way can be found to pay the cost for purchasers who fall below a certain income level.

The same kind of system can also prevent car thefts. If the key provided by the manufacture is not used to start the car, the gasoline will not flow to the engine. Can thieves find a way to disable that anti-theft mechanism? Perhaps but it strikes me as unlikely. In any event, the mechanism can be designed to alert the police if it is disabled.

Is anyone worried about income tax evasion and fraud? Estimates are that tax fraud and
evasion cost the government $300 billion a year.\textsuperscript{12} If we could eliminate fraud and evasion, we could go a long way toward balancing the federal budget, even after the profligate ways of the last six years. Moreover, Americans spend $100 billion a year in tax compliance.\textsuperscript{13} So let’s get down to work and save most of that $400 billion. Let’s eliminate the self-prepared income tax return, along with H & R Block and Turbo Tax. Instead of spending billions on preparation, enforcement, and auditing, have the government employ accountants to prepare returns for taxpayers.

Most information about income, interest, deductions, and credits can be supplied into vast computer systems by banks, employers, and charities. (I realize that the IRS has yet to develop effective computer systems but in my thought experiment we can solve any technological problem) The taxpayer would provide the IRS accountants the same kind of documents that a field audit requires. Thus, whatever taxes are picked up today in a field audit of one percent of all taxpayers would now flow to the government from one hundred percent of taxpayers. The government will gain one hundred times the tax revenue it now picks up via the audit system. Mistakes will be made, to be sure. No system is perfect. But mistakes should even out over the universe of taxpayers and, more importantly, cheating and fraud will be radically reduced as will all of the financial cost of tax compliance now borne by individuals. Even if the new system eliminated only two-thirds of the fraud, the government would net $200 billion every year and


taxpayers would save $100 billion.

I don’t have an estimate of what it would cost the government to prepare the returns, but I’m willing to bet that the amount would be less than what it now costs the government to check the returns when filed, choose the ones to be audited, conduct the audit, and argue with the taxpayer over what is owed. I am, to be sure, not counting the “cost” to taxpayers in having to collect and present the kind of information that, at present, only one percent have a duty to collect and present when audited. But it seems a reasonable requirement if we are serious about having an income tax system and content to have one that is grotesquely complex.

I have only scratched the surface with these suggestions. Moreover, my proposals can be extended beyond preventing crime. Are states worried about the loss of sales tax to surrounding states or to the internet? Simple. Require that all items over a certain price that are offered for sale contain a micro chip that will signal the tax compliance office when the item is brought into the state. If the chip sends a unique signal, it can also reveal where the item was purchased and the sales or credit card records will reveal the name and address of the purchaser. Again, just as with all the prevention schemes discussed so far, the net effect of this is to shift to those who do not avoid sales taxes much of the cost of insisting that the scofflaws pay their fair share. Is that a wise allocation of burdens? I will return to those questions in Part IV.

III.

This Part will consider crimes where deterring the actor remains the best option, but I will
offer better, more mechanical, ways of achieving deterrence. Take, for example, the crime of counterfeiting. The good news here is that the Treasury Department is already one step ahead of me. The department has introduced a series of new bills, which it claims are much more difficult to counterfeit. Perhaps more can be done. It is so much better, in this crime, as in all others, to prevent the crime at its inception rather than to have to solve it after it has been committed.

Are we serious about deterring speeding? I doubt it, but if we were, we could place sensors at random to record the speed of drivers. Drawing on an idea that Sherry Colb presented in 2001,14 we could also make the system both self-enforcing and scrupulously fair by taking a photograph of the license plate and then simply mailing a ticket to the owner of that car. Joint owners would be jointly and severally liable for the ticket. To prevent a defense of “someone else was driving my car,” the registration of a car could be conditioned on an agreement by the owner to pay all speeding tickets issued to that car. This might have the salutary fringe benefit of making parents more careful about letting teenage children drive the family car!

If we knew, for example, when we drove on the New Jersey Turnpike that random sensors could be anywhere on that road, we would be more inclined to keep to the speed limit. To avoid litigation over the accuracy of the technology that measures the speed, the police would set the speed for issuing a ticket comfortably above the posted speed limit. But that of course is what police do today, on a case-by-case and officer-by-officer basis. My system would utilize a uniform “fudge factor” that would therefore be applied consistently and without regard to the

14 Sherry Colb, Stopping a Moving Target, 3 Rutgers Race & the Law Review (2000).
particular vehicle or driver or the officer’s idiosyncracies or racial biases. A sensor system would thus not only radically increase the deterrence of speeding but also would make the enforcement of the law against speeding scrupulously fair.

I expect some readers to complain about the cost of the sensors and photography equipment. I have no idea what this system would cost but three factors will, I believe, make it feasible. First, I imagine that the cost of assigning officers to traffic duty is pretty high when summed over the useful life of the equipment. Second, even if deterrence goes up dramatically, I suspect that more tickets will be issued and thus more revenue produced. Third, I doubt that very many sensors will be required. If the police used a few sensors, twenty four hours a day, on each major highway, they could move them up and down the highway and achieve pretty wide coverage. Drivers would never know what stretch of the road is being silently and efficiently patrolled. Moreover, to the extent that the paucity of sensors led to less deterrence, and more speeding, these speeders will likely eventually drive into the sensor field, thus increasing revenue from fines.

The other complaint I would expect to hear is from drivers who feel entitled to speed. Indeed, when faced with an effective system for deterring speeding, a legislature might decide that it does not want to punish most speeders. That is another advantage of my proposals. They would force the legislature to decide what crimes it really wants to deter. If speeding is not one, then let the state adopt the no-speed-limit rule of the German autobahns. This returns me to adultery. The Michigan Court of Appeals recently noted that committing adultery constitutes
first-degree criminal sexual conduct, punishable by up to life in prison.\textsuperscript{15} Because adultery is still a felony in Michigan, an adulterer is committing sexual penetration while committing a felony. The state court “encourage[d] the Legislature to take a second look at the statutory language.”\textsuperscript{16} Rather than re-work the criminal sexual conduct language, perhaps the Michigan legislature could be persuaded to de-criminalize adultery, or at least make it a non-felony.

Let’s move to the serious crimes of robbery and burglary. I will soon propose a radical plan that would drastically reduce the use of illegal drugs and would thus save close to a trillion dollars a year. (More details on that in a moment.) The State can take some of that trillion dollars a year and spend it on elaborate cameras and alarms for businesses. These will record robberies and burglaries on tape and will also alert the nearest police station that a robbery or burglary is in progress. Moreover, we can require manufacturers to put tiny radio transmitters that cannot be removed on items costing more than some dollar amount. That way the robber or burglar will in effect catch himself. As word spreads that if you steal items worth more than X dollars, you are bound to be caught, presumably even dedicated criminals will turn to other ways to make a living.

If you are with me so far, here comes the acid test. Do we want to drug crimes more effectively than our current law achieves? Be careful what you wish for. The mechanism I will


I got this idea from my friend, Don Dripps. See Donald A. Dripps, Terror and Tolerance: Criminal Justice for the New Age of Anxiety, 1 Ohio St. J. Crim. L. 9, 41-42 (2003). But his idea was not nearly as radical as mine. He proposed requiring drug tests only from minors and only as a way of persuading the legislature to modify the drug laws so that they would not result in middle class children failing in large numbers.

You want to radically reduce the use of marijuana? Try this on for size. Driving is a privilege and not a right. Suppose our hypothetical state legislature required everyone who has a driver’s license to have random drug testing at least once a year. Each driver would get a notice in the mail giving you 24 or 48 hours (or whatever time period is short enough that illegal drugs will still show up in a drug test if the person stopped taking them as soon as the notice arrived) to show up at a local clinic. There the driver would have to give a urine sample under cheating-free conditions. The sanction for those who fail depends on how tough you want to be on particular drug crimes. Perhaps to test positive for marijuana simply results in forfeiture of one’s driver’s license for six months. When one reapplyes after the six month period has elapsed, the violator must show up in person to renew the license. The motor vehicle bureau will pick a date
at random from a 30 day period and the applicant must, once again, provide a urine sample at the local clinic the day before appearing to receive his or her license.

This is not, of course, a perfect solution. People can drive without a license. But perhaps our ubiquitous sensor can be drafted for service here, too. We could put a chip in the driver’s license and if it is not present in the car, the car will not start.

Perhaps the presence of drugs other than marijuana in a failed drug test should result in a harsher sanction than loss of license. The legislature could endow a failed test with an inference of possession of that drug in the State within the last six months. The failed test taker would have the opportunity to rebut that inference.\footnote{I have purposely avoided discussing any constitutional problems with my proposals, but I pause here to acknowledge Robinson v. California, 370 U.S. 660 (1962). I think that my hypothetical statute solves the problems that caused the Court to strike down a somewhat similar law. The problem the Court stressed was the possibility that the jury might have convicted Robinson for his addiction as opposed to his drug use.} If it is un-rebutted, criminal sanctions (of your choice) will be imposed. You can make them more or less serious depending on your view of the threat of particular drugs to our society.

Now we have a drug law with teeth. Moreover the “trial” of drug offenders will be efficient and accurate. We will have no problems with motions to suppress or police testimony about observing someone buying the drugs in an alley. The results of the drug test will be introduced and the only issue whether the defendant can rebut the inference that he did not possess drugs in the State in the past six months.
In effect, we would make people choose when they decide to apply for a driver’s license: drive or take illegal drugs. Of course, some people will borrow a driver’s license (but would you loan yours?), and some Americans don’t drive. Ralph Nader is one. But that is a relatively small group.\textsuperscript{19} Consider the scope of marijuana use today. The Bureau of Justice Statistics provides the following estimate of marijuana use in 2004:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Age & 12-17 & 18-25 & 26 and older \\
\hline
Last month & 7.6\% & 16.1\% & 4.1\% \\
\hline
Last year & 14.5\% & 27.8\% & 7.0\% \\
\hline
\end{tabular}
\end{table}

To put raw numbers on these estimates, thirty-two million Americans had used marijuana within the past year in 2004.\textsuperscript{21} Somewhat over half that number, or about eighteen million, had used marijuana in the prior month. If we could all but eliminate drug use in the driving population, it would cause a drastic disruption in the drug trafficking network. The prisons would

\textsuperscript{19} The number of licensed drivers in the country in 2000 was 191 million or 88\% of the driving age population. See http://www.fhwa.dot.gov/ohim/ohnh00/ohnh2p4.htm


begin to empty. Drug counselors would have to find another line of work.

Or perhaps I am wrong about the incentives. Perhaps most of the people who use drugs will simply give up driving so that they can continue their drug use. In that case, car-pooling and mass transit use will boom. We can imagine a whole new understanding of “designated driver”—the only person on the block who hasn’t lost his license! In that event, traffic in our congested cities would ease as car pools become ubiquitous and our mass transit system sees a new infusion of riders and money.

If millions of middle class Americans flunk the drug tests, the legislature might re-think what drugs should be illegal. In the current situation, the legislature does not have to face the consequences of its decision to criminalize a wide range of drugs. The more the merrier. Under my regime, if the threat of loss of license does not deter marijuana use effectively, the legislature will be under immense pressure to do something about the drug laws. The legislature will either face the wrath of the middle class or it will soften its drug laws. I think I know which one would occur.

One reader found the “disconnect” between the offending behavior and the sanction to be troubling. Why does smoking pot mean that one has to give up one’s driver’s license? It seemed a fair point when I first heard it, but, upon reflection, I think its force depends on current criminal sanctions being so familiar to us. Why does selling pot mean one should have to sit in a cramped room with several other men for five years? How is that sanction correlated with the offending
behavior?

Similarly, another reader worried about those who don’t drive and thus would be free to smoke pot all they wanted. Shouldn’t we, for example, make taking a drug test a condition of citizenship. I offer two comments. First, remember that the apt comparison is with the system that we have today where 100% of us are pretty much free to smoke pot. More fundamentally, I think the drug test needs to be connected to a privilege to mitigate what might be a fatal criticism that I will deal with shortly—that my proposal evokes Orwellian or Clockwork Orange images of a society in which government controls our daily life. The Orwellian images would be far worse if the drug testing was cut loose from a privilege. In effect, my plan says to Americans: You can choose between driving or smoking pot. But at least you retain a choice. Not so if everyone has to line up and urinate in cups. My proposal is too Orwellian for some, and perhaps for me, but anything that goes farther down that road should, I think, be resisted.

Another criticism, voiced by many, is the disproportionate effect on the poor and working class. The upper middle class can find a way to get to work if no one in the home has a driver’s license. It is not so easy for the single working mom with three kids. I don’t doubt the disproportionate effect on the poor, but consider what we now do. The working mom whose teenage son sells dope to get money to use drugs now faces the loss of her son for a ten-year stretch in prison.

And it may be an exaggeration to say that the working poor will find it harder to get to
work. I walk several blocks in Newark, New Jersey from my train stop to the law school, and I see many working poor taking the bus. I’ll bet that those who would be most inconvenienced by the loss of a licences tend to live in or close to cities that have adequate bus service.

As noted earlier, the United States has roughly two million prisoners, counting both jail and prison. We have the largest percentage of our population in prison than any other country, a larger percentage than Russia, than China, than Iran. “On a per capita basis, according to the best available figures, the United States has three times more prisoners than Iran, four times more than Poland, five times more than Tanzania and seven times more than Germany.”

That’s a gold medal I think most of us would be happy to relinquish. One scholar has concluded that the total cost of crime in America, including lost wages and the effect on families, is more than 1.7 trillion dollars a year. If my initiatives cut crime in half, hundreds of billions of dollars will be freed up for other purposes, including providing free of charge the anti-burglary and robbery mechanisms described earlier.

And of course there are many other advantages to freeing half our prison population. Many more families would be able to stay together. Child care would improve in the home. The children of these individuals (who would otherwise have spent years in prison) would be more likely to succeed in school and in life.

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Many in this country believe strongly in the “three strikes” concept and in the idea of keeping dangerous, violent criminals off the streets. The beauty of my hypothetical referendum is that, if it works as I think it will, we will get a huge reduction in the non-violent prison population: drug users, petty drug sellers, car thieves, and burglars. People who commit serious, violent crimes, particularly those who are caught and convicted more than once, deserve a long sentence. And we’ll have plenty of beds for them in my hypothetical state.

I have not spoken of rapes, street robberies, and aggravated assault. I think they are the toughest nut to crack and we should be sober in our estimate of what we can do to prevent these crimes. But there is already good news here. The rape rate in the United States is the lowest it has been since the Bureau of Justice Statistics started keeping data in 1973, about a third in 2003 what it was in 1973.\textsuperscript{24} Robbery and aggravated assault are down by about one-half in the period 1980-2000.\textsuperscript{25} So some things that we are doing seem to be working.\textsuperscript{26}

\textsuperscript{24} The rate in 1973 was 2.5 per 1,000 persons 12 or older. The rate in 2003 was 0.8 per 1,000 persons 12 or older. Compare http://www.ojp.usdoj.gov/bjs/pub/pdf/cv73_95.pdf with http://www.ojp.usdoj.gov/bjs/pub/pdf/cv03.pdf. The news may actually be even better than a reduction of two-thirds in the rape rate. In 1973, the BJS asked respondents only about rape. Today it asks “rape or sexual assault.” Thus, the 2003 data include sexual assaults. No one knows how many sexual assaults were excluded from the rape numbers in 1973 but surely some were. Thus, it seems likely that the rape rate today is substantially less than a third what it was in 1973.

\textsuperscript{25} Michael Tonry, THINKING ABOUT CRIME 117, fig. 5.7 (2004) (drawing on Bureau of Justice Statistics data).

\textsuperscript{26} To be sure, the BJS data do not include attempted rape. But if rape rates are one third today what they were in 1973, attempted rapes must have not fallen roughly as much. No reason exists to think that the correlation between attempts and completed rapes has changed over the last three decades.
If I’m right that the changes proposed so far will have an enormous crime-reducing effect, then we will have freed up millions of hours of police time. Rather than send police swarming into lower class neighborhoods looking for evidence of drug trafficking, we can assign them to parks and other areas that are likely venues for rapes, street robberies, or assaults. When police in my hypothetical state police lower class neighborhoods, they would be looking to protect the residents against street crimes rather than trying to find evidence of drug crimes. If we could reduce crime where it most terrorizes poor people, their lives would improve in other ways. Perhaps they would stay in school longer, try harder to find good-paying jobs, and come out to vote more often.

The point to my essay is that there are far more effective ways to prevent and deter crimes. We have seen the huge number of dollars my proposals would likely save. Are there costs of truly effective crime prevention that we might not want to incur? That is the subject of the next Part.

IV.

The world I have imagined would have a million fewer people in prison or jail. It would have a drunk driving rate and a car theft rate close to zero. Tax evasion and fraud would be almost unknown. Larcenies of expensive items, and burglaries to steal the items, would be immediately solved. Police freed from those duties could provide much more intense neighborhood policing as a way to prevent rapes, assaults, and robberies.
Would that be a better world? Yes, but we must consider the potential costs. Criminal law, after all, has value beyond crime prevention. Again quoting Seidman, “The symbolism and ritual associated with the criminal trial as well as the traditions surrounding criminal penalties make the criminal law an especially powerful tool for communicating blame.” And criminal law has symbolic value beyond blame. When one listens carefully to the arguments against de-criminalizing marijuana use, for example, a thread that appears is “we don’t want to look like Amsterdam.” We don’t want, in other words, to appear officially to endorse recreational drug use (well, with the standard exceptions of alcohol, tobacco, caffeine, and various over-the-counter drugs). And we certainly don’t want to see drug use in public. It’s better, some believe, for middle class kids to smoke dope inside their homes in Short Hills, New Jersey, than have them lounge in Washington Square Park in a haze of marijuana smoke. Think “Reefer Madness,” for goodness sakes.

I don’t discount the symbolic value of law. Quite the contrary: Richard Leo and I have argued that the famous Miranda warnings are worth keeping primarily for the symbolic value in having the government tell citizens that they need not cooperate in their own demise. And despite my hopefully-humorous reference to “Reefer Madness,” I might feel the same way if Washington Square Park became a place where decent folks (whoever they are) have to avert their eyes or avoid the area entirely. But to keep the drug laws on the books merely to protect the

27 Seidman, supra note __, at 336.

sensibilities of people who want their morality to triumph is not, I think, a good idea. Perhaps the legislature brave enough to de-criminalize marijuana possession might simultaneously include some types of public drug use in the definition of disorderly conduct.

I turn now to the most powerful criticism of my initiatives. It has three branches, though ultimately they merge into a single river. In a nutshell: Do we want government to be so deeply enmeshed in our day to day life? One branch of the argument calls on Orwell’s 1984 and Anthony Burgess’s Clockwork Orange to paint a picture of government gone wild. The other branch worries that if we use largely non-criminal mechanisms to keep people from engaging in conduct we wish to minimize, it might eventually erode our sense of personal responsibility. I don’t have to worry about whether I have had too many martinis. The car will let me know. I don’t have to be honest in preparing my income tax return, as hard as that sometimes is. I just let the government accountant tell me what I owe.

Perhaps, like most people in Orwell’s 1984, we would simply be doing government’s bidding without much thought. What is troubling, I think, is not the power that governmentseizes if it carries out my initiatives so much as the pervasiveness of government’s presence in our daily life. When we start our cars or buy TVs or renew our drivers’ licenses, government is there, silently watching, waiting for someone to offend or attempt to offend.

The third branch of the argument is the familiar slippery slope argument: If we acquiesce in this much government control, what will be next? Will the government raise the bar and begin
to mold conduct that we might not view as offending conduct? Perhaps some future government will find a way to persuade the Supreme Court that it does not violate the First Amendment to forbid expressions of discontent with government and then seek to prevent that with a filter on the internet. Then we would truly have arrived at 1984, albeit a few decades late.

It is a powerful argument. I have no ready answers for the first two branches. Indeed, the power of those arguments suggests that we tread lightly here. Perhaps it is too much to require urine tests before one can receive, or keep, a driver’s license. On the other hand, look at the trillions of dollars we spend trying to prevent drug use. So I’m not persuaded, yet, that my proposals go too far.

While I acknowledge the power of the first two branches of the Orwellian argument, I reject the theoretical core of the third branch—that we might create a monster we cannot control. I believe judges and legislatures can draw lines between molding harmful conduct and conduct that is controversial but not harmful. Preventing people from criticizing government is, I think, just categorically different from preventing drunk driving, car theft, and counterfeiting. Moreover, for a legislature to enact any of my proposals, the middle class in America would have to agree that the conduct should be minimized. The closer one gets to conduct that is controversial but not harmful, the greater would be the middle-class “push back” if a legislature tried to use my proposed initiatives to prevent it from occurring.

If a legislature goes too far in molding conduct, the citizens will vote and, like the Alien
and Sedition Acts, the offending measures will disappear. I would expect a pretty strong middle class “push back,” for example, if many of their sons and daughters (and spouses) lost their drivers’ license because they tested positive for marijuana use. If the citizens don’t vote to make freedom-limiting laws disappear, then we will have the law that we deserve. Despite efforts by academics, and occasionally the Supreme Court, to discover impenetrable counter-majoritarian barriers in the Bill of Rights, I believe that the future of our freedom depends on the citizens who vote and only on those citizens.

A little more than two decades ago, a few brave souls began to re-examine basic premises about what causes crime. They argued that the occurrence of crime may be largely situational and opportunistic. For example, James Q. Wilson and George L. Kelling argued in a famous Atlantic Monthly article in 1982 that the appearance of broken windows in a neighborhood is a signal to criminals to prey on victims in the area. “One unrepaired broken window is a signal that no one cares and so breaking more windows costs nothing.” From this premise, some argued that order should be maintained neighborhood by neighborhood, a strategy that New York City undertook beginning in 1990. Marcus Felson expanded this insight to explain how our freedoms would disappear if the citizens don’t vote to make laws disappear.


31 See Wilson & Kelling, supra note ___.

32 Id.
everyday life, in effect, causes crime.\textsuperscript{33} The criminological establishment has recently been fighting back,\textsuperscript{34} and the new theories of criminology remain controversial.

Whatever the merit of the new theories of crime causation, a re-thinking of the deterrent role played by various institutions is long overdue. A fundamental re-ordering of the mechanisms we use to deter or mold conduct is long overdue. There are many promising ways to deter the behavior we as a society really want to deter and to mold conduct in beneficial ways. But we won’t even think of most of these mechanisms until we discard the old model of criminal law enforcement where the legislature ordains and the police and prosecutors do the heavy lifting thought necessary to make law mold behavior. Let’s change the system. We should begin by looking for ways to mold conduct that do not involve the criminal law in any traditional way. If we really want to deter adultery in New York City, sending a note home from the hotels is likely to be far more effective than a few prosecutions of those unlucky enough to be caught by the police.

End

