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# DOES LIBERAL PROCEDURE CAUSE PUNITIVE SUBSTANCE? PRELIMINARY EVIDENCE FROM SOME NATURAL EXPERIMENTS

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## I. INTRODUCTION

During the 1960s, the Warren Court’s “criminal procedure revolution” imposed constitutional limits on criminal procedure in the states,<sup>1</sup> limits that persist in some form to this day.<sup>2</sup> During the 1980s, criminal justice in the United States took a “punitive turn” that resulted in the largest per capita prison population on the planet.<sup>3</sup> In this Article, I consider the claim,

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1. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 478–79, 491 (1966) (holding that statements made during police interrogation were inadmissible due to Fifth Amendment violations); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (holding that the Sixth Amendment’s requirement that a criminal defendant shall enjoy right to assistance of counsel is made obligatory on the states by the Fourteenth Amendment); *Mapp v. Ohio*, 369 U.S. 643, 655 (1961) (holding that evidence obtained by unconstitutional search was inadmissible in state prosecution and vitiated conviction).

2. See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409, 1416–18 (2013) (holding that leading a drug-sniffing dog onto the porch of a private home without consent violated the Fourth Amendment, absent probable cause and a warrant); *Maryland v. Shatzer*, 559 U.S. 98, 110, 117 (2010) (holding that questioning a prisoner three years after his invocation of *Miranda*’s right to counsel did not violate *Miranda* doctrine); *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010) (holding that failing to advise an immigrant that pleading guilty would trigger deportation proceedings was ineffective assistance of counsel).

3. See E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, NCJ 239808, PRISONERS IN 2011, at 1 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (explaining that, in 2010, 500 individuals per every 100,000 members of the general U.S. population were incarcerated, and in 2011, 492 individuals per every 100,000 members of the general U.S. population were incarcerated); Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?>

advanced by the late Professor William J. Stuntz, that a sinister causal relationship inhabits this striking paradox.

Professor Stuntz made many superb contributions to the scholarly literature. For me, and I suspect for many, his greatest contribution was to expose the always complicated, but seemingly always perverse, relationships between the procedural and the substantive sides of criminal law. One can discern two quite distinct views of the relationship in Stuntz's work.

The first characterizes the Supreme Court's acceptance of nearly plenary legislative power to define, and prosecutorial power to charge, substantive offenses as neutralizing the procedural rights recognized by the Court since the 1960s.<sup>4</sup> Call this the futility thesis. As a description of the current system this is not just plausible but, alas, correct—even if it might have turned out otherwise, as Stuntz sometimes suggested. Indeed, I have argued that serious work in the field today must either confront, or openly bracket, the Stuntzian futility thesis.<sup>5</sup>

Professor Stuntz, however, went further, by claiming that court-recognized constitutional procedural rights *caused* punitive substantive

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pagewanted=all&\_r=0 (explaining that the U.S.'s per capita prison-plus-jail population of 751 for every 100,000 leads all nations: "The only other major industrialized nation that even comes close is Russia, with 627 prisoners for every 100,000 people. The others have much lower rates. England's rate is 151; Germany's is 88; and Japan's is 63."). The term "punitive turn" apparently was coined by David Garland:

Harsher sentencing and the increased use of imprisonment; "three strikes" and mandatory minimum sentencing laws, "truth in sentencing" and parole release restrictions; . . . boot camps and supermax prisons; the multiplication of capital offences and executions; community notification laws and paedophile registers; zero tolerance policies . . . . There is now a long list of measures that appear to signify a punitive turn in contemporary penalty.

DAVID GARLAND, *THE CULTURE OF CONTROL* 142 (2001) (footnotes omitted).

4. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) [hereinafter Stuntz, *Plea Bargaining*] ("But for the most part, criminal law and the law of sentencing define prosecutors' options, not litigation outcomes. They are not rules in the shadow of which litigants must bargain. . . . The law-on-the-street—the law that determines who goes to prison and for how long—is chiefly written by prosecutors, not by legislators or judges."). For the application to suppression motions that provide primary enforcement of Fourth Amendment rights and *Miranda* rights, see William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 33 (1997) [hereinafter Stuntz, *Uneasy Relationship*] ("Prosecutors' ability to threaten loss is thus a useful tool for punishing overlitigation by appointed counsel and hence for inducing more cooperative (meaning less litigious) behavior. The plea bargaining literature contains some anecdotal evidence that prosecutors behave in precisely this fashion."). I am in general agreement with the futility thesis. See generally Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883 (2013).

5. Donald A. Dripps, *The Substance-Procedure Relationship in Criminal Law*, in *PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW* 409, 432 (Ra Duff & Stuart P. Green eds., 2011).

responses. Call this the perversity thesis. While the causal mechanisms he identified evolved over time, he clearly and consistently maintained the perversity thesis. For example, in 2006 he wrote that “[o]vercriminalization, overpunishment, discriminatory policing and prosecution, overfunding of prison construction and underfunding of everything else—these familiar political problems are more the consequences of constitutional regulation than justifications for it.”<sup>6</sup>

Unlike the futility thesis, which resonates with academics and courthouse regulars alike, this perversity thesis is arrestingly counter-intuitive. David Sklansky aptly likened its rhetorical form to that of Sam Peltzman’s claim that government-mandated auto-safety devices did more harm than good by causing drivers to take more chances.<sup>7</sup>

Today we think Peltzman was wrong, but we do not think he was wrong solely because his thesis was counterintuitive. Many regulations have caused more harm than good because of counterintuitive consequences.<sup>8</sup> The question of causation is at least in principle an empirical one; the data eventually falsified Peltzman’s prediction. We are only beginning to explore the perversity thesis as an empirical proposition.<sup>9</sup>

The perversity thesis does not merit scrutiny just because it is so arrestingly counterintuitive. This conference is titled “Criminal Law at the Crossroads” for good reason. Popular as well as elite opinion shows some signs of a fresh willingness to reconsider mass incarceration generally, and the war on drugs in particular. The Supreme Court is flirting with constitutional regulation of plea bargaining. The Court’s Eighth Amendment jurisprudence has leaped the capital/noncapital divide.

These omens may come to naught; detente is not perestroika. If, however, we are indeed approaching a window of opportunity for reforming the criminal justice system, we should make the most of the opportunity. If fresh constitutional rulings reinforcing constitutional rights to decent police practices and fair adjudication are more likely to induce a punitive backlash than to secure better police practices and fairer trials, that

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6. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006).

7. David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. F. 56, 56 (2006).

8. See, e.g., CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 274–82 (1997).

9. Sklansky effectively challenges one causal mechanism posited by Stuntz. Sklansky, *supra* note 7. Indeed, Sklansky’s points were sufficiently compelling that Stuntz subsequently abandoned the legislatures-allocate-away-from-regulation theory. The causal relationship might still be present, operating through other mechanisms. See *infra* Part III.

prospect should give us pause.

Indeed, if the perversity thesis is generalizable, the courts should be backing away from regulating the police while undertaking the robust review of plea bargaining and prison sentences. If, however, the perversity thesis is not generalizable, then there is no cruel-to-be-kind reason for the courts to refrain from insisting on decent levels of indigent defense or more compliance by police with Fourth Amendment standards. For courts to make genuine progress, they may well need to undertake constitutional scrutiny of crime definition, prosecutorial discretion, and sentence severity. They should not, however, worry that constitutional regulation of police and trial procedures is likely to stimulate a punitive backlash from prosecutors or legislatures.

Part II sets out Professor Stuntz's perversity thesis, the causal mechanisms he postulated, and the supporting evidence he offered. Part III situates the perversity thesis in the context of the literature on the punitive turn. Mechanistic explanations, by all accounts, fail to explain the magnitude of the increase in imprisonment. So the perversity thesis is by no means implausible. Somehow the public's taste for punishment skyrocketed, and a reaction against the Warren Court decisions might have been part of the "somehow."

Part III expresses some skepticism about the perversity thesis. Roughly twenty years separated the criminal procedure revolution from the punitive turn.<sup>10</sup> Legislatures and prosecutors inclined to react against *Mapp* and *Miranda* had ample opportunity to do so nearer in time to those decisions. Supreme Court decisions were not especially salient when the turn took place, and if they were, they probably were decisions other than *Mapp* and *Miranda*. More important, and better fitting the timeline, are explanations tied to rising crime, deinstitutionalization of the mentally ill, and a moral panic over crack cocaine that pushed the country toward a more punitive approach, not just to drug crime, but to crime in general.

Criminologists are still struggling to explain the punitive turn; increased crime, deinstitutionalization, and harsher penalties for drug crimes do not account for the full magnitude of the punishment boom in the late twentieth century. So, although alternative explanations are more plausible and more powerful than attributing causality to the criminal procedure revolution, they do not exclude the possibility that the Warren

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10. The most prominent legislative expression of the punitive turn was the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (signed into law on October 27, 1986), which followed *Miranda* by just a few months more than twenty years.

Court's decisions lent some additional impetus to the punitive turn. Part IV therefore looks for empirical evidence that might shed light on the perversity thesis.

The Warren Court's criminal procedure revolution had three primary components: the exclusionary rule, the right to counsel, and *Miranda*. The impact of the revolution, however, was not uniform across jurisdictions. About half the states had adopted the exclusionary rule before *Mapp*, and a majority of states provided indigent felony defendants court-appointed counsel before *Gideon*. No jurisdiction anticipated *Miranda* exactly, but some jurisdictions were regulating police interrogation more rigorously than others. It is therefore possible to compare the effects of the Warren Court decisions in jurisdictions where their impact was dramatic—indeed “revolutionary”—with jurisdictions where their impact, although significant, was far smaller.

Part IV compares changes in the incarceration rate relative to crime rate in four natural experiments, juxtaposing otherwise generally comparable jurisdictions that were respectively relatively liberal and more conservative on criminal procedure. If the perversity thesis is sound, we would expect to see a sharper or earlier punitive turn in jurisdictions that were more conservative on procedure, and so more radically transformed by the Warren Court. The evidence from these natural experiments does not bear out that expectation.

Professor Stuntz was the preeminent criminal-procedure scholar of my generation. I never read his work without learning something new and important (“read” in the last sentence is intended as present-sense; I learn from him continuously, including in the preparation of this paper). He was by all accounts (mine included) as good a person as he was a scholar. So in exploring his most famous argument I mean no disrespect. Quite the contrary; in academic discourse, to challenge is to celebrate.

## II. THE THESIS: LIBERAL PROCEDURAL RULINGS ENCOURAGE MORE PUNITIVE SUBSTANCE

Professor Stuntz developed his critique of modern constitutional criminal-procedure law over roughly fifteen years. *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*,<sup>11</sup> published in 1997, argued that the Supreme Court's focus on procedure to the neglect of substance had substantial but hidden negative side-effects.

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11. Stuntz, *Uneasy Relationship*, *supra* note 4.

Constitutional doctrine gave legislatures incentives to broaden substantive liabilities to reduce the prosecution's proof burden and to underfund indigent defense.<sup>12</sup> As the substantive grounds of liability broaden, and the resources to investigate fact-based innocence claims decline, the defense relies ever more heavily on procedure.<sup>13</sup> As the defense concentrates increasingly on procedural claims, prosecutors have an incentive to base charging decisions on factors unrelated to factual guilt.<sup>14</sup>

Constitutional law's bifurcation of criminal justice into two spheres, one procedural and densely regulated by the Supreme Court, the other substantive and left to very nearly plenary legislative and executive discretion, appears a reasonable balance based on institutional competence. But appearance can be deceiving. In one of the most eye-opening paragraphs in the whole literature on criminal procedure in the United States, Stuntz characterized the substance/procedure divide as

less a careful balance than a vicious circle. Countermajoritarian criminal procedure tends to encourage legislatures to pass overbroad criminal statutes and to underfund defense counsel. These actions in turn tend to mask the costs of procedural rules, thereby encouraging courts to make more such rules. That raises legislatures' incentive to overcriminalize and underfund. So the circle goes. This is a necessary consequence of a system with extensive, judicially defined regulation of the criminal process, coupled with extensive legislative authority over everything else.<sup>15</sup>

On this account, liberal procedural rulings initiate an iterative game played by rational actors, and the dynamic tends to generate increasingly punitive substantive law.

*The Pathological Politics of Criminal Law*,<sup>16</sup> published in 2001, amplified the agency-costs account of criminal code drafting. In this account, legislators have political incentives to reduce, or appear to reduce, crime. They have a countervailing incentive not to spend money. These incentives net out in favor of broad criminal laws with harsh penalties,

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12. *Id.* at 55–57.

13. *Id.* at 56 (“Factual litigation probably suffers more—as resource constraints become more severe, procedural litigation’s cost advantage becomes more compelling. The result is likely to be a system where litigation is more concentrated on procedural issues.”).

14. *Id.* at 49 (“The more criminal litigation focuses on procedure, the bigger the incentive for prosecutors to screen cases with procedure in mind. The less criminal litigation focuses on the merits, the smaller the incentive for prosecutors to make sure they are charging only in strong cases—which is to say, the smaller the incentive to charge only guilty defendants.”).

15. *Id.* at 54.

16. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

coupled with a delegation of responsibility to prosecutors to sort the normatively culpable from the far larger pool of the legally guilty. The laws themselves tend to disable political opposition and to foster a law-enforcement interest group supporting more of the same. The logical move for constitutional doctrine would be to regulate the substantive criminal law, but “[n]ever in our history has constitutional law taken so dramatic a step with so little support.”<sup>17</sup>

Five years later, *The Political Constitution of Criminal Justice*<sup>18</sup> revisited *Uneasy Relationship*'s systemic analysis and *Pathological Politics*'s search for plausible reforms. The rational actor model still operates in *Political Constitution*, but some new themes emerged. First, constraints on legislatures are characterized as a tax, and the absence of constraints is characterized as a subsidy.<sup>19</sup> Second, legislatures have an incentive to spend on programs they can control.<sup>20</sup>

The implication is that constitutional regulation of police practice and trial procedures discouraged spending on police and indigent defense, while encouraging spending on prisons (and investigative practices left largely unregulated by the Court, like traffic enforcement and white collar investigations). In these areas, the legislature can attach conditions to expenditures. Given the choice between spending on programs controlled by the courts, and spending on areas where the legislature is free both to condition spending and to regulate directly, legislatures opt for the latter.<sup>21</sup>

The upshot is that the Supreme Court's regulation of police search-and-seizure practices has encouraged mass incarceration. “Overcriminalization, excessive punishment, racially skewed drug enforcement, overfunding of prisons and underfunding of everything else—these familiar political problems are as much the consequences of constitutional regulation as the reasons for it. The medicine is reinforcing the disease.”<sup>22</sup> *Political Constitution* called for “radical” doctrinal change.

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17. *Id.* at 600.

18. Stuntz, *supra* note 6.

19. *Id.* at 782.

20. *Id.* at 783–84 (“Legislators spend where they can also govern. Constitutional law gives them little room to govern policing, more control over adjudication, and nearly unlimited authority to dole out punishment. Budget dollars flow accordingly.”).

21. *Id.* at 810 (“[S]pending follows regulation: the ability to regulate makes spending more politically attractive, just as the ability to spend makes regulation more valuable. State legislators and members of Congress have spent where they could govern. Constitutional law made governing policing hard, governing litigation somewhat easier, and governing punishment very easy indeed. Legislators have spent accordingly.”).

22. *Id.* at 781–82.

The courts should largely, if not entirely, get out of the business of regulating the police,<sup>23</sup> and instead focus on promoting accurate verdicts and proportionate sentences.<sup>24</sup>

*The Collapse of American Criminal Justice* maintains the claim that the Warren Court's criminal procedure revolution exacerbated the punitive turn.<sup>25</sup> The claimed causal mechanism, however, shifts from the game theory account where legislatures and prosecutors turn to substance to circumvent procedure. It shifts also from the resource allocation account in which funds flow to what legislatures can regulate and away from what they cannot.

*Collapse* claims that the Warren Court committed three primary errors. "The first, and perhaps the worst, error Warren's Court made was . . . to tie the law of criminal procedure to the federal Bill of Rights instead of using that body of law to advance some coherent vision of fair and equal criminal justice."<sup>26</sup> Second, the Court "proceduralized criminal litigation, siphoning the time of attorneys and judges away from the question of the defendant's guilt or innocence and toward the process by which the defendant was arrested, tried, and convicted."<sup>27</sup> Third, "the Court chose to ramp up the level of constitutional regulation of state and local criminal justice at a time when crime was rising sharply and criminal punishment was falling substantially . . . . That combination was bound to produce a backlash, both political and legal—and soon did so."<sup>28</sup>

I have long agreed with the first point.<sup>29</sup> Like George Thomas,<sup>30</sup>

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23. *Id.* at 832 ("[T]he best thing to do with the massive body of Fourth Amendment privacy regulation, together with the equally massive body of law on the scope and limits of the exclusionary rule, is to wipe it off the books.").

24. The specific doctrinal proposals include: encouraging funding for indigent defense by a default rule tightening the standard of ineffective assistance in jurisdictions that do not meet an expert-commission-determined lawyer-to-case ratio; imposing a burden on prosecutors to prove that suspects who engaged in conduct comparable to the defendant's were similarly charged; and imposing a burden on the prosecution at sentencing to show that similarly situated defendants received comparable sentences in other cases. *Id.* at 837–38, 840–41.

25. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 242 (2011) ("The Court's decisions probably exacerbated both crime and punishment trends, but the trends themselves had other causes . . . . But if the Justices did not cause the backlash, they made a large contribution to it.").

26. *Id.* at 227–29.

27. *Id.* at 228.

28. *Id.*

29. See DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CRIMINAL PROCEDURE* 183, 187 (2003) (suggesting that a turn to due process and equal protection doctrine could benefit the criminal justice system).

30. See George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the*

however, I criticize the Warren Court's incorporation turn by appealing directly to doctrinal legitimacy and the values at stake in the criminal process. If there had never been a punitive turn, a criminal procedure regime "anchoring the nation's criminal justice system to a set of procedures defined by eighteenth-century English law"<sup>31</sup> while leaving the promise of "an end to discriminatory criminal justice . . . unfulfilled,"<sup>32</sup> would still have made bad policy and bad law.<sup>33</sup>

Of course there was a punitive turn. *Collapse* again attributes some degree of it to the Warren Court decisions in *Mapp*, *Gideon*, and *Miranda*, but now the causal mechanism is different from those supposed in *Uneasy Relationship* or *Political Constitution*. The Court's intervention helped to nationalize the politics of crime, and the content of its intervention gave political cover to the proponents of "tough-on-crime" rhetoric. When liberals like Jimmy Carter and Bill Clinton actually implemented harsh sentencing laws, the Republican bluff was called, and they too had to sign on to ever harsher proposals. "What began as a political bluff became a bidding war."<sup>34</sup>

So we have a single causal hypothesis: Liberal procedural rulings by courts encourage punitive substantive responses by legislatures and prosecutors. Different causal mechanisms, however, are suggested in different works. The next part considers these suggested mechanisms in light of other explanations the literature offers for the punitive turn.

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*Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 170 (2005) (criticizing doctrines that allow innocence to go ignored).

31. STUNTZ, *supra* note 25, at 227.

32. *Id.* at 215.

33. For challenges to the descriptive claim that suppression motions siphoned resources away from guilt-innocence claims, see Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1442 (2012) (reviewing STUNTZ, *supra* note 25, and asking "[b]y what metric has a rights focus led to an underinvestment in the defense counsel resources that would have helped the factually innocent win acquittals?"), and Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1075–76 (2013) (reviewing STUNTZ, *supra* note 25, and stating that, "[i]n sum, the charge that Warren-era reforms tilted criminal justice efforts away from determinations of factual guilt is unconvincing. Both economic logic and the facts on the ground largely point in the opposite direction."). For a normative challenge, see DRIPPS, *supra* note 29, at 142–43 ("The methods of police investigation, such as search, arrest and interrogation, frequently 'deprive' individuals of their 'liberty,' deprivations that can be justified by the state's interest in enforcing the criminal law only to the extent that these deprivations have some prospect of resulting in a just conviction."). Regulating "the process by which the defendant was arrested" protects the innocent, albeit in future cases with unknown innocent suspects.

34. STUNTZ, *supra* note 25, at 239.

## III. EXPLAINING THE PUNITIVE TURN

## A. THE INADEQUACY OF MECHANISTIC THEORIES

The prison population is a function of additions by way of new commitments, and subtractions by way of release and mortality. The rate of new prison commitments summing both federal and state prisons stood at 46.1 per hundred thousand population in 1950, 49.3 in 1960, 39.1 in 1970, 62.4 in 1980, and 74.0 in 1983.<sup>35</sup> I have not found statistics for the years between 1983 and 2000; in 2000, federal and state prisons received 625,219 new inmates,<sup>36</sup> a rate of 222 per hundred thousand population. In 1960, the average time served by released prisoners was twenty-eight months.<sup>37</sup> In 1996 the average served by released prisoners was thirty months,<sup>38</sup> but the comparison is deceptive. Indeed the average time served by released prisoners was falling, but more and more prisoners were not being released, as jurisdictions abolished parole and adopted sentencing guidelines, truth-in-sentencing laws, and mandatory minimum sentencing policies.<sup>39</sup> Between 1990 and 1997, new commitments to state prisons rose 17 percent, while the state prison population rose 57 percent.<sup>40</sup>

Many theories attempt to explain the causes of the punitive turn.<sup>41</sup> We can divide these explanations into two broad categories. In the first category are causes that might have increased the public's demand for incarceration without changing the aggregated taste for incarceration. Call these "mechanistic causes." These include: (1) rising crime rates,<sup>42</sup> (2) economic and demographic changes, controlling for crime,<sup>43</sup> (3) deinstitutionalization,<sup>44</sup> (4) increasing wealth,<sup>45</sup> and (5) undesired

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35. MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, NCJ 102529, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES 1850-1984, at 36 tbl.3-8 (1986).

36. SUNY AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.0009.2010, <http://www.albany.edu/sourcebook/pdf/t600092010.pdf> (last visited Feb. 12, 2014).

37. CAHALAN, *supra* note 35, at 52 tbl.3-23.

38. PAULA M. DITTON & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 1 (1999), available at <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.

39. *Id.* at 12.

40. *Id.*

41. The literature is very helpfully reviewed in John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547 (2008).

42. *See id.* at 592-94 (discussing the correlation between rising crime rates and incarceration rates).

43. *Id.* at 594-98.

44. *See* Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1779-80 (2006) (discussing studies estimating the number of deinstitutionalized inmates in prison). *See generally* E. FULLER TORREY ET AL., CRIMINALIZING THE

increases in supply, as by prison overcrowding litigation.<sup>46</sup>

We can identify another category of possible causes said to change the public's desire for incarceration relative to other goods, that is increasing the satisfaction derived from each unit of incarceration. These suggested causes include (6) the transformation of the field of social control from the "welfare-penal state" to the "culture of control" in late modernity,<sup>47</sup> (7) repressed but not suppressed racial animosity,<sup>48</sup> and (8) a moral panic about crack cocaine.<sup>49</sup>

Research thus far indicates that the mechanistic causes by themselves fail to explain the magnitude of the punitive turn. For example, controlling for the tendency of crime to self-limit by causing incarceration, Yair Listokin found an elasticity of prisoners to crime rates of very nearly one.<sup>50</sup> He concludes, however, that from 1970 to 1997, increased crime should have increased incarceration by 80 percent, when in fact incarceration rose "almost fivefold."<sup>51</sup> As for deinstitutionalization, the best estimate is that, as of 1996, 48,000–148,000 state prisoners (4.5 percent to 14 percent of the 1996 prison population) had been released from mental hospitals in the

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SERIOUSLY MENTALLY ILL (1992) (reviewing study of the mentally ill in jails).

45. See Pfaff, *supra* note 41, at 565 (stating that wealthier states are in better positions to expand and maintain prison capacities).

46. *Id.* at 564–65.

47. See GARLAND, *supra* note 3, at 75–102 ("The crime control changes of the last twenty years were driven not just by criminological considerations but also by historical forces that transformed social and economic life in the second half of the twentieth century.").

48. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010) ("Rather than rely on race, we use our criminal justice system to label people of color 'criminals' and then engage in all the practices we supposedly left behind."); *id.* at 211 ("Few Americans today recognize mass incarceration for what it is: a new caste system thinly veiled by the cloak of colorblindness."); MICHAEL H. 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."); Naomi Murakawa & Katherine Beckett, *The Penology of Racial Innocence: The Erasure of Racism in the Study and Practice of Punishment*, 44 *LAW & SOC'Y REV.* 695, 697 (2010) (arguing that, "[i]n short, the penology of racial innocence begins with presumptions of race-neutrality and adopts narrow definitions of racism, as well as data and methods often ill-suited to its analysis, even as the policies and practices of criminal justice expand in ever-more race-laden ways.").

49. See MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 60–61 (discussing how mass media coverage of, for example, the crimes of Willie Horton and the overdose death of Len Bias "produced moral panics" that produced calls for "unprecedentedly repressive policies," and how "American governmental institutions and political culture provided many fewer buffers to the force of that emotionalism than do the governmental institutions and political culture of other countries").

50. Yair Listokin, *Does More Crime Mean More Prisoners? An Instrumental Variables Approach*, 46 *J.L. & Econ.* 181, 181 (2003).

51. *Id.* at 185.

years since 1970.<sup>52</sup> In 1970 the states incarcerated 177,737 prisoners;<sup>53</sup> in 1996 the number was 1,076,625.<sup>54</sup> Even reduced 14 percent, the number would have been 925,898—more than five times the 1970 number. Moreover, because a criminal conviction is necessary for a prison commitment, viewing deinstitutionalization and increased crime as independent causes is to at least a substantial degree double-counting.

None of the other mechanistic explanations appear to have either the statistical likelihood, or anywhere near the same scale of effect, as rising crime rates and deinstitutionalization.<sup>55</sup> Drug sentences became more common and harsher in the 1980s, but even “if every prisoner in 1998 whose primary offense was a drug charge were released, the total population would have been approximately 1 million instead of 1.3 million: that is still more than triple the population in 1977.”<sup>56</sup>

So if we want to explain the punitive turn, we need to look for causes of a greater taste for punishment that apply generally across the range of offenses. Garland’s culture-of-control explanation (my number (6) above) is challenged by American exceptionalism. Modernity can be found in such places as Canada and Germany, which are dramatically less punitive than the United States. Even the United Kingdom has travelled the American path much more slowly.<sup>57</sup>

American distinctiveness is quite consonant with focusing on race and morality. They are factors that have played important roles in American history (the tolerance of lynching and the prohibition of liquor, to name just two examples). Perhaps a backlash against the Warren Court augmented these familiar forces to encourage the punitive turn.

#### B. CAUSAL MECHANISMS FOR THE PERVERSITY THESIS: GROUNDS FOR SKEPTICISM

The available causal theories leave room for factors such as the criminal procedure revolution to have played a role in the punitive turn.

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52. Harcourt, *supra* note 44, at 1780 (relying on Stephen Raphael, *The Deinstitutionalization of the Mentally Ill and Growth in the U.S. Prison Populations: 1971–1996*, at 8–12 (Sept. 2000) (unpublished manuscript), available at <http://ist-socrates.berkeley.edu/~raphael/raphael2000.pdf>).

53. CAHALAN, *supra* note 35, at 29 tbl.3-2.

54. CHRISTOPHER J. MUMOLA & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, NCJ 164619, PRISONERS IN 1996, at 1 (1997), available at <http://bjs.gov/content/pub/pdf/p96.pdf>.

55. See Pfaff, *supra* note 41, at 564–65, 594–603 (discussing mechanistic explanations and the empirical literature).

56. *Id.* at 559.

57. See Liptak, *supra* note 3 (comparing the U.S. per capita prison-plus-jail population of 751 to the U.K.’s 151 and Germany’s 88).

Stuntz over time suggested at least three causal mechanisms: rational actor substitution of substantive liability for procedural safeguards; legislative reluctance to fund judicially regulated policing; and contribution to the tough-on-crime “backlash.”

Given the considerable evidence suggesting that increases in crime cause increases in incarceration, one might suppose that the criminal procedure revolution might have increased incarceration by increasing crime. The evidence, however, strongly suggests the effect of the Supreme Court’s decisions had, if any, a *de minimis* effect on law enforcement.<sup>58</sup> Nor would it be unreasonable to suppose that insisting that the police follow the rules might encourage law-abiding behavior by reinforcing the legitimacy of the system.<sup>59</sup>

We can, as Stuntz himself did, leave behind the regulation-discourages-funding explanation. During the 1970–2000 period, the federal judiciary regulated state prisons, via institutional reform litigation, far more closely than it regulated municipal police departments via the exclusionary rule.<sup>60</sup> The Supreme Court tolerated pervasive lower court involvement in prison administration, even as it aborted institutional reform litigation against the police. And while the Rodney King Law passed in 1994, the Justice Department at least initially did little with it.<sup>61</sup> So if regulation

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58. See, e.g., George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: “Embedded” in Our National Culture?*, 29 CRIME & JUSTICE 203, 232–45 (2002) (reviewing studies); Craig D. Uchida & Timothy S. Bynum, *Search Warrants, Motions to Suppress and “Lost Cases:” The Effects of the Exclusionary Rule in Seven Jurisdictions*, 81 J. CRIM. L. & CRIMINOLOGY 1034, 1041–49 (1991) (reviewing studies on the effect of the exclusionary rule); *id.* at 1064 (discussing the instant study of 1748 search warrants in seven cities, in which judges granted motions for only 2 percent of defendants, and only twenty-one of 1355 defendants (1.5 percent) escaped all liability as a result).

59. See Carol S. Steiker, *Brandeis in Olmstead: “Our Government Is the Potent, the Omnipresent, Teacher,”* 79 MISS. L.J. 149, 175–76 (2009) (“Brandeis’s folk wisdom about the dangers that might follow from the official condoning of government law breaking has found strong vindication in the work of contemporary psychologists and offers insights to contemporary legal scholars and policy makers that have tremendous significance for the difficult policy choices that our criminal justice institutions currently face.”).

60. See generally MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998) (discussing federal judicial rulings affecting U.S. prisons and jails from 1965–1990). Deborah Decker noted that, “[a]s of August 1996, consent decrees and subsequent court orders were operating in the prisons of at least thirty-four states and the District of Columbia.” Deborah Decker, Comment, *Consent Decrees and the Prison Litigation Reform Act of 1995: Usurping Judicial Power or Quelling Judicial Micro-Management?*, 1997 WIS. L. REV. 1275, 1285. Margo Schlanger found that, as of 1995, fifteen states were operating under a court order applicable to the state’s entire system rather than a particular site. Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 557, 577 (2006).

61. As of 2008, DOJ had entered into six consent decrees, the earliest of these with the Pittsburgh Police Department in 1997. See Kami Chavis Simmons, *The Politics of Policing: Ensuring*

really drives out dollars, we should have seen state legislatures defunding prisons and investing in police rather than the reverse.

Stuntz seems to have abandoned the regulation/funding story. In *Collapse*, he claims that the Court's waiver jurisprudence actually gave the police more freedom to search and interrogate than they enjoyed before *Mapp* and *Miranda*.<sup>62</sup> That is seemingly at odds with the regulation-and-funding story told in *Political Constitution*. His enthusiasm for institutional reform litigation against the police<sup>63</sup> likewise suggests a lack of confidence in this causal mechanism.

The original rational-actor logic of *Uneasy Relationship* remains compelling but partial. We have certainly seen that prosecutors can and do circumvent procedural safeguards by making coercive plea offers. We have also seen legislatures steadily increase both the scope and the severity of the substantive law, little if at all restrained by the Court's Eighth Amendment jurisprudence.

Before 1960, prison commitments were determined primarily by state court prosecutors and judges, who exercised considerable sentencing discretion. A rational-actor model predicts that these state-level judicial and executive players in the game would restore the equilibrium that prevailed before the Warren Court's move. Incarceration, however, did not return to 1960 levels. In fact it fell slightly as of 1970, began to grow in the 1970s, and exploded in the 1980s.

So it is understandable that *Collapse* characterized the causal mechanism in terms of the Warren Court changing the public's appetite for punishment. This story is consistent with the racial subordination and moral panic accounts. Hostility to liberal court decisions could have contributed to the political forces behind mass incarceration. It is not difficult to imagine that some, perhaps many, of those turning "tough on crime" in response to the menace of crack, or comfortable with the emergence of a colorblind system of racial subordination, were also hostile to "handcuffing the cops."

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*Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 509–11 (2008) (discussing DOJ's enforcement of the Rodney King Law through consent decrees and negotiated agreements).

62. See STUNTZ, *supra* note 25, at 235–36 ("Fourth Amendment searches, police station confessions, and criminal convictions alike are probably cheaper now, from the government's point of view, than before Warren and his colleagues crafted their procedural code.").

63. See, e.g., *id.* at 220–21 (arguing for institutional injunctions and against the exclusionary rule).

The backlash story, however, has a serious timing problem.<sup>64</sup> The criminal procedure revolution began with *Mapp* in 1961, reached high-water with *Escobedo*<sup>65</sup> in 1964, and was all but finished by *Miranda* in 1966 or at latest *Berger* and *Katz* in 1967. Mass incarceration didn't really take off until the mid-1980s—a whole generation after *Mapp* and *Miranda*.

Congress did respond to the criminal procedure revolution. The Omnibus Crime Control and Safe Streets Act of 1968<sup>66</sup> provided revenue to the states, repudiated *McNabb*<sup>67</sup> and *Mallory*,<sup>68</sup> purported to undo *Miranda* in federal cases, and authorized wiretapping in a form the drafters hoped would survive judicial scrutiny. Two things about the legislation stand out.

First, it is entirely procedural. Rather than enact broader statutes or harsher penalties, Congress met procedural fire with fire. The provision purporting to strike *Miranda* was hortatory, but the prompt-presentment provision and wiretapping provisions indeed changed the law. But only the procedural law. The next major piece of substantive federal criminal law was the Drug Abuse Prevention and Control Act of 1970, which abolished minimum sentences for drug offenses and classified marijuana distinctly from hard drugs.<sup>69</sup> That seems the opposite of what the backlash story predicts.

Second, Congress responded within two years of *Miranda*. The fires of backlash burn hot and fast.<sup>70</sup> State prosecutors and judges did not need

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64. See Schulhofer, *supra* note 33, at 1076 (noting that “the volume of crime soared” in the mid-1970s, but the “development that is crucial for the Stuntz thesis—the ramping up of punishment severity per case—did not begin in earnest until ten to twenty years later. If this was a compensatory response to the due process reforms of the Warren era, it was surprisingly slow to materialize.” (footnote omitted)).

65. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

66. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 701, 801, 82 Stat. 197, 210–12 (codified as amended at 18 U.S.C. §§ 2510–2520 (2012)).

67. *McNabb v. United States*, 318 U.S. 332 (1943).

68. *Mallory v. United States*, 345 U.S. 449 (1957).

69. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242.

70. See Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. F. 518, 538–39 (1975) (“But surely the most fundamental reasons for the Court’s loss of impetus lies in the social and political context of the Court in the late 1960’s. That period was a time of social upheaval, violence in ghettos, and disorder on campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were represented simply as a war between the ‘peace forces’ and the ‘criminal forces.’ The decision in *Miranda* evoked a chorus of criticism of the Court, ranging from the excited to the psychotic. Congress responded with the Omnibus Crime Control and Safe Streets Act of 1968, some provisions of which were obviously retaliatory.” (footnotes omitted)).

new legal tools to put more people in prison. Every state had a recidivism-enhancement statute.<sup>71</sup> Yet incarceration rates continued to fall into the mid-1970s (which in turn means that the prison capacity was there to use, if prosecutors and judges had been moved to use it by the Warren Court).<sup>72</sup>

By the early 1980s the Court had retreated from the criminal procedure revolution.<sup>73</sup> State judges, police officers, and popular opinion generally had come to accept *Miranda*.<sup>74</sup> Moreover, the Court had goaded potential backslashers with fresh provocations: affirmative action,<sup>75</sup> abortion,<sup>76</sup> and capital punishment.<sup>77</sup> A voter moved to favor tough-on-crime policies in the 1980s would have been more likely to transfer racial resentment from *Bakke* or from *Swann*<sup>78</sup> and the bussing that followed. A voter with an emotional need for vengeance would have been more likely to lash back at *Furman* than at the honored remnants of *Mapp* and *Miranda*.

The potential for backlash against other Supreme Court decisions suggests one final skeptical note about the account in *Collapse*. *Collapse* argues that the Court should have developed more robust constitutional

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71. See *Spencer v. Texas*, 385 U.S. 554, 559 (1967) (“Such statutes and other enhanced-sentence laws, and procedures designed to implement their underlying policies, have been enacted in all the States, and by the Federal Government as well.” (footnote omitted)).

72. The incarceration rate per 100,000 population, counting both state and federal prisoners, reached a nadir of 93 in 1972 and then rose steadily thereafter. SUNY AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl.6.28.2009, <http://www.albany.edu/sourcebook/pdf/t6282009.pdf> (last visited Feb. 12, 2014).

73. See Schulhofer, *supra* note 33 at 1077 (“[B]y the mid-1980’s, due process rights stood far below their Warren Court high-water mark. Legislatures enacted harsher sentencing policies at a time when decisions like *Mapp*, *Miranda*, and other procedural landmarks had been largely or entirely defanged.”).

74. See LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 403–04 (1983) (“*Miranda* had come to the station house. Reading a suspect his constitutional rights was as familiar a procedure to a police officer as strapping on his gun. Settled policy. Particularly among younger officers, who, like the state court judges who had come to the bench with *Gideon*, *Escobedo*, and *Miranda* already in place, had grown up with them professionally, they were accepted, if not always with enthusiasm, at least with compliance. . . . The word *Miranda* had become a staple of the law enforcement community’s vocabulary, and prosecutors and judges alike referred to the station house ritual of giving *Miranda* warnings as ‘mirandizing.’ The Hill Street blues read them over national television, and in a nationally syndicated comic strip, Peppermint Patty, on her first assignment as a school safety patrol, read them to a kindergartner who had crossed the street improperly. *Miranda* had become part of the popular culture.”).

75. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (upholding racial preferences in university admissions).

76. See *Roe v. Wade*, 410 U.S. 113 (1973) (holding a prohibition on previability abortions unconstitutional).

77. See *Furman v. Georgia*, 408 U.S. 238 (1972) (holding that unconstrained jury discretion to choose death or life imprisonment for convicted murderers violates the Eighth Amendment).

78. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

protections for substantive liberty and racial equality in the criminal process. I can easily believe that if the Court had ruled against the state in *Swain v. Alabama*,<sup>79</sup> *McGautha v. California*,<sup>80</sup> and *Doe v. Commonwealth's Attorney for Richmond*,<sup>81</sup> constitutional law would have been better. We would have had *Furman*, *Batson*,<sup>82</sup> and *Lawrence*<sup>83</sup> much earlier than these latter landmarks in fact came down. I have more trouble believing that there would have been no backlash against making these moves in the 1960s or early 1970s.

### C. COMPETING STORYLINES

There is at least one state-level narrative that at least superficially fits the backlash theory. *Mapp* had a major effect on drug enforcement in New York. While before *Mapp* warrants were “rarely used” in New York, by the end of 1965 the New York Police Department (“NYPD”) had obtained more than 17,000.<sup>84</sup> Warrants are costly to the police; the time spent preparing affidavits could be time spent kicking in doors.<sup>85</sup> New York police notably resorted to “dropsy” testimony on a substantial scale after *Mapp*.<sup>86</sup> Misdemeanor arrests by the city’s drug squad fell by 50 percent, although that number may reflect a shift to felony cases.<sup>87</sup>

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79. *Swain v. Alabama*, 380 U.S. 202, 208–09, 224–28 (1965) (rejecting equal protection challenge to “struck jury” system that had the effect of purging all blacks from jury panels, absent direct proof of discriminatory motive).

80. *McGautha v. California*, 402 U.S. 183, 185–86 (1971) (rejecting due process challenge to unconstrained jury discretion in capital sentencing).

81. *Doe v. Commonwealth's Attorney for Richmond*, 425 U.S. 901 (1976) (affirming without opinion District Court’s rejection of constitutional challenge to Virginia’s sodomy statute).

82. *Batson v. Kentucky*, 476 U.S. 79, 93–98 (1986) (adopting a burden-shifting approach to equal protection challenges to prosecutorial use of peremptory challenges).

83. *Lawrence v. Texas*, 539 U.S. 558, 575–78 (2003) (holding a statute prohibiting same-sex sodomy unconstitutional).

84. See Michael Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941–42 (1966) (stating that prior to *Mapp*, search warrants “had been rarely used,” but as of December 1965, fewer than four years after *Mapp*, 17,889 had been obtained).

85. See, e.g., William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1275 (1999) (“Warrants are costly to the police: they require both paperwork and hours hanging around a courthouse waiting to see the magistrate. Gathering evidence from informants and witnesses about whose basement contains cocaine is likewise costly. Both the warrant and probable cause requirements, then, make house searches considerably more expensive for police than those searches would be absent those requirements.” (footnote omitted)).

86. See *People v. McMurty*, 314 N.Y.S.2d 194, 196–97 (N.Y. Crim. Ct. 1970) (discussing the rise of “dropsy testimony” (testimony stating that suspects dropped narcotics to the ground) after *Mapp*).

87. See Comment, *Effect of Mapp v. Ohio on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 92 tbl.I (1968) (examining the effect of *Mapp* on arrests).

*Mapp* had a major impact in New York, and the exclusionary rule's costs are both most pronounced, and perceived as such, in drug cases. Twelve years after *Mapp*, New York adopted the Rockefeller Drug Laws, providing severe mandatory minimums for drug distribution.<sup>88</sup> Here, we have a substantive turn that follows the procedural change on a plausible timeline.

On the other hand, the Rockefeller laws were eccentric, the "toughest in the nation."<sup>89</sup> If there was a backlash confined to New York in the early 1970s, the perversity thesis would be refuted, not confirmed. And it is hard to believe that absent the exclusionary rule, New York would have suppressed the trade in heroin and cocaine. If lawless search powers really drove prices up, police corruption in all probability would have driven them back down.<sup>90</sup>

If experience in New York was superficially consistent with a backlash story, experience in California clearly was not. In 1954, California adopted harsh mandatory minimum sentences for marijuana distribution.<sup>91</sup> The following year, the California Supreme Court, reversing prior cases, adopted the exclusionary rule.<sup>92</sup> The California Supreme Court actually went further than the Warren Court. For example, in 1971, three years after Title II of the federal Omnibus Crime Control Act was enacted, the

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88. See Edward J. Maggio, *New York's Rockefeller Drug Laws, Then and Now*, N.Y. ST. B. ASS'N J., Sept. 2006, at 30, 30 (explaining how, in 1973, New York's legislature approved Governor Rockefeller's proposed "mandatory incarceration periods for those convicted of the unlawful possession and sale of controlled substances based on the measured weight of the drug involved in the case. Generally, a judge was required to impose a sentence of 15 years to life for anyone convicted of selling two ounces, or possessing four ounces, of narcotic drug (typically cocaine or heroin). These laws became known as the Rockefeller Drug Laws." (footnotes omitted)).

89. See, e.g., Symposium, *Notes from the Field: Challenges of Indigent Criminal Defense*, 12 N.Y. CITY L. REV. 203, 227 n.75 (2008) ("Signed into New York State Penal Law in 1973, the Rockefeller Drug Laws stand as the toughest drug sentencing laws in the United States.").

90. See, e.g., Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73, 76 (1995) (reporting the findings of the Mollen Commission's investigation of corruption in the NYPD, specifically that "[t]he Commission found evidence of police officers profiting from the drug trade in a variety of ways, including: (1) selling confidential police information, escorting the transportation of drugs and drug money and using police powers to harass rival drug dealers; (2) stealing drugs, money and handguns from street dealers; (3) robbing drug dealers and their customers; (4) burglarizing drug dens and stash houses; and (5) selling stolen drugs and guns to other officers or to drug dealers." (footnotes omitted)).

91. See *A Fiscal Analysis of Marijuana Decriminalization, Chapter 1. Reasons for Escalating Enforcement Costs: California Drug and Marijuana Arrests, 1960-67*, SCHAFFER LIBR. DRUG POL'Y, <http://www.druglibrary.org/schaffer/hemp/moscone/chap1.htm> (last visited Feb. 12, 2014) ("In 1953-54 minimum mandatory sentences were established for cannabis crimes, with 'escalator clauses' punishing repeat offenders more severely. Most marijuana offenses were felonies with minimums of one to ten years in prison for possession, or five to life for sale.").

92. *People v. Cahan*, 282 P.2d 905, 911-12 (Cal. 1955).

California Supreme Court reaffirmed third-party standing to invoke the state exclusionary rule just two years after the U.S. Supreme Court had reaffirmed the individual standing limitation in federal cases.<sup>93</sup>

In 1975, the California legislature, with the state high court's procedural liberalism at its height, adopted the Moscone Act reducing possession of marijuana to a citation-only misdemeanor with a maximum \$100 fine.<sup>94</sup> Seven years later, the state's voters approved Proposition 8, which abolished independent state constitutional doctrine regarding criminal procedure.<sup>95</sup> There was a backlash; but at the state level, it operated against procedure in procedural terms.

In 1994—twelve years after Proposition 8 aligned California criminal procedure with the floor set by the Burger and Rehnquist Courts—the legislature proposed, and the voters approved, the so-called three strikes law.<sup>96</sup> So the sequence in California is hard to square with the perversity thesis. In 1955, liberal procedure followed punitive substance; in 1975, liberal substance followed liberal procedure; in 1994, punitive substance followed conservative procedure.

I believe my speculation that the criminal procedure revolution had nothing to do with the punitive turn is more plausible than Stuntz's contrary speculation. I also believe that the New York record gives scant support to the perversity thesis, while the federal and California records weigh strongly against it. That said, when faced with conflicting

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93. *Compare* Kaplan v. Superior Court, 491 P.2d 1, 8 (Cal. 1971) (en banc) (upholding vicarious exclusionary rule), *with* Alderman v. United States, 394 U.S. 165, 174 (1969) (rejecting vicarious exclusionary rule).

94. *See A Fiscal Analysis of Marijuana Decriminalization, Chapter III. Legislative Changes in California Marijuana Laws in 1970s*, SCHAFFER LIBR. DRUG POL'Y, <http://www.druglibrary.org/schaffer/hemp/moscone/chap3.htm> (last visited Feb. 12, 2014) ("Senator Moscone introduced Senate Bill 95 which was heard and enacted by the Legislature in 1975. This bill was signed into law on July 9, 1975 by Governor Edmund G. Brown, Jr., making California the fifth state (out of an eventual total of eleven) to end the arrest and jailing of persons charged with possession of small amounts of marijuana for personal use.").

95. On Proposition 8, see JOSH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE 115 (1989) ("The upshot seemed to be that after Proposition 8 evidence could not be excluded in a criminal trial on the ground that it had been obtained illegally unless its exclusion was mandated by the federal Constitution . . . but our opinion stood for a broader principle: after Proposition 8 the state constitutional provisions on privacy, or unreasonable searches and seizures, could no longer be the basis for excluding evidence."), and Candace McCoy, *Crime as a Boogeyman: Why Californians Changed Their Constitution to Include a "Victims' Bill of Rights" (and What It Really Did)*, in CONSTITUTIONAL POLITICS IN THE STATES 128–46 (G. Alan Tarr ed., 1996) (exploring why California changed its constitution to include a "victims' bill of rights" and the impact of that change).

96. *See* JENNIFER E. WALSH, THREE STRIKES LAWS 55–56 (2007) (discussing the adoption of the three strikes law).

speculations and anecdotes, we would do well to look for clearer evidence.

We cannot create a parallel universe identical to the one we knew in 1961, edit out the criminal procedure revolution, and compare the results with our present situation. Nonetheless, there is at least one source of potentially informative evidence.

#### IV. SOME EMPIRICAL EVIDENCE

The criminal procedure revolution had different consequences in different jurisdictions. The revolution had three core components: *Gideon*, *Mapp*, and *Miranda*. A majority of the states required the appointment of counsel for indigent felony defendants. This group in turn was divided into those that made the appointment before hearing the plea and those that permitted a pro se felony defendant to waive counsel in the course of pleading guilty. About half the states had the search-and-seizure exclusionary rule. No jurisdiction tracked *Miranda* precisely, but there were variations in interrogation law.

In theory, these differences set up natural experiments. We can compare jurisdictions where the impact of the Warren Court decisions was at its maximum with jurisdictions where the impact caused significantly less of a shock. A jurisdiction that had anticipated *Gideon* and *Mapp* would have experienced a far lesser shock, and presumably be less fertile soil for punitive backlash, than a jurisdiction that did not. If the Warren Court influenced the punitive turn, we would expect to see these latter jurisdictions, where top-down reform was most radical, to become more punitive more quickly than the former jurisdictions.

Consider the various causal mechanisms thought to support the perversity thesis. In a rational actor model, the Warren Court cases gave legislatures and prosecutors in liberal jurisdictions only modest incentives to nullify the new federal constitutional law by ratcheting up maximum sentences and trial penalties, because the new federal law meant only that the liberal states could not henceforth depart from their own chosen policies. If the mechanism was legislative disinclination to fund what the courts regulate, in the liberal states the judges were already regulating police and the defense function.

If the mechanism was an emotional backlash on the part of median voters moved by suppressed racism, that response should have been most pronounced in those jurisdictions where the Warren Court rulings actually changed the law on the ground. Here, the perception that the police had been handcuffed so that the guilty were escaping, and the affront to local

autonomy posed by top-down regulation, would be greatest. Boston did not protest *Brown v. Topeka Board of Education*.<sup>97</sup> Boston went ballistic in 1974 when Judge Garrity ordered desegregation-by-bussing in Boston.<sup>98</sup>

If backlash would have been greater in jurisdictions where the Warren Court forced more change in practice, we can examine natural experiments set up by differences in criminal procedure law among otherwise generally comparable jurisdictions. To do this, we need to code jurisdictions as either liberal or conservative in their pre-Warren Court criminal procedure doctrine and identify a measure of how punitive a given jurisdiction is at any given point in time.

Let us start by selecting a measure of our dependent variable, comparative punitiveness. Punitiveness can be thought of as the taste for punishment given some unit of crime or perceived crime. National and state-level per capita incarceration rate data are available at ten year intervals from 1950 to 1980, and then annually from 1984 on. The usual proxy for the crime rate is the homicide rate, because homicide is almost always reported and is a gauge of violent crime more generally. One can calculate a “Punitiveness Index” (“PI”) by dividing the prison population per hundred thousand by the homicide rate per hundred thousand.

Table I shows the pattern of the national data (by per capita prison population, state and federal, divided by homicide rate, to yield the “Punitiveness Index” in parentheses) from 1960 to 2000.<sup>99</sup>

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97. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

98. See Jeff Jacoby, *Garrity’s Folly—25 Years After Busing Began*, BOS. GLOBE, Jan. 4, 1999, at A15 (explaining how the bussing order “triggered the most violent and notorious antibusing backlash in the nation”).

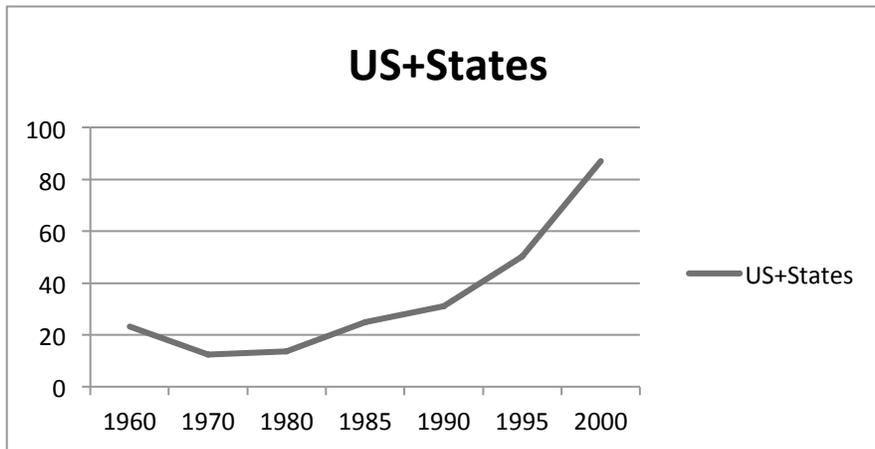
99. The incarceration data is from CAHALAN, *supra* note 35, at 32 tbl.3-4, and SUNY AT ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 501 tbl.6.29, <http://www.albany.edu/sourcebook/pdf/section6.pdf> (last visited Feb. 12, 2014). Homicide data is from *State-by-State and National Crime Estimates by Year(s)*, FED. BUREAU INVESTIGATION, <http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm> (select “United States-Total” in box a.; “Violent crime rates” in box b.; and the years 1960 to 2000 in box c.; then click “Get Table”) (last visited Feb. 12, 2014).

TABLE I.

<i>Year</i>	<i>Per Capita Prison Population (state and federal) divided by homicide rate</i>	<i>The "Punitiveness Index"</i>
1960	119/5.1	(23.3)
1970	97/7.9	(12.28)
1980	139/10.2	(13.6)
1985	200/8.0	(25)
1990	292/9.4	(31.1)
1995	411/8.2	(50.1)
2000	478/5.5	(86.9)

Chart I gives a visual impression of how the national numbers changed. There was a sharp decline during the 1960s, a gradual increase from 1970 through 1990, and a somewhat faster rise from 1990 to 2000, as prison populations continued to grow, while the homicide rate fell by almost half.

CHART I.



If the perversity thesis is true, we would expect to see punitiveness go up either earlier or more rapidly in jurisdictions that were furthest away from the federal model of criminal procedure in the early 1960s. In jurisdictions where state law did not provide either the exclusionary rule or

a robust right to counsel, the criminal procedure revolution had its most dramatic practical impact. In these jurisdictions, resentment at Supreme Court interference in local affairs would provide the greatest impetus for backlash and the greatest shield for veiled expression of racial prejudice.

The ubiquitous endogeneity problems in this area are addressed in two ways. First, since the conventional view is that the exclusionary rule and *Miranda* have de minimis effects on crime rates, we can treat the homicide rate as independent of changes in doctrine. Second, focusing on the change in punishment imposed per unit of crime within jurisdictions is not liable to a self-selection problem. We can expect that jurisdictions that were liberal on procedure tended to be less punitive as well. The hypothesis we are testing, however, is that liberal changes in procedure cause punitive changes in substance. It follows that the jurisdictions that were least liberal on procedure before the revolution should have experienced the maximum shock and accordingly experienced the sharpest increases in punitiveness. We measure each jurisdiction's punitiveness relative to a baseline set by itself before the revolution.

States with exclusionary rules and robust rights to counsel might have initiated their own state-level punitive backlashes, but there is good reason to discount this possibility. It is true that state supreme courts can trigger reactions just as the Supreme Court can. In the context of criminal procedure, however, there was no need for prosecution forces to respond substantively to procedural changes. At the state level, those could be reversed directly by either statute or constitutional amendment. Before the Warren Court, the Michigan voters by referendum created exceptions to the state exclusionary rule for concealed weapons<sup>100</sup> and for narcotics.<sup>101</sup> After the Warren Court, California voters abolished the state exclusionary rule altogether.<sup>102</sup>

At any given point in time, the prison population is a function of both policy choices made some years before to commit more offenders for longer sentences, and current policy decisions not to reduce prison populations through early releases. So the current homicide rate is a plausible measure of the crime rate driving the incarceration rate, but it is also plausible to look at the crime rate some years before. Average time served by those released has held steady at two to three years. Homicide

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100. See *People v. Gonzales*, 97 N.W.2d 16, 24 (Mich. 1959) (rejecting a federal constitutional challenge to a state constitutional amendment creating an exception for concealed weapons).

101. *Id.* at 22 n.\* (noting an amendment creating an exception for "any narcotic or drugs").

102. See *supra* note 95 and accompanying text.

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numbers can also be volatile; a spike or dip in the reference year may distort the results. So, to calculate the Punitiveness Index, I have used the mean homicide rate for the reference year and the two previous years.

In principle, one could code the prerevolution criminal procedure law of all fifty states, devise a model to control for other influences on the incarceration rate, and regress the effect of the criminal procedure score on subsequent incarceration rates. Such an approach would be both logistically demanding and methodologically problematic, absent a reliable model of the determinants of incarceration. So instead, I have looked for natural experiments, that is, states that were generally comparable except for their prerevolution criminal procedure doctrine.

I began with a list of the ten largest states by population in 1960. From these, I decided to compare New York with California. New York had a robust right to counsel but no exclusionary rule, while California had a robust right to counsel, the exclusionary rule, and had gone far toward anticipating *Miranda*. I had hoped to find another large northeastern state to compare with New York, but none had adopted the exclusionary rule. Both California and New York had capital punishment.

From the ten largest states I also matched Illinois, which had the right to appointed counsel at trial and had moved far toward appointment at arraignment, as well as the exclusionary rule, with Ohio, which was not appointing counsel at arraignment and had no exclusionary rule. Both took a restrictive view of *Escobedo* and so were equally discomfited by *Miranda*. Both jurisdictions had capital punishment.

The minority of states still refusing to appoint counsel for all indigent felony defendants even at trial was small, and some of these had the exclusionary rule. To test the effect of the revolution on a jurisdiction where the revolution's impact was at its maximum, I settled on Maryland: the state was the home of *Betts v. Brady*,<sup>103</sup> had only a limited exclusionary rule, and also had nothing like *Miranda*. I compare Maryland to Kentucky, another mid-sized border state, but one that had both a robust right to counsel and the exclusionary rule. Both jurisdictions read *Escobedo* narrowly. Both had the death penalty.

I also wanted to test a federal jurisdiction, where the impact of incorporation decisions as such would be zero. *Miranda* made new law for both state and federal actors, but the federal system was not changed at all

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103. *Betts v. Brady*, 316 U.S. 455, 473 (1942) (denying counsel to indigent defendants when prosecuted by state governments), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

by *Mapp* and *Gideon*. The logical candidate was the District of Columbia, a federal jurisdiction coping with an urban crime problem of the same sort as the state systems.

Despite obvious socioeconomic differences, I compare the District with Virginia. The Commonwealth and the District are contiguous geographically, and while the similarities may end there, the differences in criminal procedure doctrine could hardly be greater. Virginia had no exclusionary rule, was retrograde on the right to counsel, and took a conservative line on confessions.

The Appendix explains these coding decisions and provides supporting citations.

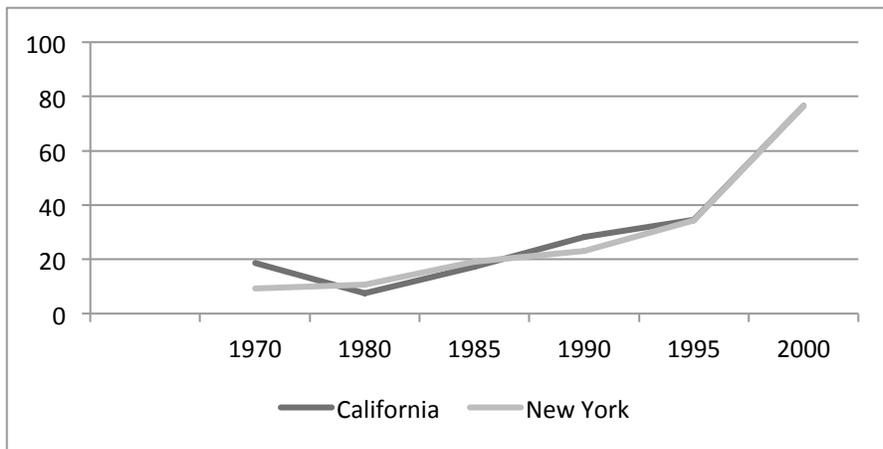
Table II records the incarceration rate, the homicide rate, and the Punitiveness Index (incarceration rate divided by homicide rate) for California and New York from 1970 to 2000.

TABLE II.

<i>Year</i>	<i>California</i>	<i>New York</i>
1970	125/6.7=(18.7)	66/7.2=(9.2)
1980	98/13.0=(7.5)	123/11.6=(10.6)
1985	181/10.5=(17.2)	195/10.2=(19.1)
1990	311/11.0=(28.3)	304/13.2=(23.0)
1995	416/12=(34.7)	378/11.0=(34.4)
2000	474/6.2=(76.5)	383/5.0=(76.6)

In Chart II below, the vertical axis measures the Punitiveness Index—the rate of prisoners per 100,000 population divided by the homicide rate per 100,000 population by year.

CHART II.



If the perversity thesis is right, we would expect New York, where *Mapp* and *Miranda* upset local practice dramatically, to take a harsher punitive turn than California, where criminal procedure grew more and more liberal until 1982. Instead, despite the Rockefeller Drug Laws, the respective PI's travel very closely together. At the 1990 data point, California is slightly more punitive than New York; otherwise they travel in lockstep.

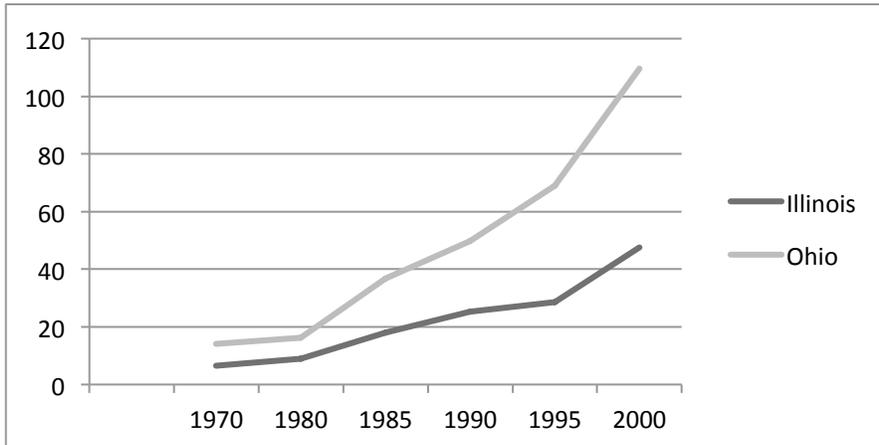
Table III lists the incarceration rate, the homicide rate, and the Punitiveness Index for Illinois and Ohio from 1970 through 2000.

TABLE III.

Year	Illinois	Ohio
1970	57/8.8=(6.5)	86/6.1=(14.1)
1980	94/10.4=(9.0)	125/7.7=(16.2)
1985	161/8.9=(18.1)	195/5.3=(36.8)
1990	234/9.3=(25.2)	289/5.8=(49.8)
1995	317/11.1=(28.6)	400/5.8=(69.0)
2000	371/7.8=(47.6)	406/3.7=(109.7)

In Chart III below, the vertical axis measures the Punitiveness Index—the rate of prisoners per 100,000 population divided by the homicide rate per 100,000 by year.

CHART III.



Here again the PIs travel similar paths, at least initially. Ohio is roughly twice as punitive as Illinois until the 1995 data point. If the revolution had a major impact, we would expect to see Ohio's PI rise to more than the baseline relationship with Illinois. It does this only in 1995, thirty years after *Miranda*, rising to 2.4 times the Illinois rate. At the 2000 data point, Ohio's PI is 2.3 times that of Illinois. From the 1970 baseline, the Illinois PI has increased by 632 percent; Ohio's, by 678 percent. If there is a backlash effect, it is not great; and it appears quite late.

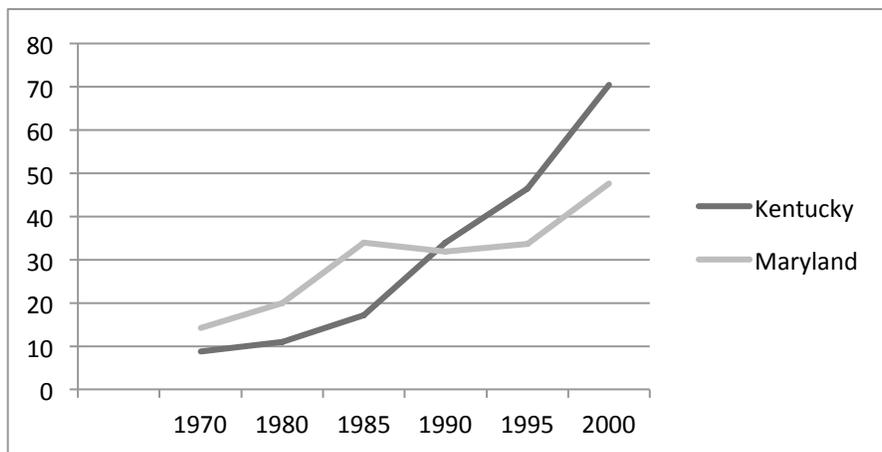
Table IV records the incarceration rate, homicide rate, and Punitiveness Index for Kentucky and Maryland for the period of 1970–2000.

TABLE IV.

<i>Year</i>	<i>Kentucky</i>	<i>Maryland</i>
1970	88/10.1=(8.7)	132/9.3=(14.2)
1980	99/9.1=(10.9)	183/9.2=(19.9)
1985	133/7.8=(17.1)	279/8.2=(34.0)
1990	241/7.1=(33.9)	348/10.9=(31.9)
1995	311/6.7=(46.4)	404/12.0=(33.7)
2000	373/5.3=(70.4)	429/9.0=(47.7)

In Chart IV below, the vertical axis measures the Punitiveness Index—the rate of prisoners per 100,000 population divided by the homicide rate per 100,000 population by year.

CHART IV.



The perversity thesis predicts that Maryland, reacting to the shock of *Gideon*, *Mapp*, and *Miranda*, one of very few jurisdictions forced to cope with all three, would ratchet up substantive punishment more swiftly than Kentucky, which was coping really only with *Miranda*. Instead, the two states have very similar patterns until the 1985 data point. At that point, Kentucky's PI rises while Maryland's remains briefly flat, and in 2000,

Kentucky's PI is about 40 percent higher than Maryland's.

I focus on one other example of maximum divergence. The District of Columbia followed federal criminal procedure law, including *Weeks*, *Zerbst*, and the *McNabb-Mallory* rule limiting protracted interrogation. Neighboring Virginia did not have the exclusionary rule and was not appointing counsel before receiving guilty pleas.

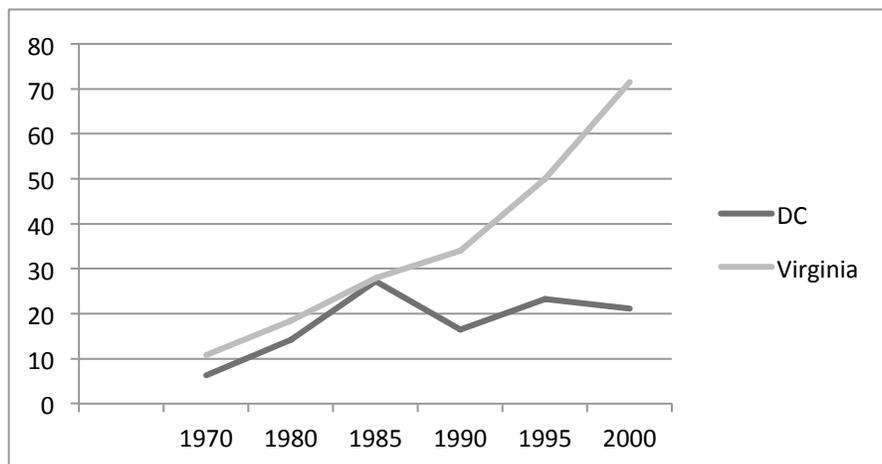
Table V compares the incarceration rate, homicide rate, and Punitiveness Index for the District and the Commonwealth.

TABLE V.

Year	D.C.	Virginia
1970	188/29.8=(6.3)	100/9.3=(10.8)
1980	426/30.0=(14.2)	161/8.7=(18.5)
1985	738/27.0=(27.3)	204/7.3=(27.9)
1990	1148/69.7=(16.5)	279/8.2=(34.0)
1995	1650/71.2=(23.2)	410/8.2=(50.0)
2000	971/46.0=(21.1)	422/5.9=(71.5)

In Chart V below, the vertical axis measures the Punitiveness Index—the rate of prisoners per 100,000 population divided by the homicide rate per 100,000 population by year.

CHART V.



This pattern is interesting. Through 1990, the liberal District, where the criminal procedure revolution had its least impact, takes the punitive turn in lockstep with conservative Virginia, where the revolution's impact was at its maximum. The falloff after 1990 does not reflect a less punitive approach in the District. The District's 1995 incarceration rate of 1650 per 100,000 is, I believe, the highest on record for any jurisdiction. But the equally shocking homicide rate of 71.2 per 100,000 produces a falling PI. The system was simply overwhelmed. I interpret the falling PI as reflecting not a taste for less punishment, but rather resource constraints that made it impossible to keep up with rising crime. In 2000, the District's prison system was merged into the federal system.

At the suggestion of Stephen Schulhofer, I have considered a final example: changes in the PI in the United Kingdom during the period 1960–2000. As Schulhofer points out, “Britain had no equivalent of the Warren Court” and therefore “offers a natural experiment.”<sup>104</sup>

Table VI shows the U.K. prison population, the total population, the incarceration rate, the homicide rate, and the Punitiveness Index.<sup>105</sup>

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104. Schulhofer, *supra* note 33, at 1078.

105. The prison population numbers are taken from HOME OFFICE, CM. 5996, PRISON STATISTICS ENGLAND AND WALES 2002, at 16 (2003), available at [http://s3.amazonaws.com/zanran\\_storage/www.archive2.official-documents.co.uk/ContentPages/2829675.pdf](http://s3.amazonaws.com/zanran_storage/www.archive2.official-documents.co.uk/ContentPages/2829675.pdf). The 2010 prison population number comes from GAVIN BERMAN & ALIYAH DAR, H.C. SN/SG/4334, PRISON POPULATION STATISTICS 20, available at [www.parliament.uk/briefing-papers/sn04334.pdf](http://www.parliament.uk/briefing-papers/sn04334.pdf) (last updated July 29, 2013). The population figures are those reported for 1961, 1971, 1981, 1991, and 2001 at Great Britain Historical GIS Project, *England and Wales Through Time, Population Statistics, Total Population*, VISION BRITAIN THROUGH TIME, [www.visionofbritain.org.uk/unit/10001043/cube/TOT\\_POP](http://www.visionofbritain.org.uk/unit/10001043/cube/TOT_POP) (last visited Feb. 12, 2014). The 2011 census figure comes from OFFICE FOR NATIONAL STATISTICS, 2011 CENSUS KEY STATISTICS FOR LOCAL AUTHORITIES IN ENGLAND AND WALES (2012), available at <http://www.ons.gov.uk/ons/rel/census/2011-census/key-statistics-for-local-authorities-in-england-and-wales/index.html>. The homicide number is the number of homicides initially reported as such to police, reported in GAVIN BERMAN, H.C. SN/SG/3805, HOMICIDE RATE AND THE DEATH PENALTY 5, available at [www.parliament.uk/briefing-papers/SN03805.pdf](http://www.parliament.uk/briefing-papers/SN03805.pdf) (last updated Nov. 18, 2005). Berman gives the homicide rate per million in population; to standardize with U.S. statistics I have changed it to reflect the rate per 100,000 population. The 2010 homicide number comes from SARAH OSBORNE, IVY LAU & ANDREW BRITTON, HOME OFFICE, HOMICIDES, FIREARMS OFFENSES, AND INTIMATE VIOLENCE 2010/2011: SUPPLEMENTARY VOLUME 2 TO CRIME IN ENGLAND AND WALES 2010/11, at 15 (Kevin Smith ed., 2012), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/116483/hosb0212.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116483/hosb0212.pdf). With both the U.K. data and the U.S. national data, I have used the reported number for the reference year rather than the mean for the reference year plus the year immediately before and after, as I have done for the state level data. I use the homicide rate to compare the American and British experiences, but there is a fresh methodological risk in using the U.K. homicide rate as an index of overall crime. Given the relative rarity of homicides in the U.K., it is possible that the homicide rate reflects crime generally, or the perception of crime generally, less reliably than in the U.S.

TABLE VI.

<i>Year</i>	<i>Prisoners</i>	<i>Population (millions)</i>	<i>Rate per 100,000</i>	<i>Homicide Rate</i>	<i>PI</i>
1960	27,099	46.1	59	0.62	95
1970	39,028	48.7	80	0.81	99
1980	42,264	48.5	87	1.25	70
1990	44,975	51.1	88	1.3	68
2000	64,602	52.0	124	1.63	76
2010	84,725	56.1	150	1.15	130

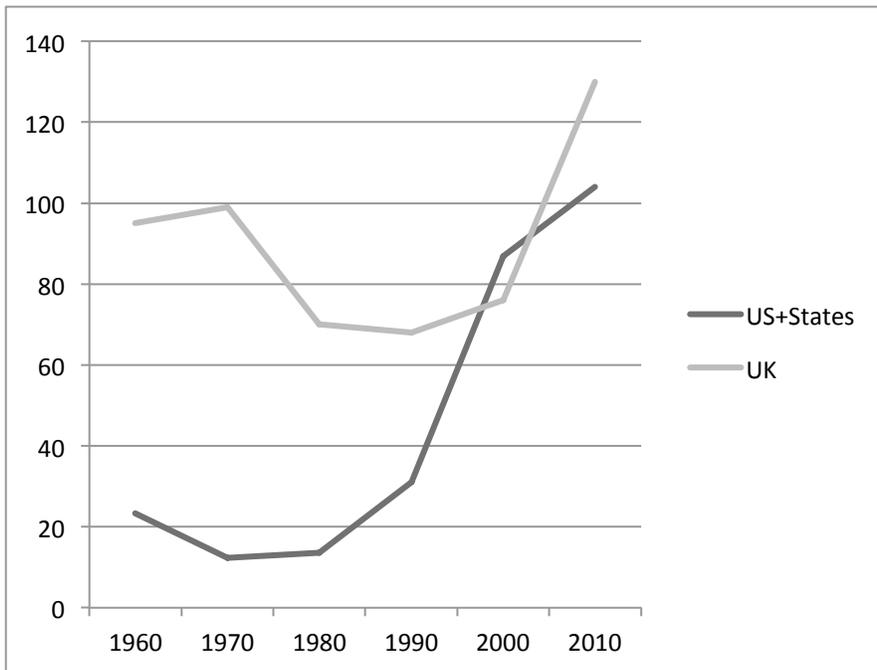
In Chart VI below, the vertical axis measures the U.K.'s Punitiveness Index—the rate of prisoners per 100,000 population divided by the homicide rate per 100,000 population by year.

CHART VI.



Chart VII compares changes in the national U.S. and U.K. Punitiveness Indexes.

CHART VII.



The U.K., without a Warren Court intervention, saw a decline in the PI from 1970 to 1990. As in D.C. during the 1990s, the falling PI is a function of a rising homicide rate rather than a decline in the incarceration rate. After 1990 the U.K. PI begins to rise, as the incarceration rate rose steadily and the homicide rate began to fall after 2000.

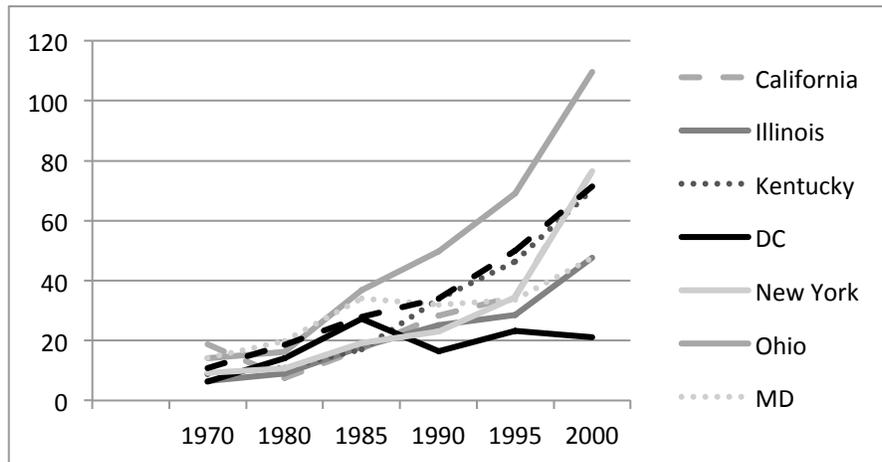
The U.K. did not experience a Warren Court, but it did experience a major change in criminal procedure: the Police and Criminal Evidence Act of 1984 (“PACE”). Although the final legislation adopted the metaphor of balancing rather than of backlash, PACE clearly shifted the balance in favor of law enforcement rather than civil liberties.<sup>106</sup> Yet this conservative

106. See Michael Zander, *PACE (The Police and Criminal Evidence Act 1984): Past, Present and Future* 1–4 (London Sch. of Econ., Working Paper 1/2012, 2012) (reviewing the origins of PACE), available at [http://www.lse.ac.uk/collections/law/wps/WPS2012-01\\_Zander.pdf](http://www.lse.ac.uk/collections/law/wps/WPS2012-01_Zander.pdf). PACE was opposed by civil liberties groups. See *id.* at 3 (noting opposition by the civil liberties lobby led by the National Council for Civil Liberties and the Legal Action Group). In general, PACE expanded police power while imposing administrative law type regulations on the exercise of the new powers. See DAVID

turn in criminal procedure was followed by harsher, rather than more lenient, substantive criminal legislation during the 1990s.<sup>107</sup> These substantive measures contributed to the growth of the prison population.<sup>108</sup> The U.K. data, in my view, support the inference of a general conservative turn in criminal justice policy, across both substance and procedure. I see no support for a generalized feedback loop converting liberal procedure into conservative substance.

Chart VIII plots all of the U.S. jurisdictions studied together:

CHART VIII.



The low outlier—the District—in fact had the highest incarceration rate, and can hardly be said to show a liberal jurisdiction that avoided the punitive turn. The high outlier—Ohio—climbs steeply from 1980 to 1990 (a growth rate of 207 percent), but not as steeply as California during the same decade (a growth rate of 277 percent). During this same period, Kentucky’s PI grew by 211 percent and that of Illinois by 180 percent, while Virginia’s growth rate was 84 percent and Maryland’s 60 percent.

Over long periods of time, growth rate statistics are highly sensitive to

BROWN, HOME OFFICE, PACE TEN YEARS ON: A REVIEW OF RESEARCH 1–4 (1997), available at <http://www.lawteacher.net/PDF/PACE%2010%20Years%20On.pdf> (examining the effects of PACE).

107. See MINISTRY OF JUSTICE, STORY OF THE PRISON POPULATION: 1993–2012 ENGLAND AND WALES 25 (2013), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218185/story-prison-population.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218185/story-prison-population.pdf) (noting adoption of the 1993 Criminal Justice Act (authorizing sentencing increases for prior offenses), 1996 Offensive Weapons Act (increasing penalties for weapons offenses), and 1997 Crime (Sentences) Act (adopting mandatory minimum sentences for certain offenses)).

108. See *id.* (“Legislative and policy changes have contributed to more stringent outcomes . . .”).

baseline choices. What seems clear is that there is no consistent pattern of procedurally conservative jurisdictions becoming more punitive than procedurally liberal jurisdictions.

## V. CONCLUSION

This study has presented evidence from four natural experiments comparing jurisdictions generally similar, but very different in their pre-Warren Court criminal procedure doctrine. The perversity thesis predicts that the liberal jurisdictions, forced to change considerably less than their conservative counterparts, would experience a comparably diminished political reaction against the criminal procedure revolution. If the Warren Court criminal cases contributed to the punitive turn in a major way, we would expect to see the ratio of prisoners-to-crime-rate increase more rapidly in the conservative as opposed to the liberal conditions.

The evidence does not bear that out. Chart II suggests that during the last third of the twentieth century, liberal California and conservative New York grew more punitive at very similar rates. Because the criminal procedure revolution hit New York much harder than it hit California, this example casts doubt on the perversity thesis.

Table III and Chart III show that until 1990, procedurally liberal Illinois and procedurally conservative Ohio experienced very similar rates of change in their punitiveness. From 1990 to 2000, Ohio surged ahead (if that is the right phrase). Explaining why that happened in the period 1990–2000, three decades after *Mapp*, and didn't happen elsewhere, leads back to reservations about timing and causal mechanisms.

Table IV and Chart IV show that procedurally liberal Kentucky turned more punitive than procedurally conservative Maryland, where the criminal procedure revolution's impact was greater. In this example, the perversity thesis predicts the opposite of what the data show.

In my view, the District-Virginia comparison does not support the perversity thesis. Through 1985, the District and Virginia PIs show comparable growth rates. Thereafter the District's homicide epidemic overwhelmed the system and its PI fell despite a staggering commitment to mass incarceration. To take the nearest state-to-state comparison, procedurally liberal Kentucky's PI grew more rapidly than Virginia's, which is the opposite of what the perversity thesis predicts.

Empirical evidence on such policy questions is rarely conclusive and almost always open to supplementation by additional studies. That said, the time-series evidence presented here, simple as it is, should not be

trivialized. The focus on changes in PI within each jurisdiction responds to endogeneity concerns. The District-Virginia comparison is a reach from a socioeconomic standpoint; however, I include it because of the extreme divergence in the contiguous jurisdictions' pre-Warren Court doctrines. The other three pairs are reasonably well matched, with quite sharp liberal versus conservative divisions in pre-Warren Court doctrine. If the perversity thesis is sound, we have to wonder why the punitive turn showed so little variation among jurisdictions along the lines of liberal versus conservative criminal procedure doctrine.

If criminal justice is indeed at a crossroads, these findings may be highly pertinent to judges, legislators, and police administrators. Procedural changes designed to reduce the risks of unjust conviction, or to encourage police compliance with constitutional standards, should be debated on their intrinsic merits rather than held back out of fear of substantive backlash. Substantive backlash against liberal procedure is conceptually possible. The available evidence, however, does not support the perversity thesis and on the whole weighs strongly against it.

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APPENDIX: CODING THE JURISDICTIONS AS LIBERAL OR  
CONSERVATIVE WITH RESPECT TO CRIMINAL PROCEDURE

By the eve of *Gideon*, a large majority of states were appointing counsel for all felony defendants at least at trial. Retrograde jurisdictions were still denying appointments even at trial. The most liberal jurisdictions appointed counsel before entering a plea at arraignment. More conservative jurisdictions appointed counsel only if the defendant requested counsel *sua sponte* at the arraignment.

On the eve of *Mapp*, the states were divided roughly evenly over the exclusionary rule.

On the eve of *Miranda* most of the states had taken a narrow reading of *Escobedo*, but California had read *Escobedo* to require proactive warnings by the police about the rights to silence and counsel in *People v. Dorado*.<sup>109</sup> The Supreme Court rejected this *Dorado* warning in a companion case to *Miranda* because the *Dorado* warning did not explicitly state that the suspect could have appointed counsel if he could not afford to hire private counsel.<sup>110</sup>

In my view, a liberal jurisdiction would have both the exclusionary rule and a robust right to appointed counsel (that is, at or before the arraignment, but in any event a proactive offer of counsel before the accused could plead guilty). A very liberal jurisdiction would have these elements plus a broad reading of *Escobedo*. A conservative jurisdiction would have no exclusionary rule and a narrow reading of *Escobedo*. A very conservative jurisdiction would have no exclusionary rule, a narrow reading of *Escobedo*, and a weak right to counsel (that is, no proactive offer before receiving a plea or, still more retrograde, refusing to appoint in some cases where the accused pleaded not guilty and went to trial).

By these criteria I coded California as very liberal, New York as conservative, Illinois as liberal, Ohio as conservative, Kentucky as liberal, Maryland as very conservative, the District as liberal, and Virginia as very conservative. Below I explain how I came to these conclusions.

A. CALIFORNIA WAS VERY LIBERAL

California had the exclusionary rule,<sup>111</sup> which was broader than the

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109. *People v. Dorado*, 398 P.2d 361, 370 (Cal. 1965) (requiring police to warn suspects of their rights to silence and counsel before questioning), *overruled by* *People v. Cahill*, 853 P.2d 1037 (Cal. 1993).

110. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

111. *People v. Cahan*, 282 P.2d 905, 911–15 (Cal. 1955).

federal rule.<sup>112</sup> California also had a robust right to counsel.<sup>113</sup> Finally, with respect to confessions, California gave *Escobedo* a broad reading.<sup>114</sup>

#### B. NEW YORK WAS CONSERVATIVE

New York rejected the exclusionary rule.<sup>115</sup> New York did have a robust right to counsel.<sup>116</sup> Finally, New York took a narrow reading of *Escobedo*.<sup>117</sup>

#### C. ILLINOIS WAS LIBERAL

Illinois had the exclusionary rule,<sup>118</sup> Illinois had a robust right to counsel,<sup>119</sup> and Illinois took a narrow reading of *Escobedo*.<sup>120</sup>

#### D. OHIO WAS CONSERVATIVE

Ohio rejected the exclusionary rule,<sup>121</sup> Ohio had a relatively weak right to counsel pre-*Gideon*,<sup>122</sup> and Ohio took a narrow reading of

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112. See, e.g., *Kaplan v. Superior Court*, 491 P.2d 1, 8 (Cal. 1971) (en banc) (reaffirming third-party standing to invoke the exclusionary rule).

113. See *People v. Mattson*, 336 P.2d 937, 945–46 (Cal. 1959) (“When defendant is brought before a magistrate on an arrest, the magistrate must inform him ‘of his right to the aid of counsel in every stage of the proceedings.’ The magistrate, and the superior court before arraignment, must ask defendant ‘if he desires the aid of counsel,’ and if defendant desires and is unable to employ counsel, ‘must assign counsel to defend him.’” (citations omitted)).

114. *Dorado*, 398 P.2d at 370 (requiring police to warn suspects of their rights to silence and counsel before questioning).

115. *People v. Defore*, 150 N.E. 585, 588–89 (N.Y. 1926).

116. See *People v. Breslin*, 149 N.E.2d 85, 86–87 (1958) (noting that, although *Betts* made it optional, “New York, however, has provided in section 308 of the Code of Criminal Procedure: ‘If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel’”).

117. See *People v. Gunner*, 205 N.E.2d 852, 855–56 (N.Y. 1965) (holding that, where a suspect does not request counsel, *Escobedo* does not apply and police need not warn the suspect of his or her rights).

118. See, e.g., *People v. Dalpe*, 21 N.E.2d 756, 759–60 (Ill. 1939) (excluding evidence from an illegal search); *People v. McGurn*, 173 N.E. 754, 761 (Ill. 1930) (excluding evidence obtained during a search incident to an illegal arrest); *People v. Castree*, 143 N.E. 112, 117 (Ill. 1924).

119. See *People v. Carpenter*, 115 N.E.2d 761, 762 (Ill. 1953) (“[Illinois Supreme Court] Rule 27A provides: ‘In all criminal cases wherein the accused upon conviction shall, or may, be punished by imprisonment in the penitentiary, if, at the time of his arraignment, the accused is not represented by counsel, the court shall, before receiving, entering, or allowing the change of any plea to an indictment,’ advise him of his right to counsel, and if he is unable to employ counsel shall appoint counsel to represent him.”).

120. *People v. Hartgraves*, 202 N.E.2d 33, 36 (Ill. 1964) (holding that police need not warn suspect of rights, and that giving a warning is only one factor under the voluntariness test).

121. *State v. Mapp*, 166 N.E.2d 387, 390 (Ohio 1960), *rev’d*, *Mapp v. Ohio*, 367 U.S. 643 (1961).

122. See *In re Burson*, 89 N.E.2d 651, 655–56 (Ohio 1949) (holding that there is no duty to offer counsel to an indigent defendant at arraignment, absent a request; relying on *Betts*); *Sharp v. Eckle*, 171

*Escobedo*.<sup>123</sup>

#### 5. KENTUCKY WAS LIBERAL

Kentucky had the exclusionary rule,<sup>124</sup> Kentucky had a robust right to counsel,<sup>125</sup> and Kentucky took a narrow reading of *Escobedo*.<sup>126</sup>

#### 6. MARYLAND WAS VERY CONSERVATIVE

The Maryland courts initially rejected the exclusionary rule, and the exclusionary rule adopted by state statute applied only in misdemeanor cases.<sup>127</sup> Maryland had only the federally mandated due process minimum right to counsel pre-*Gideon*,<sup>128</sup> and Maryland took a narrow reading of *Escobedo*.<sup>129</sup>

#### 7. THE DISTRICT WAS LIBERAL

The District followed federal exclusionary rule jurisprudence,<sup>130</sup> the

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N.E.2d 747, 748 (Ohio 1960) (rejecting a habeas challenge to a guilty plea entered without appointment of counsel; relying on *Burson's* implied waiver theory); *Dinsmore v. Alvis*, 96 N.E.2d 427, 429 (Ohio Ct. App. 1950) (“The record does not show affirmatively that this matter was brought to the attention of the court at the time of arraignment, at which time petitioner pleaded guilty.”).

123. *State v. Swiger*, 214 N.E.2d 417, 425–26 (Ohio 1966) (holding that a suspect must request counsel to trigger *Escobedo*).

124. *Russell v. Commonwealth*, 23 S.W.2d 546, 547 (Ky. 1930).

125. *See Gholson v. Commonwealth*, 212 S.W.2d 537, 540 (Ky. 1948) (“In addition to legal rights and guarantees common justice demands that every person accused of a felony be given a fair and impartial trial. This would include the informing of an accused at the beginning of his trial by the judge relative to his legal rights and guarantees; and especially is this true where a plea of guilty is offered and entertained. It is incumbent upon the trial judge to determine whether the waiver of a right to be represented by counsel is made ‘intelligently, competently, understandingly and voluntarily.’ In the absence of such a showing, as is revealed by the record in the case at bar, we think the accused should be granted a new trial.”).

126. *Scamahorne v. Commonwealth*, 394 S.W.2d 113, 117 (Ky. 1965) (rejecting *Dorado*; holding that *Escobedo* did not require affirmative warnings).

127. *See Johnson v. State*, 66 A.2d 504, 507 (Md. 1949) (“[The common law rule] was the rule in Maryland in all cases until the adoption of the Bouse Act, and since that time the common law rule does not apply in Maryland in prosecutions for misdemeanors. The common law rule still applies in Maryland in cases of felony.”).

128. *See Lishure v. Warden*, 156 A.2d 435, 436 (Md. 1959) (rejecting a habeas petition from an indigent defendant who was denied counsel at trial and was serving prison sentence following his conviction for burglary; explaining that no “element of unfairness” entered the trial as required by *Betts*).

129. *Green v. State*, 203 A.2d 870, 874 (Md. 1964) (holding that, even if officers had failed to warn the suspect of his right to silence, “we hold that the failure to so advise the appellant, alone, is not sufficient to make an otherwise voluntary statement involuntary”).

130. *See Travers v. United States*, 144 A.2d 889, 891 (D.C. 1958) (holding that the fruits of an illegal search should be suppressed).

District had a robust right to counsel,<sup>131</sup> and the District had a mixed record on confessions.<sup>132</sup>

#### 8. VIRGINIA WAS CONSERVATIVE TO VERY CONSERVATIVE

Virginia rejected the exclusionary rule.<sup>133</sup> Virginia also had a weak right to counsel pre-*Gideon*. While the practice in the trial courts may have been more generous, the law required appointing counsel before guilty pleas only if the accused made an affirmative request. If the accused pleaded not guilty, the trial court was then required to offer counsel.<sup>134</sup> In *Stonebreaker v. Smyth*, the court described the guilty plea process:

The procedure on a plea of guilty, voluntarily entered by the accused is quite informal. The usual practice when the accused has no counsel is for the trial judge to ask if he has any witnesses present or desires any to be summoned. If the accused responds in the affirmative, the witnesses are summoned. The witnesses for the Commonwealth are either examined or cross-examined by the trial judge. The accused is given an opportunity to make any statement that he desires, or to introduce any pertinent evidence in mitigation of the offense; after which the trial judge alone determines the measure of punishment. . . . Few if any of the incidents of the trial are set forth in the record as the State does not give trial judges the aid of secretaries or stenographers. The clerk of the court, without making any notations of the incidents of the trial, prepared the formal order declaring the innocence or guilt of the accused and the measure of punishment determined by the judge.<sup>135</sup>

On collateral attack the petitioner had the burden of proof, and so if counsel was not offered that fact might be impossible to prove.

Finally, Virginia took a narrow reading of *Escobedo* in *Biddle v. Commonwealth*.<sup>136</sup>

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131. See *Humphries v. United States*, 68 A.2d 803, 804 (D.C. 1949) (rejecting a claim that a court should appoint counsel for an indigent defendant who refuses the offer; noting that under “Federal Rule of Criminal Procedure No. 44, 18 U.S.C.A., . . . ‘[i]f the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.’”).

132. Compare *Cephus v. United States*, 352 F.2d 663, 665 (D.C. Cir. 1965) (distinguishing *Escobedo* as involving police interference with counsel’s attempt to meet with a client), with *Ricks v. United States*, 334 F.2d 964, 969 (D.C. Cir. 1964) (taking a strong prodefense view of the *McNabb* prompt-presentment rule).

133. *Hall v. Commonwealth*, 121 S.E. 154, 155–56 (Va. 1924).

134. See *Fitzgerald v. Smyth*, 74 S.E.2d 810, 816 (Va. 1953) (holding that the accused have the right to be afforded counsel upon a plea of not guilty to a felony charge); *Wilkinson v. Youell*, 23 S.E.2d 356, 359 (Va. 1942) (holding that a guilty plea generally acts as a waiver of the right to counsel).

135. *Stonebreaker v. Smyth*, 46 S.E.2d 406, 410 (Va. 1948).

136. See *Biddle v. Commonwealth*, 141 S.E.2d 710, 713 (Va. 1965) (“We do not interpret the

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holding in the Escobedo case to mean that a voluntary confession made to the police in a routine investigation to ascertain whether a crime has been committed and to question persons who may have some knowledge of the facts is absolutely inadmissible unless the party making a confession has first been affirmatively warned that he may remain silent. Hence, the circumstances under which a confession is made are determinative of its admissibility.”).